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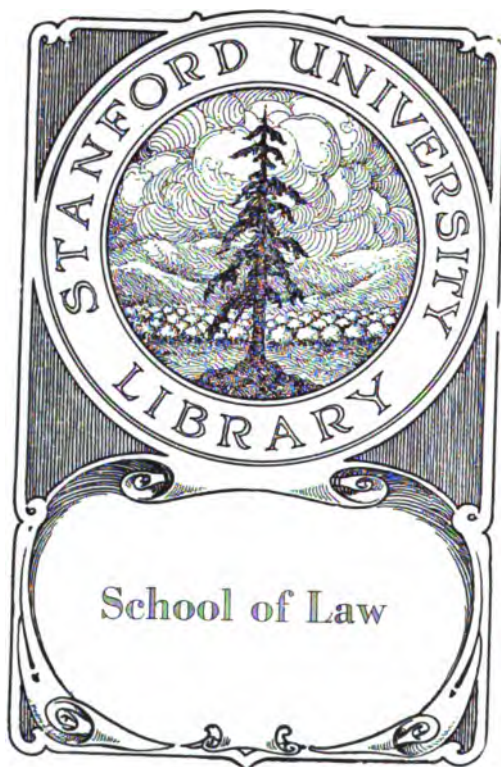
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# **THE PRINCIPLES OF JUDICIAL PROOF**



THE  
PRINCIPLES OF JUDICIAL PROOF

AS GIVEN BY

LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE

AND ILLUSTRATED IN  
JUDICIAL TRIALS

COMPILED BY

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To

HANS GROSS

PROFESSOR OF CRIMINAL LAW IN THE UNIVERSITY OF GRAZ

WHO HAS DONE MORE

THAN ANY OTHER MAN IN MODERN TIMES

TO ENCOURAGE THE APPLICATION OF SCIENCE TO JUDICIAL PROOF

THIS VOLUME IS DEDICATED

IN TOKEN OF

PERSONAL GRATITUDE

AND

PROFESSIONAL ADMIRATION



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# THE PRINCIPLES OF JUDICIAL PROOF

AS CONTAINED IN LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE  
AND ILLUSTRATED IN JUDICIAL TRIALS

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## INTRODUCTION

THIS book aspires to offer, though in tentative form only, a *novum organum* for the study of Judicial Evidence.

The study of the principles of Evidence, for a lawyer, falls into two distinct parts. One is Proof in the general sense, — the part concerned with the ratiocinative process of contentious persuasion, — mind to mind, counsel to juror, each partisan seeking to move the mind of the tribunal. The other part is Admissibility, — the procedural rules devised by the law, and based on litigious experience and tradition, to guard the tribunal (particularly the jury) against erroneous persuasion. Hitherto, the latter has loomed largest in our formal studies, — has, in fact, monopolized them; while the former, virtually ignored, has been left to the chances of later acquisition, casual and empiric, in the course of practice. Here we have been wrong; and in two ways:

For one thing, there is, and there *must* be, a probative science — the principles of proof — independent of the artificial rules of procedure; hence, it can be and should be studied. This science, to be sure, may as yet be imperfectly formulated or even incapable of formulation. But all the more need is there to begin in earnest to investigate and develop it. Furthermore, this process of Proof is the more important of the two, — indeed, is the ultimate purpose in every judicial investigation. The procedural rules for Admissibility are merely a preliminary aid to the main activity, viz. the persuasion of the tribunal's mind to a correct conclusion by safe materials. This main process is that for which the jury are there, and on which the counsel's duty is focused. Vital as it is, its principles surely demand study.

And, for another thing, the judicial rules of Admissibility are destined to lessen in relative importance during the next generation or later. Proof will assume the important place; and we must therefore prepare ourselves for this shifting of emphasis. We must seek to acquire a scientific understanding of the principles of what may be called "natural" proof, — the hitherto neglected process. If we do not do this, history will repeat itself, and we shall find ourselves in the

present plight of Continental Europe. There, in the early 1800s the ancient worn-out numerical system of "legal proof" was abolished by fiat, and the so-called "free proof"—namely, no system at all—was substituted. For centuries, lawyers and judges had evidenced and proved by the artificial numerical system; they had no training in any other,—no understanding of the living process of belief; in consequence, when "legal proof" was abolished, they were unready, and judicial trials have been carried on for a century past by uncomprehended, unguided, and therefore unsafe mental processes. Only in recent times, under the influence of modern science, are they beginning to develop a science of proof.

Such will be our own fate, when the time comes, if we do not lay foundations to prepare for the new stage of procedure.

The present work seems to be the first attempt in English, since Bentham, to call attention to the principles of judicial Proof (distinguished from Admissibility) as a whole and as a system.<sup>1</sup> It is therefore tentative. The chief service it aims to fulfill is to emphasize the subject as a science, and to stimulate its professional study.

The materials exist in abundance. But they need systematic collection and analysis. The illustrative materials here offered are culled from a wide range; though the search for them has merely touched the surface. A longer search would have found apter materials in many places, especially from the annals of civil trials. Most of the selections are from criminal cases; first, because they usually show the specific inference in more striking shape and shorter compass, and next, because they are the more profuse in the records. But it should not be forgotten that while blood and poison and pistol waddings are usually conceived as types of Circumstantial Evidence, yet the short and simple annals of civil cases are equally permeated with it, in less sensational form.

Now a few words about the use of the book.

1. It is intended mainly for law-school work. But it may profitably be used (we hope) for the self-training of the maturer practitioner.

2. Though most of the topics are introduced or followed (as befits a novel subject) by a brief expository passage, to focus the reader on the possibilities of the topic, yet the main part of the material may and must be used inductively. Some of it merely illustrates; but most of it calls for self-application of the process of analysis and inference.

<sup>1</sup> Mr. Burrill's masterly work, two generations ago, covered only a part of the field, Circumstantial Evidence. Mr. Moore's recent treatise (a valuable arsenal of extensive research), on *Facts, or The Weight and Value of Evidence*, deals in substance with Testimonial Evidence only. Mr. Justice Stephen's introduction to the Indian Evidence Act, entitled *The Principles of Judicial Evidence* (1872), contains a brief though thoroughly scientific survey of the subject; and perhaps his exposition should be classed as an attempt at a system. He seems to have believed that the logical Methods of Agreement and of Difference supplied the sufficient key to all such questions ("the principle is precisely the same in all cases, however simple or however complicated"). Inadequate though this may be deemed, certainly his point of view is so plausibly stated that it must be reckoned with in any future proposals of a system. The present exposition not being controversial, no attempt is made to note the objections to Mr. Justice Stephen's method.

On the Continent, the great pioneer work of Hans Gross, entitled (not happily) "Criminal Psychology" (translated in the Modern Criminal Science Series) is still the only systematic treatise on the psychology of testimony. However, not being written from the point of view of our law, its system is not directly available.

There is a probative moral to every one of the cases; to point out in footnotes the moral as conceived by the compiler would have spoiled the object of the book. The profitable use of the book will be to employ each illustrative case rigidly as a mental exercise somehow bearing on the subject where it is classified. In this field no one can afford to let another do his thinking for him.

3. There is no attempt to cover all kinds of evidential data. Many minor but troublesome varieties (for example, handwriting, hearsay, corroboration of witnesses) are ignored, partly because space did not permit, partly because their treatment might doubtfully complicate the system here offered. Some day a system will arise into which all of these can easily be fitted.

4. In the use of these materials, the following warning suggestions are offered:

(a) Do not attempt to invoke mentally any of those exclusionary rules of Admissibility commonly thought of as *the* rules of evidence. Keep them out of the ratiocinative process. Think of the problem as a juror would think of it if the evidence were safely in the case and the counsel were arguing to him about it. What we are aiming to analyze is the actual mind-to-mind process of persuasion and belief.

(b) Do not assume that any of the quoted extracts purporting to describe (especially in Part II) the facts of experience in various sorts of testimony are here put forward as sound. Give them such credence as their chroniclers may seem to deserve; but test them by your own experience, and apply such discount as may seem needed. Those materials are here offered merely *as* materials for reflection, and not as dogmas of truth.

(c) Use Parts I and II as simply preliminary, *i.e.* as a drill in method of analysis, and a supply of data of experience to supplement one's own. Then make Part III (Problems in Masses of Evidence) the main objective. Parts I and II are like the elemental moves or strokes in chess or in golf; they must of course first be studied; but the real thing is the game. Or they are like the various scales, arpeggios, and chords in music; they are the component parts, in varying form, for every one of a million pieces of music; but the musical piece is what we always expect ultimately to play or to hear. The single bits or kinds of evidence, as presented in Parts I and II, must first for exercitation be taken apart and analyzed, each by itself; but in judicial trials single kinds of evidence are not thus presented in segregated form. What is really found is a mixed mass of evidence, culminating in a single large issue (or series of issues): "Did he, or did he not?" "Was it, or was it not?" In Part III, and there only, we have the problem of Proof as it is actually forced upon us every day in our courts.

5. Part III thus represents the ultimate and most difficult aspect of the principles of Proof; namely, the *method of solving* a complex mass of evidence in contentious litigation. Such a method is here suggested (in No. 376). Nobody yet seems to have ventured to offer a method, — neither the logicians (strange to say), nor the psychologists, nor the jurists, nor the advocates. The logicians have furnished us in plenty

with canons of reasoning for specific single inferences; but for a total mass of contentious evidence, they have offered no system.<sup>1</sup> What is here put forward is a mere provisional attempt at method. One must have a working scheme. If this will not work, try to devise some other, or try what success there is in getting along without any.

The problems in Part III will offer a varied range for testing the practicability of whatever scheme one may devise. But *some* method there ought to be. It seems incredible that advocates can have got along without any, through the long period of judicial annals. What is wanted is simple enough in purpose, — namely, some method which will enable us to lift into consciousness and to state in words the reasons why a total mass of evidence does or should persuade us to a given conclusion, and why our conclusion would or should have been different or identical if some part of that total mass of evidence had been different. The mind is moved; then can we not explain *why* it is moved? If we can set down and work out a mathematical equation, why can we not set down and work out a mental probative equation?

In offering this collection of illustrations and problems as a help towards the attainment of this higher purpose, the Compiler realizes the inadequacy of his own contributions (mainly No. 376, herein) towards developing a sound and workable method. Yet, as Locke put it, "He that will not stir till he infallibly knows that the business he goes about will succeed, will have but little else to do but to sit still and perish." And there is at least the consolation of believing that the illustrations will furnish entertaining reading in a field little patronized hitherto by lawyers. And along with this entertainment ought to come some consciousness of the importance of the general problem, and a resolve to bring the Courts and the Bar to recognize the coming stage of the law of Evidence, — an epoch in which the present rules of Admissibility, already become too largely formalistic and unreal, will be partly supplanted by a new method.

<sup>1</sup> The feasibility of such a system has indeed been questioned in their ranks. Thus: "The theory of probabilities is the very guide of life; hardly can we take a step or make a decision of any kind without correctly or incorrectly making an estimation of probabilities. . . . Attempts to apply the theory of probability to the results of judicial proceedings have proved of little value, simply because the conditions are far too intricate. . . . No mathematical formulas can be framed to express the real conditions. . . . But such failures in no way diminish the truth and beauty of the theory itself; in reality there is no branch of science in which our symbols can cope with the complexity of Nature. . . . The difficulty, in short, is merely relative to our knowledge and skill, and is not absolute or inherent in the subject." (W. Stanley Jevons, *The Principles of Science: a Treatise on Logic and Scientific Method*, p. 34, 2d ed., 1877, reprint of 1907.) If anybody could have performed this service for Judicial Evidence, Jevons was the man to do it. His *Logical Abacus and Logical Machine* shows that he had the keenest appreciation of the possibilities.

Through the kind assistance of his colleague, Professor Horace C. Longwell, the present author has consulted the modern works on Logic, but must still avow that, for the purposes of judicial controversy, they do not afford the desired help.

## GENERAL THEORY OF JUDICIAL PROOF

1. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

§ 1. *Definition of Judicial Evidence*. It is of little practical consequence to construct a formula defining Judicial Evidence. That term represents:

Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing the effect of persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.

*Inference* is the persuasive effect of each evidentiary fact, regarded separately, as to its Probandum.

*Proof* (or *Disproof*) is the persuasive effect of a mass of evidentiary facts, regarded as a whole, as to a Probandum.

§ 2. *Distinctions between Factum Probandum and Factum Probans*. Evidence is always a relative term. It signifies a relation between two facts, the *factum probandum*, or proposition to be established, and the *factum probans*, or material evidencing the proposition. The former is necessarily hypothetical; the latter is brought forward as a reality for the purpose of convincing the tribunal that the former is also a reality. No correct and sure comprehension of the nature of any evidential question can ever be had unless this double or relative aspect of it is distinctly pictured in each instance. On each occasion the questions must be asked, What is the Proposition (Probandum) desired to be proved? What is the Evidentiary Fact (Probans) offered to prove it?

Part of the confusion often found arises from the circumstance that each Evidentiary Fact may in turn become a Proposition to be proved, until finally some ultimate Evidentiary Fact is reached. For example, to prove the Proposition that a murder was committed by John Doe, the Evidentiary Fact may be offered that John Doe left the victim's house shortly after the murder; to prove this in turn, as a Proposition, the Evidentiary Fact may be offered that John Doe's shoes fit the track left near the house by the murderer; and this again, as a Proposition, may be evidenced by the statement of a witness on the stand who has placed the shoe in the tracks. Here each evidentiary fact in its turn becomes a proposition requiring the marshaling of new evidentiary facts, more or fewer according to its complexity. Any specific matter may be Proposition or Evidentiary Fact, according to the point of view of the moment.

§ 3. *Classification of Evidentiary Facts; Autoptic Proference*. There are two possible modes of proceeding for the purpose of producing persuasion on the part of the tribunal as to the Probandum. The first is by the presentation of the thing itself as to which persuasion is desired. The second is the presentation of some independent fact by inference from which the

<sup>1</sup> Adapted from the same author's *Treatise on the System of Evidence in Trials at Common Law* (1905, Vol. I, §§ 1-29).

persuasion is to be produced. Instances of the first are the production of a blood-stained knife; the exhibition of an injured limb; the viewing of premises by the jury; the production of a document. The second falls further into two classes, according as the basis of inference is (a) the assertion of a human being as to the existence of the thing in issue, or (b) any other fact; the one may be termed Testimonial or Direct Evidence, the other Circumstantial or Indirect Evidence.

The first mode above mentioned has been termed Immediate, or Direct, Real Evidence.<sup>1</sup> "Thus," says Mr. Best,<sup>2</sup> "where an offense or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the Court would in some cases inspect the wound, in order to see whether it were a mayhem or not. . . . Immediate Real Evidence is where the thing which is the source of the evidence is present to the senses of the tribunal." A preferable term is Autoptic Proference; this avoids the fallacy of attributing an evidential quality to that which is in fact nothing more nor less than the thing itself. With reference to this mode of producing persuasion no question of logic arises. "*Res ipsa loquitur*." The thing proves or disproves itself. No logical process is employed; only an act of sensible apprehension occurs, — apprehension of the existence or non-existence of the thing as alleged. Bringing a knife into court is in strictness not giving evidence of the knife's existence. It is a mode of enabling the Court to reach a conviction of the existence of the knife, and is in that sense a means of producing persuasion, yet it is not giving evidence in the sense that it is asking the Court to perform a process of inference,<sup>3</sup> and it therefore gives rise to no questions of relevancy.<sup>4</sup>

Though the classes of things that can become the subject of autoptic proference are few, yet within those classes its use is common. In addition to jury views of land, the production of movables associated with a crime, and the exhibition of personal injuries, the perusal of documents is the most usual instance of its employment. Though a document is generally evidential only as being the assertion of its writer, yet when it becomes desirable and allowable to prove the terms of the assertion (*i.e.* when its existence becomes in itself a Probandum), it is obvious that we must either have some one tell about its contents, which would be using testimonial evidence, or must infer its existence circumstantially from some other fact, or produce the document itself for inspection, which would be Autoptic Proference.

§ 4. *Distinction between Circumstantial and Testimonial Evidence.* Aside from Autoptic Proference, then, all evidence must involve an *inference from some Fact (Probans) to the Proposition (Probandum) to be proved*. The kinds of inferences, with regard to the material taken as their subject, fall naturally into two great classes; or, rather, a single special class of evidentiary facts separates itself from the mass and calls for a distinct

<sup>1</sup> Mr. Bentham, in his *Treatise on Judicial Evidence* (tr. Dumont, London, 1825), p. 12, used "real evidence" to mean the inferences from a *res*; this of course is a different usage.

<sup>2</sup> Chamberlayne's *Best on Evidence*, 1893, §§ 196, 197.

<sup>3</sup> It might be said that the Court is to use the fact of its sense perception as a basis of inference to a judgment; but this is a distinction which cannot be accepted in the law of evidence, because practically the Court recognizes none such and takes the results of its senses as immediate and full knowledge.

<sup>4</sup> Of course, the knife might become the source of an inference, *e.g.* as to the nature of a wound; but in that aspect it is merely circumstantial evidence.



treatment, attended as it is with uniform and peculiar qualities affecting its probative features. That a separate treatment is inevitably demanded by these qualities has been long recognized in experience and acknowledged by jurists. This special class of facts is the assertions of human beings regarded as the basis of inference to the propositions asserted by them. This may be called Testimonial Evidence;<sup>1</sup> Direct Evidence is an alternative term sanctioned by usage, though not so satisfactory in theory. All remaining facts form a class known as Circumstantial Evidence.<sup>2</sup> The distinction has been thus stated:

Mr. THOMAS STARKIE. *Evidence*. (1824. I, 13.) Where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a bygone fact can be ascertained: 1st, By information derived either immediately or mediately from those who had actual knowledge of the fact; or, 2dly, by means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established. In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and that which is unknown. In each case the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ.

Sir J. F. STEPHEN. *Indian Evidence Act*. (1872. p. 38.) It will be found upon examination that inferences employed in judicial inquiries fall under two heads:

- (1) Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted;
- (2) Inferences from facts, which upon the strength of assertions are believed to exist, to facts of which the existence has not been so asserted.

... This is the distinction usually expressed by saying that all evidence is either direct or circumstantial. . . . The truth is that each inference depends upon precisely the same general theory. . . . The judge hears with his own ears the statements of the witnesses and sees with his own eyes the documents produced in court. His task is to infer from what he thus sees and hears the existence of facts which he neither sees nor hears.

<sup>1</sup> The word "evidence" was until the middle of the 1700s used distinctively of testimonial evidence, — circumstantial evidence being either not reckoned with or else conceived of under the term "presumptions"; hence, in the trials of that period "an evidence" is used to mean "a witness": 1628, *Coke upon Littleton*, 282, b ("Evidence, *evidentia*: This word in legall understanding doth not only containe matter of record, . . . and writings under seale, . . . and other writings without seale, . . . which are called evidences, *instrumenta*; but in a larger sense it containeth also *testimonia*, the testimony of witnesses, and other proofes to be produced and given to a jury for the finding of any issue betweene the parties. And it is called evidence, because thereby the point in issue is to be made evident to the jury."); 1746, Lord Lovat's Trial, 18 How. St. Tr. 798; 1754, Canning's Trial, 19 *id.*, 478, 488, 514, 580.

<sup>2</sup> An earlier term for this class was "presumptive evidence." The distinction between "presumption" in the sense of a mere circumstantial inference and in the sense of a rule of procedure affecting the duty of proof has in modern times led to confusion. It may be noted here that the term is often met with in the sense of "inference," as applied to the probative value of ordinary circumstantial evidence, and as distinguishing it from testimonial evidence: 1810, Boyle, C. J., in *Davis v. Curry*, 2 Bibb, 239 ("Evidence, whether written or oral, is either positive or presumptive. Positive evidence is the direct proof of the fact or point in issue; presumptive evidence consists in the proof of some other fact or facts from which the point in issue may be inferred"); 1873, Gilpin, C. J., in *State v. Carter*, 1 Houst. Cr. C. 402, 411 ("When the existence of the principal facts is deduced inferentially by a process of sound reasoning from facts or circumstances proved and established in the case, it is termed presumptive evidence"; and he later uses the phrase "circumstantial or presumptive evidence").

In the grouping of Circumstantial Evidence difficulty has arisen from not keeping in mind that most circumstantial evidentiary facts must ultimately in turn become themselves a Probandum and be proved by testimonial evidence, and also from confining the latter term to assertions of some main fact in issue. For example, the finding of a bloody knife upon the accused after a secret killing is a circumstance from which an important inference may be drawn; yet this fact of the finding must be proved by some person's assertion; here the special rules of assertive or testimonial evidence must be applied in weighing the assertion, and the ordinary rules of circumstantial relevancy in weighing the fact of finding, assuming it as proved by the assertion. But this mixture of both kinds is not necessary and inevitable. At one extreme, as in a jury's view of a corpse or in a matter of judicial notice, we may have a circumstance given us as the basis of inference without the intervention of an assertion. At the other extreme, we may have assertions, as of the signing of a deed or of the perceived felonious abstraction of a bank note, directly positing the main probandum of the case, and needing no intervening inference, except from the fact of the assertion. But between these extremes lies the mass of ordinary evidence, for which at least two distinct steps of inference are required, — the inference from the fact of an assertion to the matter asserted, and then the inference from the matter asserted to another matter. Moreover, just as we may need even two or three inferences of the latter sort before reaching a main proposition of the pleadings, so (as in using hearsay) we may often need to use two inferences from assertions, — first from one assertion on the stand to the fact of the making of the extra-judicial assertion, and then from the latter to the truth of the matter asserted by it.

Now, so far as the principles of proof are concerned, it is apparent that it does not matter how we have come to our knowledge of these so-called "circumstances," *i.e.* things not assertions, — whether we get at them through believing assertions, or otherwise; what matters is the nature of the particular evidentiary fact in hand, whether it is assertive or circumstantial. In dealing with the probative value of the circumstantial class, we are to take the alleged circumstantial (or non-assertive) fact as assumedly proved, and then determine its effect. It is immaterial whether it has itself to be proved by testimony (as ordinarily) or by the tribunal's use of its own senses or existing knowledge (as occasionally). . . .

§ 5. *Special Characteristics of Legal Proof in General.* When a fact is offered as evidence, the very offering of it is an implication that it has some bearing on the proposition at issue, — that it tends naturally to produce a conviction about that proposition. The situation is thus in its elements the same as when the persons engaged are not occupied in a legal controversy. One might suppose that the question would be essentially one of the ordinary laws of reasoning, whether it were to be decided by a judge or jury, or by the audience of a lecturer, or by a policeman notified of an alleged misdemeanor in his district, or by a class in rhetoric. But the application of the laws of reasoning is here attended with peculiar considerations not existing for any investigation but a judicial one.

These features of legal proof have been emphasized, from different points of view, by some of the most original thinkers in the law of evidence:

Sir J. F. STEPHEN. *Indian Evidence Act*. (1872. p. 33.) The leading differences between judicial investigations and inquiries into physical nature are as follows: 1. In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments. In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased. 2. Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at. In judicial investigations it is necessary to arrive at a definite result in a limited time; and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice. 3. In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions, which are observed by trained observers who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation, if they were disposed to be fraudulent. In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established. 4. On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial inquiries every man's individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries. 5. Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory.

Professor J. B. THAYER. *Preliminary Treatise on Evidence*. (1898. pp. 271-275.) It is a proper qualification when we use the phrase *legal reasoning*; not because, as compared with reasoning in general, it calls into play any different faculties or involves any new principles or methods, or is the creature of technical precepts; but because in law, as elsewhere, in adjusting old and universal methods to the immediate purposes in hand, special limitations, exclusions, and qualifications have to be taken into account. . . . The peculiar character and scope of legal reasoning is determined by its purely practical aims and the necessities of its procedure and machinery. Litigation imports, for the most part, as we have seen, a contest, and adversaries. It has in it, therefore, a personal element, and it requires not merely a consideration of what is just in general, but of what is just as between these adversaries. It has often to be conducted with the aid of a tribunal whose peculiarities in point of number and of physical and mental capacity, and whose danger of being misled, must constantly be considered. It must shape itself to various other exigencies of a practical kind, such as the time that it is possible to allow to any particular case, the reasonable limitations of the number of witnesses, the opportunities for reply, and the chance to correct errors. It must adjust its processes to general ends, so as generally to promote justice, and to discourage evil, to maintain long-established rights, and the existing governmental order. The judicial office is really one of administration. . . . While these are some of the chief characteristics of legal reasoning, it will be noticed that they are only, in the nature of them, so many reasonable accommodations of the general process to particular subject matters and particular aims. Amidst them all the great characteristics of the art of reasoning and the laws of thought still remain constant. As regards the main methods in hand, they are still those untechnical ways of all sound reasoning, of the logical process in its normal and ordinary manifestations; and the rules that govern it here are the general rules that govern it everywhere, the ordinary rules of human thought and human experience, to be sought in the ordinary sources, and not in law books.

ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. p. 94.) Between the results of judicial investigation of crime, and those of certain philosophical inquiries, there exist analogies worthy of consideration. Thus, they both have a common subject, — a past transaction, occurrence or event, which has had an actual, though merely transient existence; and they have a common immediate object, — the discovery of its cause; and, in the attainment of this object, they act upon the same general principle. But in all that relates to the particular mode and course of inquiry, and what may be called its external circumstances, the resemblance again fails, and further particulars of difference and contrast are found to present themselves. The most important of these will now be enumerated.

1. The philosophic inquirer deals with the particular cases which come under his observation, for the sake of, and with reference to some *general* truth to be eventually deduced from them. It is, moreover, a characteristic of the occurrences or events to which his attention is directed, that they are liable to be repeated in the same or nearly the same form, or happen again, under precisely similar circumstances. In fact, it is to the *recurrence* of a phenomenon, in some form or other, that he constantly looks forward, and upon it that he often confidently relies, either to complete his observations, or to verify and confirm their results.

But the cases with which the judicial investigator — the juror — has to deal, have not, in general, this quality or capacity of recurrence or repetition, in the same or similar forms. The same combination of circumstances which go to make up a case of crime, cannot, where they are at all numerous, be expected to occur again. And even if it could and did occur, it would answer no purpose; for it is the identical transaction which took place, and as it took place, which is to be the sole subject of inquiry. The investigator deals with the cases submitted to him, for their *own sake*, and for the express purpose of ascertaining the truth of every fact composing them; and not at all with reference to anything that may happen or be discovered in future. He looks exclusively to the past, as well for the facts from which he is to reason, as for the experience which enables him to reason accurately. His object is not to establish a general principle, but to ascertain the existence or non-existence of a particular disputed fact. Hence, the very first step he is obliged to take, is actually to revive and recall his subject. . . . It is in this peculiar process of revival and reconstruction, that the characteristic difficulties of judicial inquiry by means of circumstantial evidence, are found to consist, as may appear from the following further considerations.

2. In the majority of instances, the philosophical investigator combines with the character of inquirer, that of *original observer*, also. He has himself witnessed the occurrence, the cause of which he seeks to discover. He has observed the phenomena, not only once, but repeatedly, — observed them as they occurred, and with the utmost deliberation and precision, — observed them for the very purpose of deducing a result. His impressions of them are direct, and therefore of a corresponding perfection. If he ever relies upon the observations of others, it is only such as he has found to be worthy of confidence, because made with the same care that he himself would have bestowed; and even these he sometimes prefers to repeat, and thus to test by his own personal observation. He reasons and draws his conclusions confidently, because he *knows* the facts upon which they are based.

But with the juror, the case is different. He knows, or is presumed to know nothing of the transaction into which he is called to inquire. He has not witnessed one — even the most trifling — of its component circumstances. For his knowledge of each of them, in its character of a past event, he must rely on the observations of *others*. . . . Hence, his observation is of an indirect, dependent, and therefore inferior kind.

3. Again, the disadvantage arising from the last consideration is often increased by the intrinsic character of the *observations* themselves, as originally made by the *witness*. The philosophical observer either actually goes in search of his subject, or,

where it is suddenly presented to his view, arrests and keeps it before him, and in both instances, for the very purpose of examination. He observes with express reference to a specific object and result; and his predetermination always is that his observation shall be complete and correct to the minutest particular possible. . . .

But the observer of the facts and appearances which constitute, or are connected with criminal action, — especially of those which precede or accompany the commission of crime, — the observer who is to appear in the future character of a judicial witness, often acts under very different circumstances, and in a very different frame of mind. Many of the facts and appearances just mentioned (including frequently some of the most important materials of evidence) not only present themselves to the senses, incidentally, unexpectedly and transiently, but are, outwardly, and as they present themselves, of the most ordinary and familiar kind, having nothing on their face to attract or arrest attention in any considerable degree; and not to be distinguished from the great mass of facts and events which are constantly passing before the eyes of men, in their daily public intercourse with each other. Hence, where they are perceived merely by the organs of sense, without any act on the part of the observer, to give them connection with himself, they are usually perceived in a general and superficial manner. . . .

6. But supposing the facts fairly placed before the juror, by evidence to which no objection on the score of admissibility exists. They are, in the next place, to be put together; to be considered in connection; to be used in reconstructing the case. Assuming all those testified to, to have been reported accurately, to be, in short, the actual facts as they occurred, a new difficulty may arise. Some fact is seen to be wanting; it has not been proved. And some fact may be wanting, the absence of which is not noticed. . . . The philosophic anatomist may, by the aid of scientific rules, build up, with accuracy, an entire skeleton, from a single fossil bone. But the juror cannot supply a single fact; he cannot add one component element to the number of those which have been "retrieved" from the past; he cannot go a step beyond the evidence. . . .

7. The great characteristics of philosophical inquiry are deliberation and precision; and, as necessary conditions of these, mental, if not physical, abstraction, and unlimited *freedom* in every sense. We have seen with what undivided attention and laborious accuracy, the investigator in physical or astronomical science collects his facts. He observes and registers with the utmost care. He rarely, especially on a subject not before examined, attempts to draw a conclusion from a single observation, or set of observations. He observes and registers again and again. . . . In all this, he is under no sort of constraint. He is not necessarily confined to any particular place. He may retire into the most perfect seclusion, not admitting even the presence of his associates in inquiry; and he often adopts this course, to secure that mental composure which such investigations generally require. He is equally at liberty, in regard to time. He may decide now, a month or a year hence, as he may choose. He constantly postpones decision until he can reexamine his facts, or confirm them by new observations. And where he does decide, he often does so *provisionally*.

But the juror, with his eleven associate inquirers after truth, finds himself under very different circumstances. The processes of collecting the facts, and deducing from them the inference desired, are, in his case, if not positively combined, at least so hedged in by the common limits of a single inquiry, as not to admit of separation for any practical purpose. . . .

But this is not all. From the moment the juror enters upon the business — with him, the duty — of inquiry, to the moment after his verdict is pronounced, he acts under the almost constant pressure of immediate personal constraint. From the moment he enters the court room, in obedience to the summons of the law, until discharged, he places himself under judicial control. He renounces, *pro hac vice*, his personal freedom. . . .

been admitted. Judges constantly find it necessary to warn us that their function, in determining Admissibility, is not that of final arbiters, but merely of preliminary testers, *i.e.* that the evidentiary fact offered does not need to have strong, full, superlative, probative value, does not need to involve demonstration or to produce persuasion by its sole and intrinsic force, but merely to be worth consideration by the jury. It is for the jury to give it the appropriate weight in effecting persuasion. The rule of law which the judge employs is concerned merely with admitting the fact through the evidentiary portal.

Mr. W. D. EVANS. *Notes to Pothier on Obligations*. (1806. II, 157; No. 16, § VI.) The general rules of law concerning the admission and sufficiency of evidence, and the particular conclusion which a jury may draw from the evidence before them in a particular case, are two things which, as I have already more than once observed, whilst they differ most essentially in their nature and principle, are very subject to be confounded, and which therefore in every discussion should be most carefully kept distinct.

TINDAL, C. J., in *Wright v. Tatham*. (1837. 7 A. & E. 407.) The judge who presides at the trial, by admitting this evidence, is not determining, nor has he any right to determine, the question of the [testamentary] competency of the testator. That is a question which the jury are to decide, after the termination of a long course of conflicting evidence. All that the judge has to determine is whether a particular piece of evidence is at a particular period of the cause admissible for the consideration of the jury as the matter then stands.

Proof, then, is obviously a distinct thing from Admissibility; because each evidential fact is offered separately, and we could not expect any one fact to produce demonstration. Since the production of evidential facts takes time, and one fact must precede another, we do not come to the question of Proof until all the evidence is in and the jury is ready to retire.

The principles of Proof, then, represent the natural process of the mind in dealing with the evidential facts after they are admitted to the jury; while the rules of Admissibility represent the artificial legal rules peculiar to our Anglo-American jury-system. Hence the former should be studied first. They bring into play only those reasoning processes which are already the possession of intelligent and educated persons. They familiarize the student with the materials most commonly presented in trials at law, and thus prepare him to take up more readily the artificial rules of Admissibility devised by judicial experience for safeguarding legal investigations of fact.

Moreover, this process of Proof is after all the most important in the trial. The trial culminates in either Proof or non-Proof. When the evidence is all in, the counsel sets himself to his ultimate and crucial task, *i.e.* that of persuading the jury that they should or should not believe the fact alleged in the issue. To do this, he must reason naturally, as all men reason and as juries reason. He must have familiarized himself with the logical processes which men naturally use and with general experience as to the classes of inferences commonly called for in legal trials. Here he has no use for the artificial rules of Admissibility. Those have been disposed of, at the outset, by the judge. The evidence is in, and the question now is, What is its effect? The student of the principles of Proof is thus an essential part of the lawyer's equipment in dealing with Evidence. All the artificial

rules of Admissibility might be abolished; yet the principles of Proof would remain, so long as trials remain as a rational attempt to seek the truth in legal controversies.

The proper order of study is therefore:

I. The Principles of Judicial Proof, as contained in logic, psychology, and general experience.

II. The Legal Rules of Admissibility.

The first of these is the subject of this volume. The second is the subject of the present Compiler's Cases on Evidence (2d ed., 1913).

## 2. JOHN H. WIGMORE, *Principles of Judicial Proof*. (1913.)<sup>1</sup>

*Modes of Inference and Proof.* We thus take up first the inquiry: What is the logical form of inference or proof employed in the use of litigious evidence? And what are its standards or tests?

§ 1. *Form of Argument is Inductive.* The process of passing upon probative value is and must be based ultimately on the canons of ordinary reasoning, whether explicitly or implicitly employed. It is therefore necessary to review the distinction which Logic makes between the two great types of Argument<sup>2</sup> or Proof, — the Deductive and the Inductive forms. Modern Logic looks at this distinction without prejudice. Its tendency is to accept both types as capable of reduction to a single one. Nevertheless the distinction is a practical and substantial one, particularly in litigious proof. It is set forth with clearness and brevity by an eminent authority:

Professor ALFRED SIDGWICK. *Fallacies; A View of Logic from the Practical Side*. (1884. pp. 212 ff.) The real foundation of Proof is always the recognition of resemblance and difference between things or events known and observed, and those which are on their trial, — whether such recognition is based (1) on knowledge already reached and formulated in names or propositions or (2) on direct observation and experiment. (1) In proportion as we openly and distinctly refer to known principles (already generalized knowledge) is Proof *deductive*; (2) in proportion as we rapidly and somewhat dimly frame new principles for ourselves from the cases observed is Proof *inductive, empirical*, or (in its loosest form) *analogical*. . . . The whole history of the rise and growth of knowledge (it has been also already remarked) is a record of fruitful rivalry and interaction between two opposite processes. Observation of facts has demanded theory — statement of "laws" or uniformities — to explain, and even to name, the things and events observed; theory in its turn has always been more or less liable to purging criticism of "fact." . . .

Strictly speaking all Proof, so far as really *proof*, is deductive. That is to say, unless and until a supposed truth can be brought under the shadow of some more certain truth, it is self-supporting or circular. Unless we have some more comprehensive and better-tested generalization within the sweep of which to bring our Thesis, we reach no foundation broader than itself; no assurance beyond what may be derived from the fact that nothing has yet been found to contradict the theory. For two elements, express or implied, are required for all rationalization: (1) a Principle or abstract indication (an assertion that a certain sign is trustworthy); (2) an Application of such Principle, or an assertion that the sign is present in the case or cases contemplated by the Thesis. In other words all rationalization may be represented syllogistically. . . . Just as Explanation always demands a reference to some wider

<sup>1</sup> [This passage is adapted from the same author's *Treatise on Evidence* (1905. Vol. I, §§ 30-36).]

<sup>2</sup> "Argument" is here used in the logician's sense of a "proposed inference."

Generality than that which is to be explained, so Proof always demands a reference to some wider Generality than that which is to be proved. To explain and to prove consist essentially in this. Both are forms of "rationalization." But there is yet a meaning in the distinction [between inductive and deductive], and, with certain limitations and apologies, I propose to make some use of it.

Although the dependence of any Thesis on its Reason must be rationalized — *i.e.* must have the underlying principle made clear — before the testing operation can be called complete, yet in regard to special dangers it makes considerable difference whether that principle is at first definitely apprehended or not, — whether (as it is commonly expressed) the Proof professes to rely (1) upon laws known or supposed to be true, or (2) upon facts observed or supposed to be observed. We must distinguish, then, as far as possible, between that kind of Proof which rests *openly and distinctly* upon already generalized knowledge — Deductive Proof — and that which rests upon what may be loosely described as "*isolated facts*" or "perception of resemblance and difference" or "observation and experiment" . . . — that which is commonly known in its highest form as Inductive Proof, and in its lowest form as the Argument from Analogy. The required limitations in preserving the distinction appear to be, in the first place, a clear recognition that although in Induction the Principle or Law connecting the cases is in the case of *Inference* commonly dropped out of sight, or at least left highly indistinct, yet the whole cogency of Inductive Proof depends upon the extent to which such principle is first rendered definite and then confronted with observable or admitted fact. . . . The second difficulty in preserving the distinction lies in the fact that as a rule the Empirical and Deductive processes are found in combination, both being employed on the same subject-matter. . . . These two considerations make it of course extremely difficult in practice to label every argument at once with one or the other name. Sometimes, as where the Reason is a direct statement of the Principle itself, or again where it consists of a record of some experiment, no hesitation need practically be felt as to where the danger lies; but in a large number of cases we have no means of deciding whether the argument may best be classed as empirical or deductive or both. . . . But, because the distinction breaks down when pressure is put upon it, we need not consider it wholly worthless. It possesses a solid core of applicability, and if we can be content to use it as a rough guide in finding the weak point of an argument, much value may still be extracted from it in economy of time. . . . However we choose to name the two different kinds of arguments, the distinction between them has a certain real importance, as already shown; and all that is intended to be done with it is to recognize that so far as the given argument may be seen to belong to one or the other class, so far we are already on the track of special dangers.

A brief examination will show that in the offering of evidence in court the form of argument is always inductive. Suppose, to prove a charge of murder, evidence is offered of the defendant's fixed design to kill the deceased. The form of the argument is: "A planned to kill B; therefore, A probably did kill B." It is clear that we have here no semblance of a syllogism. The form of argument is exactly the same when we argue: "Yesterday, Dec. 31, A slipped on the sidewalk and fell; therefore, the sidewalk was probably coated with ice"; or, "To-day A, who was bitten by a dog yesterday, died in convulsions; therefore, the dog probably had hydrophobia." So with all other legal evidentiary facts. We may argue: "Last week the witness A had a quarrel with the defendant B; therefore, A is probably biased against B"; "A was found with a bloody knife in B's house; therefore, A is probably the murderer of B"; "After B's injury at A's machinery, A repaired the machinery; therefore, A probably acknowledged that the machinery was negligently defective"; "A, an adult of sound mind



and senses, and apparently impartial, was present at an affray between B and C, and testifies that B struck first; therefore, it is probably true that B did strike first." In all these cases, we take a single or isolated fact, and upon it base immediately an inference as to the proposition in question. This is the Inductive or Empiric process.

It may be replied, however, that in all the above instances, the argument is implicitly based upon an understood law or generalization, and is thus capable of being expressed in the deductive or syllogistic form. Thus, in the first instance above, is not the true form: "Men's fixed designs are probably carried out; A had a fixed design to kill B; therefore, A probably carried out his design and did kill B"? There are two answers to this. (1) It has just been seen that every inductive argument is at least capable of being transmuted into and stated in the deductive form, by forcing into prominence the implied law or generalization on which it rests more or less obscurely. Thus it is nothing peculiar to litigious argument that this possibility of turning it into deductive form exists here also. It is not a question of what the form *might* be, — for all inductive may be turned into deductive forms, — but of what it *is*, as actually employed; and it *is* actually put forward in inductive form. (2) Even supposing this transmutation to be a possibility, it would still be undesirable to make the transmutation for the purpose of testing probative value; because it would be useless. We should ultimately come to the same situation as before. Thus, in one of the instances above: "A repaired machinery after the accident; therefore, A was conscious of a negligent defect in it"; suppose we turn this into deductive form: "People who make such repairs show a consciousness of negligence; A made such repairs; therefore, A was conscious of negligence." We now have an argument perfectly sound deductively, *i.e.* if the premises be conceded. But it remains for the Court to declare whether it accepts the major premise, and so the Court must now take it up for examination, and the proponent of the evidence appears as its champion and his argument becomes: "The fact that people make such repairs indicates (shows, proves, probably shows, etc.) that they are conscious of negligence." But here we come again, after all, to an inductive form of argument. The consciousness of negligence is to be inferred from the fact of repairs, — just as the presence of electricity in the clouds was inferred by Franklin from the shock through the kite string, *i.e.* by a purely inductive form of reasoning. So with all other evidence when resolved into the deductive form; the transmutation is useless, because the Court's attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise; which presents itself again in inductive form. For all practical purposes, then, it is sufficient to treat the use of litigious evidentiary facts as inductive in form.

§ 2. *Practical Requirements of the Process, to constitute Proof.* The next inquiry is, What are the peculiar dangers of the argument, the loopholes for error, the opportunities for false inference? By ascertaining these, we shall learn what safeguards or tests ought to be applied by the jurors in weighing the evidence, and what opportunities of counterargument are offered to the opponent.

These peculiar dangers and necessities are thus set forth by the same eminent authority:

Professor ALFRED SIDGWICK. *Fallacies*. (1884. p. 270.) There is at bottom one primary source of fallacy in the inductive argument, call it by whatever name may be most convenient. We may name it, for instance, the *danger of overlooking plurality of causes*, or of neglecting possible chance or counteraction, or the possibility of unknown antecedents, or of arguing either "post hoc ergo propter hoc" or "per enumerationem simplicem," or of neglecting to exclude alternative possibilities, or of forgetting that facts may bear more than one interpretation, . . . or of failing to see below the surface, or—perhaps on the whole the best of all—of unduly neglecting points of difference. . . . [The form of argument is] a case or cases brought forward of which a certain conclusion is asserted to be the best explanation. If, then, some better explanation is possible, the theory as stated is impeachable. . . . By the "best" explanation is meant . . . that solitary one out of all possible hypotheses which, while explaining all the facts already in view, is narrowed, limited, hedged, or qualified, sufficiently to guard in the best possible way against undiscovered exceptions. . . . Hence, the "best" explanation of the facts A and B and C is that explanation which, while neglecting certain points of difference among them, and thus forming some generalization, neglects only those differences which are "unessential." The best explanation of (*i.e.* generalization from) one solitary sequence observed is that which neglects only its unessential elements or features. . . . It is in every case, then, through undue neglect of the essential difference between the specific case or cases observed and the wider genus to which the assertion professes to refer, that we rise to a generalization not sufficiently guarded against possible exceptions. . . . All positive proof depends . . . on the care, the precautions with which observation has been interpreted and experiment conducted. *So far only as these exclude alternative possibilities are they of real value.* . . . Because all positive assertion can only justify itself . . . when mistakes have been either one by one eliminated or in a body prevented, the burden of doubt to be removed by evidence consists essentially in the group of alternative theories remaining undiscarded. . . . The important point is, always, to show that *all other possible theories are weighed in the balance and found wanting*,—that is to say, that all precautions have been taken against that crudest kind of unchecked generalization which the least-trained mind possesses in the greatest abundance. This objection against a theory, that alternative theories are not yet discarded, appears, however, more directly applicable, more fruitful of results, against a concrete or an abstract-concrete thesis than against a directly abstract one. . . . And the right of the theory chosen, over all its possible rivals, depends entirely upon the depth of our insight into the conditions under which the experiment or observation was really made. This is the main lesson of Logic as regards Induction. . . . These alternatives have to be faced as possible explanations of each observed case; and the immediate question in each case is, What certainty can we obtain that the alternative chosen is the right one out of all those conceivable? The methods of Inductive Proof may be viewed as attempts to answer this question.

The peculiar danger, then, of Inductive Proof is that there may be *other explanations*, than the desired one, for the fact taken as the basis of proof.

Let us now examine this principle from the point of view of the opposing parties in a legal trial. Since our system of procedure is based on the method of leaving the production of evidence to the parties themselves, the proceeding is an antiphonal one. Both counsel and jury therefore need to examine each piece of evidence, first, from the proponent's point of view, next, from the opponent's point of view, and finally, from the joint jury's point of view. Some (1) with the defect of the inductive proof is that the fact offered as the basis

of the conclusion may be open to one or more other explanations or conclusions, the failure to exclude a single other rational hypothesis would be, from the standpoint of Proof, a fatal defect; and yet, if only that single other hypothesis were open, there might still be an extremely high degree of probability for the conclusion first claimed. When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human being was absolutely proved. There was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability. The provisional test, then, from the point of view of judicial Proof, would be something like this: Does the evidentiary fact point to the desired conclusion (not as the only rational hypothesis, but) as the hypothesis (or explanation) most plausible or most natural out of the various ones that are conceivable? Or (to state the requirement more weakly), is the desired conclusion (not, the most natural, but) *a* natural or plausible one among the various conceivable ones? After all the other evidential facts have been introduced and considered, the net conclusion can be attempted. At present, in dealing with each separate fact, the only inquiry is a provisional one: How probable is the Probandum as based on this Probans?

This general attitude may be illustrated from various sorts of evidentiary facts. (1) The fact that A left the city soon after a crime was committed will raise a slight probability that he left because of his consciousness of guilt, but a greater one if his knowledge that he was suspected be first shown. Here the evident notion is that the mere fact of departure by one unaware of the charge is open to too many innocent explanations; but the addition of the fact that A knew of the charge tends to put these other hypotheses into the background, and makes the desired explanation or conclusion — *i.e.* a guilty consciousness — stand out prominently as a more probable and plausible one. Even then there are other possible hypotheses — such as a summons from a dying relative or the fear of a yellow-fever epidemic in the city; but these are not the immediately natural ones, and the greater naturalness of the desired explanation makes it highly probable. (2) The fact that A before a robbery had no money, but after it had a large sum, indicates that he by robbery became possessed of the large sum of money. There are several other possible explanations, — the receipt of a legacy, the receipt of a debt, the winning of a gambling game, and the like. Nevertheless, the desired explanation rises, among other explanations, to a fair degree of plausibility. (3) The fact that A, charged with stealing a suit of clothes, was a poor man is offered to show him to be the thief. Now the conclusion of theft from the mere fact of poverty is, among the various possible conclusions, one of the least probable; for the conclusions that he would preferably work or beg or borrow are all equally or more probable, and the hypothesis of stealing, being also a dangerous one to adopt as the habitual construction to be put on poor men's conduct, has the double defect of being less probable and more hard upon the innocent. Such evidence, then, is of slight value to show that conclusion. (4) A person of unbalanced delusions asserts on the stand that he saw A strike B. Nowadays it is recognized that a delusion may affect the powers of observation and memory to a limited extent only, and may not concern the subject of

the testimony. If it does concern that subject, the hypothesis that the act occurred as he states it is too feeble and improbable, alongside of the hypothesis that his delusion is the only source of his statement. But if the delusion does not concern that subject, then his statement may prove something, even though it is still possible that his statement has been affected by the delusion. Thus the notion is, as before, that the evidentiary fact — *i.e.* the assertion on the stand — is of probative value so far as the correctness of the assertion is at least one among probable hypotheses. (5) The fact that A makes his statement on the witness stand in response to a leading question of his counsel is not of great value, because in experience the chances are so great that his answer is based on the counsel's suggestion and not on his own knowledge. On the other hand, where the leading question deals merely with the preliminary matters of his name, age, and residence, the answer is fairly probative because, there being so little motive for falsification on those subjects, the conclusion that he answered truly is far the most probable one. (6) The fact that A, the witness, has had a lawsuit with B, the defendant, is offered to show that A has feelings of animosity towards B which make it probable that he cannot testify correctly against him. Yet the inference of such animosity is a forced and unnatural one; the mere fact of a lawsuit is consistent with so many other more probable hypotheses that the evidence does not reach a great degree of probative value.

Thus, throughout the whole realm of evidence, circumstantial and testimonial, the theory of the inductive argument, as practically applied from the standpoint of Proof, is that the evidentiary fact has probative value only so far as the desired conclusion based upon it is a more probable or natural hypothesis, and the other hypotheses or explanations of the fact, if any, are less probable or natural. The degree of strength required will vary with different sorts of evidentiary facts, depending somewhat upon differing views of human experience with those facts, somewhat upon the practical availability of stronger facts. But the general spirit and mode of reasoning of the Courts substantially illustrates the dictates of scientific logic.

§ 4. *Same: Occasional Subordinate Tests; Method of Agreement and Method of Difference.* Thus, the main question for the inductive argument is (in the words of Professor Sidgwick, already quoted): "What certainty can we obtain that the alternative chosen is the right one out of all those conceivable?" But there have been stated by scientific logic several subordinate methods or processes of investigation which may be viewed as attempts to answer this question. Usually enumerated as five, they are reducible in essence to two, — the Method of Agreement and the Method of Difference. Occasionally they may be and are conveniently resorted to in the testing of judicial evidence.

(a) *Method of Agreement.* The canon which this applies may be thus stated: "Whatever circumstances can be excluded without excluding the phenomenon whose effect (or cause) is being sought, or can be absent notwithstanding its presence, are not causally connected with it. . . . The remainder, those circumstances which are not eliminated by this process, are supposed to be thus shown to be essential to the phenomenon, — to be the proved effect (or cause)." <sup>1</sup> From the point of view of Proof, then, when we

<sup>1</sup> Sidgwick, *ubi supra*, p. 340.

argue that the observed instances of  $a$ , viz.  $a'$ ,  $a''$ ,  $a'''$ , being always followed by  $b$ , prove  $a$  to be the cause of  $b$ , we can avoid the danger of ignoring other causes as the true explanation, by providing that the various instances shall be attended by identically the same circumstances or conditions; then, and then only, when  $a$ , under identically the same conditions, is followed always by  $b$ , have we the right to claim that  $b$  is the effect of  $a$  and not of some other cause. This subordinate test — which is merely a practical aid to the ultimate or fundamental one — will naturally be most available and useful where the evidential fact consists of a supposed parallel instance. To illustrate: (1) In showing that a person's illness was due to the eating of certain food, the fact is offered that other persons were ill after eating of the same food. Here the test naturally to be applied is whether the other illnesses occurred under substantially similar conditions of time, surroundings, and symptoms. (2) To show that a portion of a pavement caused an injury because dangerous to passers-by, the fact is offered that other persons who passed fell down at that place. Here a similar test is called for. (3) To show that the accused wore a black hat, not a gray hat, the prosecution calls five different witnesses, all of whom were present, and none of whom were acquainted with each other. All agree that the hat was black. The conditions being substantially similar, the conclusion is highly probable. Judicial annals contain a vast variety of instances in which this same subordinate test is the natural one to be applied, and is in practice used by the Courts.

(b) *Method of Difference.* The canon of this method is:<sup>1</sup> "If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur have every circumstance in common save one, that one only occurring in the former; the circumstance in which alone the two instances differ is the effect, or the cause, or an indispensable part of the cause, of the phenomenon." As applied to the judicial purposes of Admissibility, the test of this argument becomes: In order to prove that  $x$  is the cause of  $b$ , by the fact that wherever  $x$  was present the effect  $b$ ,  $b'$ ,  $b''$ , was found, and that wherever  $x$  was not present the different effects  $c$  or  $d$  were found, the various instances  $b$ ,  $b'$ ,  $b''$ ,  $c$ , and  $d$  are admissible if they were substantially similar to each other in all respects except the presence of  $x$ . This test is of comparatively rare employment in circumstantial evidence, because it is rare that instances occur which fulfill this requirement, unless where prearranged experiments are possible. But in testimonial evidence, the argument may be and is employed. To illustrate: (1) The injury to the paint on the plaintiff's house is attributed by the defendant to sewer gas; for this purpose, from the fact that under conditions and circumstances as nearly as possible like those surrounding the plaintiff's house, except the presence of the sewer gas, he argues that the injury to paint did not occur. (2) The accused calls a witness to prove an alibi, who testifies that the accused at the time in question was in a certain saloon at 345 Fifth St., five miles away from the crime. The prosecution calls four other witnesses, all of whom say that they were in the same room at that time and the accused was not there. The accused's witness is his brother; the other persons are strangers. Here the fact of the accused's relationship and his witness' probable bias is the only circumstance different in his case from that

<sup>1</sup> Sidgwick, p. 345.

of the other four. Hence we may infer that this bias is the cause of his telling a different story from theirs.

The purpose in using both these subordinate tests is always the same general one, — to secure a fair probability for the claimed hypothesis, as against and in competition with other possible ones.

§ 5. *Same: (2) with Reference to the Opponent.* It is important to notice the double treatment of which every offer of evidence may admit. Where we are dealing with the general subject of Proof in Logic, the single inquiry is whether the argument offered as involving Proof does really fulfill the logical requirements. But wherever, in the applications of logical principles to specific practical purposes, two parties are found contending, the proponent and the opponent — as in a formal debate, a controversy of scientific investigators, and, preëminently, a trial at law — the mode of argument must be studied from the two points of view. Whenever, on the evidential fact offered by the proponent, a single other hypothesis remains open, complete Proof fails; the desired conclusion is merely the more probable, or a probable one; the other hypotheses, less probable or equally probable, remain open. It is thus apparent that, by the very nature of this process, a specific course is suggested for the opponent. *He may now properly show, by adducing other facts,* that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact. That fact has been admitted in evidence, but its force may now be diminished or annulled by showing that some explanation of it other than the proponent's is the true one. Thus every sort of evidentiary fact may call for treatment in a second aspect, viz.: What are the other hypotheses which are available for the opponent as explaining away the force of the fact already admitted? To illustrate: (1) In showing the defendant's connection with a murder, the fact is admitted of the finding of a knife, bearing his name, near the body of the deceased; the defendant, to refute the claimed conclusion that he was present with the knife at the murder, may show that he lost the knife a month before; thus giving greater color of probability to the hypothesis that some one else was present with the knife. (2) To show the defendant's animosity against the deceased, the fact of a serious quarrel ten years before is offered; the claimed conclusion, namely, that the animosity existed at the time of the killing, is an hypothesis of low relative probability; for the opponent may show, by the fact of a reconciliation in the interim, that the fact of the quarrel does not lead to the conclusion claimed. (3) To show the injurious vibrative qualities of a bridge in causing cracks in adjacent buildings, the fact of the existence of cracks in other adjacent buildings is received; this may be explained away by the fact that the operation of a railway, and not the bridge vibrations, had been their cause. (4) A witness may appear to have had adequate opportunity to observe accurately the facts related; but he may be mendacious by disposition, and if the opponent can show his bad character, it will tend to explain away all his assertions as those of a confirmed liar. (5) The rest of a conversation or writing, of which a part has been received, may be presented by the opponent to explain away the apparent effect of the fragment; thus, to adopt Algernon Sidney's famous illustration (frequently used by Erskine in his arguments for the accused in the sedition trials of the 1790s),

the prosecution, on a charge of blasphemy, might offer a statement of the defendant: "There is no God"; but this might be instantly explained away as being merely part of a quotation from the Bible of the passage, "The fool hath said in his heart, 'There is no God.'" Such is the complementary process of Explanation, by the opponent, as suggested by and related to the evidentiary fact received from the proponent.<sup>1</sup>

§ 6. *Same: Occasional Subordinate Forms.* It has been seen that the proponent's evidentiary fact is occasionally subjected to subordinate tests, peculiarly useful in a few situations (*ante*, § 4). In the same way, the opponent, desirous of explaining away the force of an evidentiary fact by showing that another hypothesis is equally or more probable than the one claimed, finds that the process, just described in its common form, sometimes takes on a specific subordinate form peculiarly useful in certain situations. These forms, as noticed in judicial annals, seem to be practically three in number.

(1) *Explanation by Inconsistent Instances.* Where the proposition is that  $y$  is the effect of  $x$ , and the evidentiary fact is that in instances  $a$ ,  $a'$ , and  $a''$ , the circumstance  $y$  followed and the circumstance  $x$  was present, a convenient way of annulling the effect of these instances is to show that in a fourth instance  $a'''$  the circumstance  $x$  was present and yet the circumstance  $y$  did *not* follow.<sup>2</sup> To illustrate: In arguing that the vibrations of the defendant's railway bridge cracked the plaintiff's buildings at the eastern end, the injured condition of various buildings at that end is received for the plaintiff; to explain this away, the fact is probative for the defendant that at the western end the vibrations were even more severe, and yet no buildings there were cracked.

A chief use for this mode of argument is to demonstrate an alleged possibility or *impossibility*. When A's argument is that an event or deed  $x$  is possible or impossible, it is obvious that the whole force of his evidentiary facts is at once destroyed by a single instance of its impossibility or its possibility, provided the conditions are substantially similar in both cases. In this way the hypothesis originally set up as the exclusive one is shown not to be an exclusive one at all, by the fact that a contrary one has occurred in the instance offered by the opponent. A universal or absolute affirmative can be thus exploded equally as well as a universal or absolute negative. It is the universality of the alleged indication that lays it open to fatal attack by one inconsistent instance. To illustrate: (a) A burglar was alleged to have entered through a certain window; but the accused affirmed the impossibility of a man's getting through it; the prosecuting attorney suddenly put the frame over the defendant's head and drew it completely down, thus disproving the alleged impossibility; (b) at a trial for murder, there was testimony that the accused was seen going up a certain hill, wearing a pepper-and-salt suit, the witness looking from the rear and facing the sun; experiments showed that under such circumstances it was impossible for an observer to distinguish any color at all; (c) at a trial for arson, the prosecution claimed that the fire was set with a candle set in a closed box so as to

<sup>1</sup> The term "infirmative fact" was invented, to signify this class of facts here termed "explanatory," by Jeremy Bentham, and was afterwards adopted by Alexander Burrill (*Circumstantial Evidence*, 1868, p. 153).

<sup>2</sup> Sidgwick, *ubi supra*, p. 275.

burn down into a bunch of shavings; experiment showed that under the conditions alleged a candle would have gone out in a shorter interval than that which must have elapsed.

(2) *Explanation by Dissimilarity of Conditions.* Where the proponent's evidentiary fact has been admitted under the subordinate test of § 4, *ante*, — the substantial similarity of conditions in the instances offered, — the opponent's course is naturally suggested; *i.e.* he may show that there is at least a residuum of dissimilar conditions which diminish probative value, by making some other hypothesis a possible one, if not an equally probable one. To illustrate: (a) In arguing that arsenical wall paper was the source of the plaintiff's illness, the fact that others living in the same house were affected by similar symptoms is received; to explain this away, evidence is received that the same symptoms customarily attend the eating of unsound oysters, and that the others, but not the plaintiff, had eaten oysters; thus the dissimilarity of conditions is emphasized as the possible source of erroneous explanation. (b) To prove the qualities of a dental invention as a pain killer, the fact is received that the patrons of the dentist using it had suffered pain under other dentists but not under him; to explain this away, it may be shown that they had never been under him before he used this pain killer; thus emphasizing the dissimilarity of conditions to suggest that this dentist's personal skill, and not the invention, had prevented their pain.

(3) *Explanation by Cumulative Instances.* Where the proposition is that *y* is the effect of *x*, and the evidentiary fact is that in instances *a*, *a'*, and *a''*, the circumstance *y* followed and the circumstance *x* was present, another way of annulling the effect of these instances is to show that in a fourth instance *a'''* the circumstance *y* again followed, and yet the circumstance *x* was *not* present. This argument is in a manner the opposite of (1) *supra*, and consists in offering other instances in which the same effect is found, but without the presence of the alleged causing circumstance; and this forces us to look upon its presence in the proponent's original instances as merely accidental, and not really causative. The requirement of this argument is that the conditions of the additional instances shall be substantially similar in every respect except the alleged causing circumstance; for if they were not, then the elimination of the alleged cause as harmless is not accomplished. For example, the fact of the defendant's flowage of certain lands of the plaintiff is alleged to be the cause of deterioration in their productiveness during the previous ten years; to refute this, the defendant offers the fact of similar deterioration of other lands that had not been subjected to the flowage; this is probative only so far as the other lands are near by and presumably under the same influences of soil and climate.

§ 7. *Same: Other Methods of Rebuttal by the Opponent.* It must be understood, of course, that the opponent's modes of opposition are not confined to the process of Explanation. He has three processes in all. He may (2) *deny* the truth of the evidentiary fact itself; or (3) *advance some new and rival* evidentiary fact tending to prove his own Probandum. But in neither case is he using any new logical process. In (2) there is no form of argument at all, but a simple denial of the evidentiary fact; in (3) there is a wholly new argument, in which the opponent in turn becomes proponent and submits his material as proof, according to the ordinary tests. To



illustrate : To charge A with murder, the prosecution shows a specific threat, an old quarrel, and traces of blood on his clothes. The defendant answers : (1) *Explaining* away the old quarrel by showing an intervening reconciliation; explaining away the blood traces by showing the recent killing of a chicken; this is the complementary process of Explanation suggested by the evidentiary facts of quarrel and blood, and is directed to diminishing their force; this complementary process depends for its conditions and possibilities upon those original facts; (2) *Denying* the specific threat; this in itself does not affect the logical probative value of the threat as circumstantial evidence; it introduces an issue of evidence, raising a doubt as to the very existence of the circumstantial fact; (3) *Advancing the rival facts* of an alibi and of good character for peaceableness; here the defendant is simply a proponent of new evidentiary facts, just as the prosecution was for its own evidence; this new question of relevancy depends on precisely the same tests as the prosecution's original evidence.

All an opponent's modes are reducible to these three. In the first, he is an opponent by logical nature of his argument. In the second, he is an opponent from the contradictory point of view, but this may require him to become a proponent of either a new circumstance or a new witness. In the third, he becomes himself the proponent of a new argument, which the original proponent may now attack as an opponent. The first is inherent in the probative use of the proponent's original fact; the other two are not inherent, and may or may not be resorted to.

§ 8. *Summary of Probative Processes.* It has thus been seen that every evidentiary fact or class of facts may call for four processes and raise four sets of questions, which may be grouped as follows: (P) representing the proponent, and (O) the opponent.

(P) The first process, *Assertion*, consists in offering a fact tending to *prove* a specific conclusion or Probandum. This is subject to the test whether the claimed conclusion is a probable or a more probable one, having regard to conceivable other interpretations of the fact. This process we may label PA.

(O) The second process, *Explanation*, consists in *explaining away the original fact's force* by showing the existence and probability of other hypotheses; for this purpose other facts affording such explanations are receivable from the opponent. This process we may label OE.

(O) The third process, *Denial*, consists in *negating the original proponent's evidentiary fact* as such, either testimonially or circumstantially; and thus (O) as proponent offers a new witness or circumstance. This process we may label OD.

(O) The fourth process, *Rivalry*, consists in adducing a new fact, circumstantial or testimonial, which by a *rival inference* tends to *disprove* the proponent's Probandum. This process we may label OR. Here the opponent becomes in turn a proponent, and the fact offered by him is now open to the same processes as above from the original proponent, viz.: OE, OD, and OR.

Such are the forms of probative processes available for each single fact as offered. For each additional new fact the processes may be repeated, though they may not be actually used in each instance.

The following outline will illustrate the application of the processes to a

single offered fact of each variety, circumstantial and testimonial. The sign  $\longrightarrow$  signifies "tends to prove"; the sign  $\rightarrow$  signifies "tends to disprove"; the sign  $<$  signifies "explains away"; letter T stands for a testimonial evidential fact; letter C stands for a circumstantial evidential fact:

*Circumstantial Evidence Processes:*

*Probandum:* X stabbed Y with a knife at a certain time and place.

PA (Proponent's Evidential Fact) C = Bloody knife was found on X  $\longrightarrow$  Probandum.

OE (Proponent's Evidential Fact explained by Opponent)

C = X drew it from the wound after the affray on coming to Y's assistance  $<$  Proponent's Evidential Fact.

OD (Proponent's Evidential Fact denied by Opponent)

C = Bloody knife was not found on X  $\rightarrow$  Proponent's Evidential Fact.

and this the opponent may do either

(1) by adducing new evidential facts

T = M's assertion that on searching X no knife was found.

C = No trace of blood appeared on X's garments by the knife.

(2) or by questioning the inference from the T or C on which PA itself rested as a probandum.

OR (Rival New Facts adduced by Opponent)

C = X had no quarrel or other motive to stab Y  $\rightarrow$  Probandum.

and T = N a bystander asserts that X did not stab Y  $\rightarrow$  Probandum.

In the above instance, OE is of course inconsistent with OD; and in this particular case the two processes would not be employed together in the above manner. Note also that under OE, OD, and OR, alike, new T and C will ramify into further details; yet the processes will always be one or more of these three.

*Testimonial Evidence Processes:*

*Probandum:* X an automobilist was carrying a light at the time of a collision.

P (Proponent's Fact)

T = M's assertion that a light was being carried by X at the time  $\longrightarrow$  Probandum.

OE (Proponent's Fact explained by Opponent)

C = M is X's chauffeur and is therefore biased  $<$  Proponent's Evidentiary Fact.

OD (Proponent's Fact denied by Opponent)

(This is not here feasible except as stated below.)

OR (Rival New Facts adduced  
by Opponent)

C = After the collision, no acetylene was found in X's lamp  $\rightarrow$  Probandum.

T = N a bystander asserts that no light was carried  $\rightarrow$  Probandum.

In the above instance, the process OE is commonly termed Impeachment of the Witness, in legal phrase, and includes all methods of detracting from the force of the witness' assertion, by showing it to be untrustworthy. The process OD, it will be noticed, is not ordinarily feasible for testimonial evidence, because, when the witness is testifying in court, the fact of his making the assertion cannot be disputed. Yet even then the opponent may induce him on cross-examination to retract the assertion; which would be the process OD. Moreover, when the witness is not in court, and his making of the assertion is proved by hearsay, its making may be disputed by the opponent; which would be another instance of the process OD.

For testimonial evidence, therefore, as well as for circumstantial evidence, the available processes are four in all. Their distinction is due to the fact that separate methods of reasoning are involved in each.

The *jury's point of view*, in estimating the total effect of the mass of evidence, will be examined *post* (No. 376), after the various kinds of evidential facts have been studied in detail.

§ 9. *Analysis of an Evidential Fact.* From the foregoing exposition of the kinds of evidence and processes of probative reasoning, it will be seen that the essential thing, in preparing to estimate the effect of evidence, is to *analyze accurately the inference proposed* in each instance. Every evidential fact is offered as tending to prove a Probandum. We know that in most instances it will not completely prove. Therefore it is necessary to place it in the light and dissect it to see what are its shortcomings. For practical purposes this analysis has four steps.

The *first step* is to state to ourselves, in words, precisely what the offered evidence is, and then precisely what is its supposed Probandum. Until this is done, it is useless to go further. For example, a policeman tells his story about capturing the accused after an affray. Out of that story we may select two or three supposed facts; *e.g.* (1) that the accused had no hat, and (2) that his hand was cut. This (1) first supposed fact we may then analyze into the inferences as alleged or implied by the proponent; *e.g.*

C — The fact of having no hat  $\rightarrow$  P — it was lost by running;

C — The fact that he lost it by running  $\rightarrow$  P — he was running away;

C — The fact that he was running away  $\rightarrow$  P — his consciousness of guilt;

C — His consciousness of guilt  $\rightarrow$  P — his actual guilt of the assault charged.

Now at any one of these four steps a lack of certainty in the inference may become important; whether and just where the doubt will become important will depend upon the opponent's attitude in the case in hand.

The (2) second supposed fact we may analyze thus :

- C — The fact of having a cut hand  
→ P — the recent contact with a sharp weapon ;
- C — Recent contact with a weapon  
→ P — contact with the weapon used in the affray ;
- C — Contact with the weapon used in the affray  
→ P — taking part in the affray.

Here, too, there is an opening for dispute as to the successive inferences. The analysis enables us to estimate the strength of the final inference, and to prepare for the various possibilities of dispute at any possible point.

The *second step* is to set down, in words, precisely, what the opportunities are for the opponent to explain away the inference at any one of the successive stages, and to estimate the probabilities of any one of them being more correct, in the case in hand, than the one constituting an inference towards our own probandum. Thus, in the first instance above taken :

- C — the fact of having no hat, may be explained by four other inferences :  
→ Hat was blown off by a gust of wind ;  
or → Hat was already off when the accused came out of his store to learn the cause of the commotion ;  
or → Hat was off because the day was hot ;  
or → Hat was off because he never wore one.

One or more of these explanations may be absurd ; but the necessary process is first to set them down in black and white and label them according to their probability.

Again, in the next step of inference, assuming that the proponent's inference is sound, nevertheless —

- C — The fact of losing the hat by running, may be explained thus :  
→ He was running to board a street car ;  
or → He was running to give an alarm of fire ;  
or → He was running to evade a third person.

Any one of these may be improbable ; but the needful thing is to determine explicitly whether it is or not.

The *third step* is to set down, in words, precisely, what the possibilities are for the opponent in dealing with the above evidential facts. Thus, C — the fact that the accused when arrested had no hat, may be (OE) explained away, (OD) denied, or (OR) rivalled. (OE) It may be explained away by one of the above suggested inferences as the true one. (OD) It may be denied, by another witness who contradicts the policeman's asser-

tion, or by the circumstance that the accused still had his hat a few minutes later. (OR) It may be rivalled, by the circumstance that the accused had no motive for making an assault. — Whether the opponent will explain, or deny, or adduce rival facts, cannot be told beforehand; but the directions which his refutation may take, must be thought out beforehand and prepared for.

The *final step* consists in the analysis of the effect of a mass of evidential facts. This is something larger than the analysis of each separate fact, and involves additional canons of reasoning (*post*, No. 376).

The main subject of study will therefore be the *various kinds of specific evidential facts commonly offered in litigation*, and their *possibilities of inference*.

The instances taken from the chronicles of litigation will illustrate these varied possibilities. The exercise gained from their analysis will be the essential value of the work to the student.

The material may best be taken up under three heads:

Part I. Circumstantial Evidence;

Part II. Testimonial Evidence;

Part III. Problems involving a Mass of Evidence of Both Kinds.

## PART I: CIRCUMSTANTIAL EVIDENCE

3. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

*Classification of Circumstantial Evidence.* Two important considerations affect the classification of circumstantial evidence for convenient treatment.

(1) The starting point of the classification should be the proposition desired to be proved (Probandum), rather than the evidentiary fact offered. The fundamental inquiry whether the claimed conclusion is a probable inference from the offered fact. Now if we take a specific probandum as the starting point, and ask in turn, whether it is relevantly evidenced by fact *a*, fact *b*, fact *c*, and so on, we are able to compare intelligently, without repetition, the various sources from which the conclusion or proposition is capable of being inferred.

(2) A second consideration is that we are here dealing, not with a general scheme of human life or of modes of proof, but with a limited body of rules brought forth by problems laid before the Courts for adjudication. Not every species of evidentiary fact or of inference is brought into the realm of judicial evidence, but chiefly certain common and frequently recurring matters affecting the usual crimes and civil disputes.

With these considerations in mind, the general grouping of Probanda may be made as follows:

- I. An Event, Quality, or Condition of Physical (Inanimate) Nature;
- II. The Identity of a Thing or Person;
- III. A Quality or Condition of a Human Being;
- IV. The Doing of a Human Act.

Further, under each group, it will be often convenient to arrange the evidentiary facts according as the proof or indication they afford is:

- A. Prospectant;
- B. Concomitant; or
- C. Retrospectant.<sup>2</sup>

The distinction between the first and the third heads is always marked and often useful in hints. For instance, under Group IV, above, the evidentiary facts of Character, Plan or Design, Motive, point forward to a future act; *i.e.* we take our stand before the time of the act, and argue that because of the person's character, design, or motive, he was likely, or not, to do the act in the future; while the fact of Consciousness of Guilt points backwards, *i.e.* we infer from his state of mind that he has been guilty of some crime in the past. In evidencing matters under Group III, this distinction

<sup>1</sup> Adapted from the same author's *Treatise on Evidence* (1905, Vol. I, § 43).

<sup>2</sup> It is perhaps worth noting that this analysis was long ago hinted at by Burke, in his disquisition on evidence in the Report on Warren Hastings' Trial, in 1794 (31 Parl. Hist. 342); "every circumstance," he remarks, "precedent, concomitant, and subsequent, become parts of circumstantial evidence." Mr. Burrill's treatise on Circumstantial Evidence also uses the same classification.

becomes also useful; *e.g.* the fact of hereditary insanity as pointing forward to a defendant's insanity raises a question of relevancy essentially different from that raised by evidence of abnormal conduct exhibited by him; so also in proving an emotion or passion (motive), evidentiary circumstances such as family relationship, need of money, and the like, are offered as pointing forward to the probability of such an emotion being excited, while outward exhibitions of conduct, used for the same purpose, have a retrospectant value as showing that the emotion was the probable source of the evidentiary conduct. This distinction, then, while not always an essential one, at least provides a convenient order of arrangement, and is often serviceable in emphasizing related qualities of probative value.

**TITLE I: EVIDENCE TO PROVE AN EVENT, CON-  
DITION, QUALITY, CAUSE, OR EFFECT OF  
EXTERNAL INANIMATE NATURE**

4. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> § 1. *Classification of Probanda*. There can be, at certain points, no sharp distinction between a Human Act, a Human Quality or Condition, and a Physical Fact (External Inanimate Nature), with reference to evidencing them as probanda. Some matters, such as death, may sometimes be viewed in either the first or the second aspect; for other matters, such as the possession of land, it may not be easy to distinguish between the second and the third. The propositions which come to be proved before tribunals of justice embrace every sort of fact in life, and no classification not purely arbitrary can divide them for practical purposes into classes always absolutely distinct.

But in the present group the distinguishing feature is the absence of the element of a human will and of the human emotion, reason, and character as affecting conduct.

The kinds of probanda may be further subdivided into four categories:

I. Identity (for example, whether a machine delivered was the same as the one agreed to be delivered);

II. Occurrence of an Event (for example, whether a tree fell, or whether lightning struck a house);

III. Existence, or Persistence, in Time (for example, whether a defect in a street or a house was in existence at the time in issue);

IV. Tendency, Capacity, Quality, Cause, or Effect (for example, whether a place in a sidewalk was dangerous, or whether a gunshot could carry a certain distance).

Here, again, no specific single terms can accurately distinguish the different groups, nor is it possible always to draw the lines sharply between the various groups. A given evidentiary fact may and usually does involve (as already observable in dealing with the other materials) more than one of these processes of inference. For example, in proving a sidewalk hole to be unsafe, the evidence may be that A fell there two weeks ago; this involves, first, an inference in the fourth group, namely, that the place was then unsafe,

<sup>1</sup> Adapted from the same author's *Treatise on Evidence* (1905, Vol. I, §§ 432-461).

and, secondly, an inference in the third group, namely, that its unsafeness two weeks before evidences its unsafeness at the time in issue; and either of these inferences may be rejected as unsound, while the other remains sound. Again, to prove the identity of a bale of goods delivered, its features six months before may be offered; and this involves the soundness of two inferences, one of the first and one of the third sort. Again, the question being whether a tree was lying across a street on January 1, the evidentiary fact that the tree was struck by lightning on July 1 preceding involves two inferences, namely, that the tree fell when struck, and that its fallen condition continued till the time in question, *i.e.* an inference of the second and one of the third sorts. Again, to show that a dust explosion occurred in a certain room, the evidentiary fact that a dust explosion previously occurred in the same room involves two and perhaps three inferences, — first, that there is a tendency in a room thus circumstanced for the dust to explode spontaneously, secondly, that as a result of this tendency an explosion did occur, and perhaps (intervening between these two), thirdly, that the condition at the previous time continued up to the time in question, — inferences, respectively, of the fourth, the second, and the third sorts.

In spite, however, of this incidental resort to two or more of the kinds of inference in one piece of evidence, the kinds of inference, as types, remain distinct.

§ 2 (I). *Identity of One Object with Another.* The mode of inference used in proving identity is precisely the same for objects of inanimate nature and for human beings and will be examined *post*, No. 14.

§ 3 (II). *Occurrence of an Event.* This term includes theoretically matters which might perhaps be conceived of also under the category of Existence. For example, if the probandum be the destruction of a house, it might ordinarily be conceived of either as an event, the momentary fact of destruction, or as a condition of existence, the state of being destroyed.<sup>1</sup> For practical evidential purposes, however, the choice of terms is here not important. The distinction between the second and the third groups is the distinction between the *mere* fact of occurrence or existence *as such*, and the fact of occurrence or existence with reference to *time*. In the present group it is asked how to prove the mere fact of destruction or non-destruction.

§ 4. *Same: Occurrence of an Event, as evidenced from Cause or Effect.* An event may be evidenced circumstantially by a cause or by an effect. This mode of inference is available in the three forms already mentioned (*ante*, No. 2), — Prospectant, Retrospectant, and Concomitant. For example, the sinking of a ship is evidenced prospectantly by the presence of a storm in the vicinity; the occurrence of a fire is evidenced retrospectantly by the blackened ruins left as its traces; the revolution of car wheels is

<sup>1</sup> "When successive phenomena are in question, these abstracted portions [*factum probandum* and evidentiary fact] may always themselves be viewed as events, even where so uneventful as hardly to deserve the name in popular language. Thus, where any quality of anything changes ever so slightly — say, when a thermometer rises one degree — we have what is here considered an 'event.' . . . It may seem [in these examples] strange to call a large river or a large town 'events,' but here the names are only used elliptically, for the growth of the town and the continued existence of the river." (Sidgwick, *Fallacies*, pp. 333, 338.)



evidenced concomitantly, by the motion of the car, to the person riding in it. This type of inference, though perhaps in practice the commonest of all, gives rise, nevertheless, to practically no judicial problems. One reason for their rarity is that, for the occurrences of external or inanimate nature, testimonial evidence is commonly abundant. Another reason is that, where the desired inference transcends the scope of ordinary instinct and experience, it is offered as the subject of a testimonial knowledge or opinion by an expert witness, — as where a physician testifies that froth in the lungs of a corpse evidences a certain kind of death. Another reason is that most events of external nature are associated with some human act, and hence the proof involves evidence of the act. But a reason the most important for present purposes is that an inference of this type, though in form the first one to be put forward as the main inference, frequently — if not usually — resolves itself into another of a different type, and the evidential question comes to turn upon the other. This feature it is necessary to explain more fully. The process may be examined for each of the three modes of inference in turn, — prospectant (inference from a prior or causal fact), retrospectant (inference from an effect), and concomitant.

(1) *Prior Cause, as the Basis of Inference.* That a corporal injury will cause a permanent disability to work; that noxious fumes will cause the destruction of herbage, — these are examples of this sort of inference. The evidential offer may be put in this way: The fact of noxious fumes is offered as evidence that at a future time there will ensue no herbage. But, in practice, these offers involving an argument from cause to effect do not raise any evidential questions in the above form, but resolve themselves into others; because the inference rests on an important assumption, which in its turn becomes the subject of a new evidential question. To take the second illustration above, and state it more accurately: The fact of these fumes *having a tendency* to destroy herbage evidences that in future they will probably result in destroying the herbage in question. Now this form of statement brings out the necessity of proving, in its turn, a fact of a new and different category, viz. this assumed *tendency of the fumes to destroy herbage*; and this fact of *tendency* (or capacity) is seen to be in reality the probable point of controversy.

(2) *Subsequent Effect, as the Basis of Inference.* That the falling barometer indicates the existence of an atmospheric disturbance; that the derailed car indicates the prior occurrence of a collision or other destructive event, — these are instances of inferences from effect back to the existence of a cause. Such inferences, however, rarely raise evidential questions in practice, for reasons the same as those just explained. Thus, in the illustration above used, the destruction of the herbage is evidently relevant, without question, as indicating the same destructive influence of atmosphere, soil, or the like; but in the further process of fixing on the fumes in question as the precise cause, either we proceed to offer that specific inference through an expert witness, who asserts as a matter of professional experience that the appearance of the herbage indicates specific fumes as the source (in which case no questions of circumstantial relevancy arises), or, in attempting otherwise to fix upon the fumes as one of the probable destructive influences, it must first be shown that they have this *tendency* to destroy herbage. Thus, in general, the inference from an effect to the existence or

operation of a cause usually leads to a new controversy as to whether the supposed cause has any causing tendency of the alleged sort, and this new controversy involves a different sort of inference.

(3) *Concomitant Events, as the basis of Inference.* An event cannot be inferred from its concomitant event except on the assumption that they have a common cause, or unless the inference is really not one of concomitancy, but of cause and effect. An example of the latter sort is the inference of fire from smoke, *i.e.* it is really the inference of fire as a cause from smoke as the effect. An example of the former sort is the inference of revolving wheels from the motion of the car, *i.e.* there is really an inference, first from the motion to the motive power as a cause, and next, from the motive power to the revolution of the wheels as a common effect of the same cause. Hence, no separate problem is involved in this form of argument.

§ 5 (III). *Existence (or Persistence) in Time.* There is, in strictness, no place for a separate category of mere Existence, as distinguished from Occurrence; for, as above suggested, the notion of a thing's either coming into being or of its having been in being is an inclusive and single notion, with reference to which inferences from cause or from effect may equally be made. Thus in inferring future disability from corporal injury, it is immaterial whether the former be termed the occurrence of an event or the existence of a condition; the inquiry is merely how far we may infer towards it from something else as its cause or its effect; and the term Occurrence has therefore been employed as the one most generally applicable to the probandum. Nevertheless, it is convenient to separate, for some purposes, a category of Existence in Time as the probandum, *i.e.* those instances in which the Existence in Time of an object, condition, or quality is to be evidenced by a prior, subsequent, or concomitant existence. The inference may, as usual, be of one of these three general types; but the first two are not dissimilar in their operation, and may be considered together.

§ 6. *Same:* (1) *Existence, from Prior or Subsequent Existence; General Principle, applied in Sundry Instances (Highways, Machines, Buildings, Railway Tracks, etc.).* When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap bubble was in existence half an hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence to-day will vary according to the nature of the tree and the conditions of life in the region. So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.

Similar considerations affect the use of *subsequent existence* as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of

the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin. On landing at New York it can hardly be inferred that the steamer at the next dock has been there for a week; but it may usually be inferred that the dock has been there for some years; while the particular circumstances of appearance and the like will in the last instance affect the length of time to which the inference could be carried back. Here, as with prior indications, the *interval of time* to which any inference will be allowable must depend upon the nature of the thing and the circumstances of the particular case.

The opponent, on the principle of *Explanation* (*ante*, No. 2, § 5), may always attempt to explain away the effect of the evidence by showing that in the meantime other circumstances have occurred to raise a probability of change instead of continuance.

The precedents show the principle applied to all manner of subjects, — to the condition of a highway, or of a bridge, or of a railway track, station, or roadbed, or of a stream, or of premises, without or within, or of machinery and apparatus, or of a stock of goods, or of sundry articles, or of the condition of a human body or of an animal. These applications of the principle are analogous to the use of the same inference in evidencing, from prior or subsequent condition, a human quality, — habit, possession, ownership, partnership, and solvency, emotion, physical capacity, insanity, and character. In the proof of a place or person by photographs, the principle is frequently applied.

§ 7. *Same*: (2) *Existence, from Concurrent Existence; the Whole evidenced by the Parts, etc. (Highways, Railway Tracks, Premises, etc.)*. The process of thought by which one thing *concurrently* indicates another rests on the assumption that in human experience the one is likely to be found associated with the other. This assumption, then, in one form or another, must underlie any attempt to evidence the latter by showing the concurrent existence of the former. For practical purposes the situations may be grouped under three heads.

(a) *Miscellaneous Instances*. That the presence of smoke indicates the concurrent presence of combustion; that in coming upon sea water in its natural place we are likely to come upon fish; that on apple trees fruit is likely to be found in season, — these are illustrations of the form which this inference most usually takes. This form, however, is but superficially a concurrent indication; almost every apparent inference is in reality a prospectant one, *i.e.* from cause to effect. That apple trees are likely to produce apples; that fire is likely to produce smoke, — such are the true forms of these arguments upon analysis. There are few, if any, genuine instances of concurrent argument of this sort.

(b) *Existence of the Whole inferred from a Part, or of one Part from Another*. To argue to the whole from a part, or to one part from another, is also, in the last analysis, an argument from one effect of a common cause to another effect. But for practical purposes it is sufficient to treat the inference as an immediate one. The condition of the inference's propriety is that in human experience the whole has been found probably to exist with certain related parts; we may then use the existence of one of the parts as evidence from which to infer the presence of the whole or of one of the associated parts,

— as where, observing a floating iceberg, it is inferred that beneath the water's surface is a larger mass of ice in the proportion usually found associated with such a mass above water; or where on observing, from one side of a locomotive, two driving wheels, we infer that on the other side there are two similar ones. This sort of inference is common enough in trials.

(c) *Condition or Quality in one Place, from Condition or Quality in Another.* Logically of the same nature as the preceding, but in practice having a slightly different aspect, is the inference frequently desired to be made from the nature of a condition or quality in one place to the condition or quality at another place, usually in the vicinity. The logical assumption is that by a common cause or causes uniform effects have been produced over a given area, which is thenceforth related to the evidential place as a homogeneous whole to its parts. In practical application, therefore, the requirement is that the two places should be so related that they probably form parts of a homogeneous area including them both; and in such case the condition or quality of the one place is probative to show the condition or quality of the other. This principle receives frequent application, — to highways, to railway tracks, stations, and roadbeds, to machines, buildings, and other structures, to natural growths and formations, weather conditions, and the like.

§ 8. *Same: Samples as Evidence of an Entire Lot.* It is on the present principle that a sample is receivable in evidence to show the quality or condition of the entire lot or mass from which it is taken. The probative requirement is merely that the mass should be substantially uniform with reference to the quality in question, and that the sample portion should be of such a nature as to be fairly representative. When the sample is not taken from the very substance or article in issue, but from another one, the only difference in the argument is that another inference is introduced, *i.e.* the inference of Identity (*post*, No. 14). It must first be evidenced that substance A is in nature identical, for the purpose in hand, with substance B, and then a sample from B, working through a double inference, evidences the nature of substance A.

§ 9. *Same: Sample Copies of Printed Matter.* An impression from type (usually known by the unfortunate because ambiguous term *copy*) is evidence of the contents of another impression from the same type, the required assumption being merely that both were produced by the same type. The easier mode of proof is usually by a witness who offers one impression as representing his recollection of the other. The present principle, however, is to be distinguished from that which is involved when it is attempted from one type-impression to show the *authorship*, or publication, of another and similar one. Where the authorship (or publication) of a single impression is shown, the authorship of another impression exactly similar is not necessarily proved, although it ought at least to be regarded as evidenced, because the printing of one evidences in ordinary experience the probable printing of all others of the same content and appearance. That question, however, does not involve the present principle, *i.e.* the nature of the article, but involves the doing of an act, *i.e.* of authorship or publication.

§ 10 (IV). *Tendency, Capacity, Quality, Cause, or Effect.* It has been noted above how, in so many instances of other classes of cases, that which is the main or first apparent inference offered is upon analysis to be

resolved into an inference of the present sort, *i.e.* in which the probandum is a tendency, capacity, or the like. It is thus easy to see why the great majority of the rulings are concerned with this specific sort of inference.

What, then, is the mode of evidencing circumstantially a tendency, capacity, or quality of external inanimate nature? In general, the inference is from specific instances of *observed effects, exhibitions, or illustrations, to the supposed tendency, capacity, or quality producing them.* For example, the question at issue may be whether the vibrations of factory machinery have caused a conceded injury in an adjacent house. The main controversy is whether the former is the cause of the latter; but, in searching among the probable causes, the argument is obviously confined to those things which have a tendency or capacity to produce such effects, and thus the real proposition of the proponent now becomes this, namely, that the factory apparatus has a tendency or capacity to produce such effects. Thus, while one of the ultimate issues for the jury still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity. In short, when it is desired to show broadly the occurrence of an event, or the cause of it, the process of thought usually resolves itself into two inferences, — first, that the capacity or tendency of something to cause the event is evidence that the event did so result therefrom; and, secondly, that something else is evidence of such a capacity or tendency; and it is the second of these inferences which in practice raises evidential questions.

§ 11. *Same: Principle of Probative Value* (*ante*, No. 2, § 3). The requirements for this process of inference are indicated by the logical principles already examined. The general logical requirement is that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances of the same effect found attending the same thing elsewhere, these other instances have probative value to show such a tendency or capacity *only so far as the conditions or circumstances in the other instances are similar to those in the case in hand.*

But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. For instance, in the case put above, the circumstance that house B' was of wood while house B was of brick would conceivably affect the ease and likelihood of injury by vibration; but the circumstance that the inner walls in B' were papered while those in B were kalsomined, or that the house B' was painted red while the house B was painted green, or that the occupant of house B' was a Presbyterian while the house B was occupied by a Methodist, — such a circumstance, though perhaps material in other aspects, could not have any bearing upon the likelihood of injury by vibration. A similarity between the two cases in respect to such circumstances, therefore, would not be required. The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a substantial similarity, *i.e.* a similarity in such circumstances or conditions as might supposably affect the result in question.

There is also available here, but not so commonly, the subordinate form of argument known as the *method of difference* (*ante*, No. 2, § 4). This mode of evidencing is in judicial investigations not so frequently available,

because it is not usually feasible to find instances which fulfill these requirements; but so far as the issue admits of experiments in which the conditions can be thus artificially manipulated, the mode is equally feasible. Occasional instances are found in the precedents, usually in the form of proof of the absence of the harm in question before the alleged harmful act and then the supervening presence of the harm immediately after.

§ 12. *Same: Distinction between Experiment and Observation.* There are two ways in which the data may be obtained for evidencing tendency, capacity, or quality, on the principle under consideration. One is by using such instances as may be found ready at hand, — instances which have already occurred in the ordinary course of events and happen to be suitable for the purpose. The other is to reproduce artificially and expressly the appropriate conditions and then observe the data obtained by this effort and prearrangement. The former process is the simple one of Observation; the latter is that of Experiment. The former is, in general scientific acceptance, distinctly inferior for most purposes to the latter; because, in taking data just as they come, it is not usually feasible to secure precisely the proper conditions required for the validity or certainty of our inference; while in the latter the conditions may usually be prearranged precisely as they are needed in order to make a sound inference. Indeed, the former source of data, in the modern scientific world, is looked upon as concededly so inferior in probative value, as not to be resorted to except in such situations (for example, geological formations and human diseases) as do not usually admit of artificial prearrangement and control.

§ 13. *Same: Distinction between Possibility, Capacity, Tendency, and Cause, as the object of Evidence; Evidencing a Possibility.* The notion of Causation is in logic by no means easy to analyze; but it is enough to point out here that certain superficially different terms represent essentially the same evidential process. When it is asked, for example, whether certain factory vapors were the cause of a destruction of herbage, the notion of "cause," simple as it seems, becomes upon analysis somewhat complex and at the same time indefinite. Stated in its broadest form, the notion of cause and effect is merely that of invariable sequence. It is only rarely, however, if at all, that such an abstract assertion can be made in universal terms that will stand examination. Thus, that a bullet shot from a pistol into the heart "causes" — *i.e.* will invariably be followed by — death, is a seemingly impregnable assertion; and yet not only may it not be true of bullets of every size, but it may not be true, even with ordinarily large bullets, in instances recorded here and there; and, in the future, surgical skill may show that the instances of non-sequence of death might be made even more numerous. The assertion may then be amended by adding limiting conditions, so as to say that, provided this and that and the other be so, a bullet through the heart causes death. In short, instead of an absolute certainty or invariability of sequence, the assertion will be only of a very high probability of sequence. In most instances no one thinks of making an assertion in absolute form, and it is easy to see that an assertion of causation means usually only an assertion of high probability or strong tendency. Thus, the planting of seed in good soil at the right time of the year will probably result in a harvest in due season; but the result is not invariably certain, because no rain may fall or the land may be built upon

or other influences may intervene. Though we should feel justified in speaking of the seed as the cause of the harvest, yet it would not be intended to assert anything more than that the seed has a tendency to produce the harvest. Coming now to an example of still weaker probability, suppose it to be asserted that gunpowder may spontaneously — *i.e.* without human meddling — explode, this is not saying that it will probably so explode, but merely that under a rare combination of circumstances it will do so, *i.e.* it has a capacity to do so.

Capacity, then, is a quality representing the same process of thought as tendency; *i.e.* it represents the possibility of a result as compared with the probability of a result, and above them both is a notion of a still higher degree, rarely realized in experience, — that of absolute certainty of result. All these are in the same category; the difference is that in the highest degree we think of the sequence as occurring under any and every combination of other circumstances, but in the middle degrees under the ordinary combinations only, and in the lowest degrees under rare combinations only. The notion of causation is perhaps most commonly associated with the middle and highest degrees only; *i.e.* one would naturally enough say, "A bullet through the heart will cause death," and "Sowing seed will cause a harvest"; while in the lowest degree one would either not speak at all of cause or would qualify the statement, for example, by saying, "Gunpowder may cause spontaneously an explosion." The essential thing to note is that *all these terms express only varying degrees of certainty or probability or possibility*; and that they all belong to the same logical category of thought:

Professor ALFRED SIDGWICK. *Fallacies*. (pp. 18, 285.) Abstract assertions of succession are commonly made with a large margin for the incalculable. We feel fairly contented in obtaining any hint of "law," — any knowledge, that is, which may form a basis for even imperfectly secure inference and proof. The only alternative to "Chance" is often "Tendency," and in our gladness to escape from Chance we dignify this as "Law." . . . Between mere guesses, hypotheses, theories, empirical laws, and "laws of Nature," there are only continuous differences of degree in certainty, according to the nature and number of the tests they have stood and the duration of their past invulnerability. . . . The resemblance in uncertainty between a fanciful guess and a proved law may be less important than the difference in the degree of certainty; but the fact cannot be safely hidden that the resemblance exists. . . . The method of proving laws is one and the same, whether they be the merest wildest supposition or the soundest explanation of the facts of Nature.

In the precedents upon the present subject, then, there is *no difference in logic or in legal principle* between evidencing a capacity, a tendency, or a certainty of operation or causation. The only difference is as to the practical need or utility of one or the other degree of likelihood in the case in hand. Thus, if the issue is as to a spontaneous explosion of gunpowder, we may appreciably advance our proof by showing merely a capacity, *i.e.* possibility, of such a result. But, if the issue is as to the destruction of herbage by vapors, the capacity of the vapors to do this would probably be conceded, and the only useful way of advancing the proof will be to show, not merely a capacity, but a strong tendency to produce this effect.

§ 14. *Same: Number of Instances required.* It follows, from what has just been said, that the number of instances offered is immaterial, so far as the logical principle is concerned. The only difference will be as to the

practical utility, for the case in hand, of the inference to be drawn. One instance may indicate a capacity to produce the result; but so feeble and indefinite a possibility may practically not advance the cause beyond what would be already conceded or easily accepted. So, too, a limited number of instances might show a tendency or common probability, and yet this tendency might be already beyond dispute and unnecessary to prove, and nothing short of an approach to certainty or universality of operation would advance the cause of the proof. Where the purpose is to show the existence of a mere capacity, so as to negative the impossibility of a thing's occurrence, here a single instance may suffice.

§ 15. *Negative and Affirmative Instances; Evidencing an Impossibility.* Whether an instance is to be regarded as affirmative or negative in form depends much on the issue as made by the parties. For example, if it were desired to prove performance of a warranty that a certain substance is calculated to deaden pain in dental operations, instances of the substance having made operations painless are affirmative of the quality alleged by the warranty; but if a patient were suing the dentist for careless use of a substance calculated to produce pain, the offer of the same instances by the dentist would in form negative the alleged quality, *i.e.* they would be instances in which pain was not produced.

Assuming, then, that the issue is such that the instances are thus genuinely negative in purpose and form, is there any difference to be noted as to the conditions of their use, as distinguished from affirmative instances? Keeping in mind the principle just examined (*ante*, § 13), it will be seen that there is no difference of logical principle, though there is practically a difference in availability, according to the object of the evidence:

(1) Suppose that the proponent in the issue is (correctly) offering only to show a *capacity* — *i.e.* an occasional possibility — of producing the effect. Obviously, it is here logically of no avail to produce against him instances in which the effect was not produced. They do not meet his point; for it is quite consistent with the capacity or possibility of producing the effect that there should be many instances in which the effect was not produced; for example, if the proponent has evidenced by one or two instances the capacity of a pistol to carry two hundred yards, it is logically of no avail for the opponent to answer with a negative instance (or instances) in which it has not carried thus far. Logically nothing short of a universal negative will suffice.

(2) Suppose, however, that the proponent is aiming to show something stronger than a mere capacity, *i.e.* a *general or usual tendency*, and has evidenced this by a few instances; here, obviously, an equal or greater or less number of negative instances or perhaps even a single instance would help to show that no usual or general tendency could be predicated, and thus would be practically available to answer the showing made by the proponent.

(3) But suppose, finally, that the proponent is interested in showing a *fair certainty or inevitableness* of effect; here even a single negative instance would suffice to dispose of his contention. The proponent cannot claim that an effect is invariably found, if an instance is shown in which the effect is not found; for example, where it is claimed that a near gunshot wound always leaves powder stains, a single instance will overturn this claim.

§ 16. *Same: Opposing the Proponent's Instances.* An opponent finds three processes at hand for opposing the proponent's instances. The three



ways have been examined already in dealing with Relevancy in general (*ante*, No. 2, § 8); and a brief notice of their application to the present sort of evidence will here suffice.

(1) *Explanation*. The opponent may show that, while the proponent's instances occurred *prima facie* under similar conditions, yet there was for one or more of them some attendant condition which was really important and was likely to have been the true source of the effect observed, so that the proponent's instance may or must be attributed to that other and not to the alleged tendency or cause in question. Thus he *explains away* the proponent's instance by showing that it does not mean what it seemed to mean.

(2) *Denial*. The opponent may *deny* that the proponent's instances ever did in fact take place.

(3) *Rivalry*. The opponent may offer rival instances, tending to the opposite result; and these may be of two sorts: (a) The proponent's instances being offered to show a tendency or capacity to produce an effect, the opponent answers by producing *other and negative* instances, in which the effect *did not appear*; arguing from this that the tendency must be only a limited one and does not produce its effects with any probability. (b) The opponent may offer other instances in which the same effect *did appear* but without the presence of the alleged cause. The absence, in these additional instances, of the thing alleged to have the causing tendency, forces us to look upon its presence in the proponent's instance as merely accidental, and explains that instance away as due not to the alleged tendency but to something else. Thus, to show that an illness following Monday's dinner was not due to the ham eaten, an instance of the same illness following Tuesday's dinner, at which the dishes were the same except that no ham was eaten, indicates that some other dish was probably the common cause on both occasions. The limitations on the use of this form of disproof are that the conditions (other than the alleged cause, *e.g.* the ham) were substantially the same on both occasions; for, unless this is insured, it might be supposed that the alleged cause — *e.g.* the ham — might have operated in the one case and some other cause in the other case. It is only by confining the difference of the two instances to the single circumstance in question that the argument is effective to eliminate it as the cause.

§ 17. *Same: Instances of the Foregoing Principles.*

How shall the various precedents be arranged most usefully for the present purpose? The principle involved is the evidencing of a tendency (capacity, or quality) by its effects. The precedents may therefore best be grouped according to the various kinds of tendencies (capacities, or qualities) and the various kinds of effects. A preliminary grouping may be A. *Material effects* (for example, marks left by a pistol shot, damage done to houses by smoke, fire set by locomotive sparks); B. *Corporal effects*, including animal and human effects (for example, wounds produced by shots, disease produced by poison, injuries by dangerous highways); C. *Mental and Moral effects*, *i.e.* on human conduct (for example, efforts to escape the danger of a railroad collision, time required by a workman for work, precautions required for a dangerous machine).

A. *Instances of Material Effects, as Evidence*. In this way may be evidenced the existence (or not) of sundry *nuisances*, by the presence (or ab-

sence) of certain effects under similar circumstances (for example, of similar damage by other factories, streams, hospitals, sewers, operating under analogous conditions); of the nuisance-nature of a *railroad*, by its injurious effects upon similar adjacent property, in respect to smoke, noise, vibration, and the like; of the tendency of *water*, in various forms, by its effect under similar circumstances (for example, in the flowage of streams, the silting of harbors, the breaking of dams, the destruction of bridges); of the tendency of *gases*, by their injurious effects, on other houses, trees, or water supplies; of other injurious operations and structures affecting the condition of *land* or *buildings* by vibration, burning, or otherwise; of the tendency or quality of *tools*, *weapons*, *vehicles*, *acids*, and other materials, as indicated in their effects upon similar substances under similar conditions; and of the tendency of a *machine* or *apparatus*, as shown by other instances of its operation under similar circumstances, to operate defectively or otherwise (for example, in actions for breach of warranty or personal injury), or of the workings of other similar machinery (tools or apparatus) provided the conditions were similar.

*B. Instances of Corporal Effects, as Evidence.* The capacity or tendency of a *weapon* (gun or pistol) may be indicated by the appearance of other wounds, with reference to size of bullet, proximity of weapon, nature of powder, or direction of the shot; the specific tendency of a *drug*, *poison*, *disease*, *food*, or other substance, by the corporal symptoms or effects in other like situations, either on animals or on human beings; in particular, the *intoxicating* tendency of a *liquor*, by its effects upon others partaking it. The same principle applies to *similar injuries to other persons at the same machine, highway, railroad, or building*. If a white powder's tendency to produce illness may be evidenced by the symptoms following its administration, then in the same way the tendency of a projecting spike in a gate to catch and tear the garment of a passer-by may be evidenced by instances of such tearings, and the tendency of a part of a highway to make the feet trip upon it may be shown by instances of trippings. The mass of precedents dealing with the use of other injuries (or "accidents") as evidencing the *dangerousness of a place or a machine* are concerned with an inference of precisely this form, *i.e.* an inference as to the harmful tendency or capacity of the machine, highway, building, or track, as indicated by the occurrence of such harm to human beings in other instances.

The other instances of injuries received should have occurred under substantially similar circumstances. Note that a *double inference* usually is necessary, *i.e.* from the other instances to the tendency or condition at the time of their occurrence, and then from the tendency or condition at that time to its persistence at the time in question. The principle governing the latter inference has also been examined (*ante*, § 6).

*C. Instances of Mental and Moral Effects, as Evidence.* There is no reason why the tendency or quality of an object of external nature should not sometimes be as easily ascertainable from its mental or moral (psychological) effects as from its corporal or its material effects, by adducing instances of such effects, if they have attended the use or operation of the thing in question. For example, if one is looking out of the window of a comfortable home the persons on the highway are observed to be shuddering and turning up their ulster collars, a natural inference is that the temperature without is

extremely cold. Or, if on looking some distance ahead, as one drives through a street, all the vehicles are observed to be turning aside at a certain apparently vacant spot in the road, a natural inference is made that some obstruction exists, such as a pavement hole or a broken electric wire. This sort of inference from human or animal conduct is of constant service in daily life, and claims also an important part in the realm of evidence for litigated issues. All those material conditions and qualities of material objects in external nature which become effective with reference to the ordinary sense perceptions and muscular activities of human beings or animals may be evidenced by specific instances of such effects, — used subject to the limitations of the general principles already noticed. A condition of *light* may be evidenced by instances of other persons' experience in *seeing* or *identifying* under similar circumstances; and this application of the principle includes broadly all cases of the possibility of *mistaken identity*, as shown by other instances of mistaken recognition. A condition of *sound* may be evidenced by instances of other persons' experience in hearing under similar conditions. The *time* required for walking or riding a certain *distance*, or for stopping a train within a certain distance, may be evidenced by other instances under similar conditions. The *height* of a *cattle guard*, with reference to the possibility of cattle leaping it, may be evidenced by instances of what cattle have done with similar fences; or the amount of animal *feed*, by the quantity consumed by others. In general, when a question arises whether at a certain machine, house, field, mine, or other thing, a certain act can be done, under given conditions of time, strength, skill, or achievement, "one way to do," in the language of Mr. Justice Doe, "is to speculate about it; and another way is to try it."

So, too, a *measure of negligence, danger, insufficiency, unreasonableness, cruelty, unskillfulness, or their opposites*, may be evidenced by similar conduct or habits of other persons or animals. If a person is in the house and wishes to know whether he needs to take out his umbrella with him, and the condition of the atmosphere makes it difficult to see whether it is raining, he may look at the passers-by, and observe whether their umbrellas are lifted. If he wished to ascertain whether a hill was too steep to descend in a wagon without a brake, he would learn something by observing whether the brake was applied to other persons' wagons in descending. If he observed the workmen in a powder factory wearing felt shoes, he might infer that the tendency of the powder was to explode from the concussion or friction of ordinary shoes, and that felt shoes were necessary for obviating this tendency. In all these cases, he is judging of the nature or tendency of a material object from its effects on the *conduct of others*. This tendency of the material object is usually not shown (as in the preceding classes of cases) by its direct effects upon senses or muscles, — as where a person uses his vision in sighting an object or feels pain upon eating a substance, — but by its indirect effects, *i.e.* usually, by voluntary conduct, exhibited in avoiding the supposed tendency of the object. Thus, the wearing of the felt shoes is that sort of conduct which the person is forced into in order to avoid the consequences otherwise to be expected; the raising by the traveler of the protective umbrella is what he is put to in order to escape a drenching; and the use of the brake is resorted to for avoiding the danger of slipping down the hill. Nevertheless,

the conduct is equally cogent evidentially as indicating the tendency of the material object. The only difference is that it approaches a degree nearer to the line between testimonial and circumstantial evidence, and thus raises more distinctly the question of the Hearsay rule. In the application of this principle, then, the dangerous tendency of an object to *frighten horses* may be evidenced by instances of other horses being frightened by it under similar circumstances. So, too, the tendency of an extraordinary situation to *frighten human beings* (as when in a collision the reasonableness of a person's conduct in jumping or rushing out is in issue) may be evidenced by the conduct of other persons similarly situated. Where the ordinary operation of (for example) a railroad car is in issue, with reference to the care to be used by *passengers, employees, or highway travelers*, or the possibility of *safely riding, standing, passing, coupling, or climbing* in a certain manner, the same principle applies, though the risk is greater of the jury's improperly confusing the evidential effect with the legal standard of care. Where the care required of the *owner of a railroad* is in issue, this sort of evidence may serve in a variety of ways, — to indicate, for example, the adequate construction or operation of tracks, platforms, bridges, cars, turntables, spark arresters, switches, or any object whose qualities are exhibited by the specific conduct or habitual practice of other persons or *other railroads* in using it. Thus also may be evidenced the condition of a *factory, mine, house, vessel, machine, boiler*, or other apparatus, with reference to the propriety of certain precautions in construction and operation; or of a pavement, ditch, or other part of the *highway*, with reference to its proper mode of use; or of *money or chattels*, with reference to the proper method of loading, warehousing, using, mending, or otherwise handling; and, in particular, of a *business*, or a *stock of goods*, with reference to the prudence of carrying it. Whether in *medical matters* a certain kind of remedy, skill, or treatment is necessary or sufficient, may often be evidenced in this manner. Even in matters more nearly involving moral standards, some light may properly thus be obtained from the conduct of other persons, — as when the propriety of a *schoolmaster's* or *ship-captain's* discipline or treatment is evidenced by the practice of others; or when the *cruelty* of treatment to animals is evidenced by other persons' like methods.

**5. ROBERT SALMON'S CASE.** (CAMDEN PELHAM. *Chronicles of Crime*. ed. 1891. Vol. II, p. 417.)

This case arose out of the extremely dangerous practice of administering quack medicines. Morison's vegetable pills have been for many years an article from the sale of which immense profits have been derived; but it is to be regretted that in more than one instance the life of the patient has been sacrificed, from their undue and improper use.

At the Central Criminal Court Sessions, which commenced on Monday the 4th of April, 1836, Mr.

Robert Salmon, a medicine vendor in Farrington Street, was indicted for the manslaughter of Mr. John M'Kensie, by administering to him certain large and excessive quantities of pills, composed of gamboge, cream of tartar, and other noxious and deleterious ingredients. The deceased, it appeared, was the master of a vessel, and lived in the neighborhood of the Commercial Road. He was induced to take some of Morison's pills as a purgative, upon the representations of a Mrs.

Lane, a woman who was employed by his wife as a sempstress, who sold the Hygeian medicines; and subsequently Mr. Salmon's aid having been claimed, on account of his suffering from rheumatism in the knee, he recommended increased and still-increasing doses, until at length the deceased became so ill as that his life was placed in jeopardy. Medical aid was now called in, but it was too late, and death soon put an end to his sufferings. A *post-mortem* examination left no doubt that the medicine prescribed by the prisoner had been the cause of this termination of the case, and the present indictment was in consequence preferred.

On the part of the defendant a great many persons were called from all parts of the kingdom, who stated that they had taken large quantities of these pills, with the very best

results, as a means of cure for almost every species of malady to which the human frame is subject. One person stated that he had taken no fewer than twenty thousand of them in two years, and that he had found infinite relief from swallowing them in very large doses.

Mr. Justice PATTESON left the case to the jury, who had to decide upon the facts which had been proved; and after about half an hour's consideration they found a verdict of "Guilty," with a recommendation to mercy, upon the ground that the defendant was not the compounder, but the vendor only of the medicines.

The trade in Morison's pills is, however, still carried on to a very great extent, and Mr. Salmon continues one of the largest agents for the sale of the medicine in the metropolis.

#### 6. BRADFORD *v.* INSURANCE CO. [Printed *post*, as No. 49.]

7. EIDT *v.* CUTTER. (1879. MASSACHUSETTS. 127 Mass. 522.)

Tort for injuries to the plaintiff's house and fence, alleged to have been caused by the fumes, vapors, and gases escaping from the defendants' copperas works, and discoloring the paint on the house and fence.

At the trial in the Superior Court, before DEWEY, J., it appeared that the premises of the parties were in the southerly part of the city of Worcester, and in close proximity to an open sewer maintained by the city; and there was evidence tending to show that from this sewer, and from the piles of filth dug from it and laid on its banks, there were foul exhalations of gases containing ammoniacal salts. The evidence of the defendants' experts tended to show that the gases and substances escaping from the copperas works would not of themselves produce the discoloration visible on the plaintiff's house, but that the discoloration as seen was produced by the

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union of the gases and substances from the defendants' works with the ammoniacal gases escaping from the sewer. The defendants' experts testified that copperas deposited on a painted surface did not break through or abrade the paint; and exhibited to the jury a board, upon which they had atomized copperas in large quantities, and changed its color by ammonia, from which the copperas had been brushed, and the painted surface was shown intact underneath. This experiment was offered only to show the fact that copperas did not penetrate paint.

The evidence of the plaintiff's experts tended to show that the condition of the plaintiff's house and fence could be, and was, brought about by the gases and substances coming from the defendants' works; that the gases coming from the open sewer probably accelerated and intensified the effect, but that there

is a sufficient quantity of ammonia in ordinary atmosphere to account for the present discoloration. These experts stated that they formed their judgment from their general knowledge of chemistry, from experiments heretofore made, and from a series of experiments recently made by them, both at the house of the plaintiff, and in the city of Providence, Rhode Island, and elsewhere. The experiments made at the house of the plaintiff were upon boards, papers, etc., exposed for six weeks to the atmosphere, and to the fumes, vapors, and substances therein contained, and were acted upon thereby under the same circumstances and conditions as the plaintiff's house during the time they remained on the house. The experiments made at Providence and elsewhere consisted mainly of atomizing copperas upon boards, papers, glass, etc., and exposing the same to the atmosphere and were made under conditions and circumstances which, as the plaintiff's experts stated, were, in their opinion, as near like those surrounding the plaintiff's house, in the absence of the sewer, as was possible, and were made for the purpose of ascertaining the effect of copperas gases where the atmosphere was otherwise pure. The boards, papers, etc., thus used by these witnesses of the plaintiff in these experiments, were brought into court and exhibited, and explained to the jury, and a detailed account of the experiments given to the jury by the witnesses. The defendants objected to the introduction before the jury of any of the experiments, and the evidence given explanatory thereof, made by the plaintiff's experts at Providence, Rhode Island, and at other places other than the plaintiff's house. The judge admitted these last-named experiments and the evidence relating thereto on the ground that,

the experts, having first stated their judgment as to the character and effect of the gases and substances from the defendants' works alone, and when in union with ordinarily pure air, and when in union with the gases coming from the city sewer, might state the grounds on which they based their judgment; and, they having stated that, among other things, the grounds on which they based their judgment were certain experiments made by them, the judge allowed the witnesses to testify as to the experiments made by them, limiting them to the statement of the experiments on which they said they had, in part, based the judgment and opinion as to which they had testified.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

*W. S. B. Hopkins & A. G. Bullock*, for the defendants. *J. R. Thayer*, for the plaintiff, was not called upon.

By THE COURT. The question in controversy, and upon which both parties had introduced the testimony of experts was whether the injury to the plaintiff's house was caused by the fumes and gases from the defendants' works, or by the emanations from a sewer. The grounds and reasons of the opinions of the experts, including the details of experiments made by them under conditions and circumstances which, as they testified, were as nearly as possible like those surrounding the plaintiff's house in the absence of the sewer, were rightly permitted to be stated by the experts, in order to assist the jury in understanding their testimony and applying it to the case. *Lincoln v. Taunton Copper Co.*, 9 Allen 181. *Commonwealth v. Piper*, 120 Mass. 185, 190. *Williams v. Taunton*, 125 Mass. 34. Exceptions overruled.

**8. EAST ST. LOUIS v. WIGGINS FERRY CO.** (1882. APPELLATE COURT OF ILLINOIS. 11 Ill. App. 254.)

Error to the City Court of East St. Louis; the Hon. CHARLES T. WARE, Judge, presiding. Opinion filed September 29, 1882. . . .

BAKER, P. J. This was a suit by the Wiggins Ferry Company against the City of East St. Louis to recover damages sustained by it as owner of certain lots of land, occasioned by the building of the approaches to the Illinois & St. Louis Bridge over and along Crook Street in said city. See *Stack v. City of East St. Louis*, 85 Ill. 377. A jury trial resulted in a verdict and judgment for \$10,610. . . . A portion of the claim of plaintiff was for damages occasioned by the passage of loaded wagons, locomotives, cars, and trains over the superstructure of the bridge approach, whereby its lots were so shaken as to be greatly injured for building purposes. Plaintiff had introduced testimony tending to prove this claim. Thereupon defendant offered to prove how the bridge approach was constructed on the other side of the river in the city of St. Louis, and that there is more vibration there to the adjoining property on account of the operation of trains which cross the bridge than there is on the Illinois side, and that the three-, four-, five- and six-story brick buildings in St. Louis, close to the bridge approach, are not injured by the

vibrations. This testimony was objected to and the objection sustained. This was error, more especially in view of the character of the evidence that had gone to the jury on behalf of plaintiff, bearing on this issue. Differences arising from diversity of soil or geological formation, if any, or otherwise, could readily have been ascertained on cross-examination, or by the introduction of rebutting testimony. Besides, the proffered testimony included the proposition that the vibrations were greater on the west than on the east side of the river.

Defendant also proposed to prove that the vibrations caused by the Belt Railway are greater in the vicinity of Crook Street than the vibrations of the bridge approach. This testimony was not permitted by the court to go to the jury. If, as some of plaintiff's witnesses had testified, buildings, walls, plastering, and chimneys on plaintiff's lots, and on other lots on Crook Street and in the immediate vicinity of plaintiff's property had been cracked and damaged by vibrations, then surely it was competent to show the greater part of these vibrations were occasioned by trains on the Belt Railway, and not by travel over the bridge approach. The ruling of the court in this regard was erroneous. . . . Reversed and remanded.

**9. KNOWLES v. STATE.** (1885. SUPREME COURT OF ALABAMA. 80 ALA. 9.)

Appeal from Wilcox County Court. Tried before Honorable JOHN PURIFOY.

Mat Knowles was indicted, and tried in the Wilcox County Court, for selling intoxicating liquors in violation of a local statute. The case was tried by the court, on the plea of "not guilty"; the defendant was found guilty, and a fine of one

thousand dollars adjudged against him. One of the witnesses for the State testified that he had bought of the defendant three bottles containing fruit, with liquid around the fruit; that he and another had eaten of the fruit, and drunk the liquid that was in the bottles; that the effect of this eating and drinking upon witness was like the effect of

drinking whisky; that he felt like he was intoxicated. After the State had closed, the defendant introduced a witness, Dock Griffith, who testified that he had many times bought of the defendant the same kind of fruit and liquid in bottles, described by the witnesses for the State, and had eaten the fruit and drunk the liquid without feeling any intoxicating effect, or any such effect as he experienced from drinking whisky. The solicitor moved to exclude this testimony of defendant on the ground that it was irrelevant; and, the same was excluded by the court. The defendant introduced a number of other witnesses, who testified, substantially, as the witness Griffith, that they had purchased of the defendant fruit and liquid, such as was testified about by the witnesses for the State, had eaten the fruit and drunk the liquid, without feeling any intoxicating effects. Their testimony was also, upon motion of the solicitor, excluded by the court. Defendant excepted to these several rulings of the court, and, on appeal, assigns the same as error.

*T. N. McClellan*, Attorney-General for the State.

SOMERVILLE, J. . . . The court, in our judgment, erred in excluding

the statements of the several witnesses, who testified as to the effect upon themselves of the beverage for the sale of which the State had elected to prosecute the defendant. . . . The most available mode of testing the nature and properties of a fluid or drug, next to that of chemical analysis, is by its effects on the human system. That a liquor when taken in certain quantities intoxicated or failed to intoxicate the person taking it, is as competent to prove or disprove its intoxicating qualities, as it would be to prove the poisonous nature of a drug by the effect following its administration. Negative testimony of this kind may often be very weak and inconclusive, because of the comparison involved in determining the relative facility with which different persons may or may not become intoxicated or drunk. But we cannot say what would have been the effect of this evidence upon the mind of the judge, who was substituted for the jury as the trier of the facts of the cause. We decide nothing more than the admissibility of this evidence, leaving to the County Court itself to decide what shall be its weight or credibility. The judgment is reversed and the cause remanded.

**10. GOLDEN REWARD MINING CO. v. BUXTON MINING CO.** (1899. FEDERAL CIRCUIT COURT OF APPEALS. 97 FED. 413.)

In error to the Circuit Court of the United States for the District of South Dakota.

The Buxton Mining Company, an Iowa corporation, brought this action against the Golden Reward Mining Company, a corporation of South Dakota, to recover damages for a wrongful entry upon its property, situated in the state of South Dakota, known as the "Bonanza Lode Mining Claim," and for the removal therefrom and conversion to its own use of a large amount of gold- and silver-bearing ore, alleged to be of the value of

\$200,000. The Golden Reward Mining Company, the defendant below (the plaintiff in error here, referred to hereafter as the defendant) filed a general denial, which merely put in issue the commission of the alleged trespass, and did not seek to justify it. There was a lengthy trial before a court and a jury, lasting from February 9, 1898, until March 18, 1898, when the jury returned a verdict against the defendant below in the sum of \$61,500, on which verdict a judgment was subsequently entered in favor of the plaintiff below. The proceed-



ings at the trial are brought before us for review by a writ or error.

*William L. McLaughlin and William R. Steele*, for plaintiff in error.

*Eben W. Martin* (*Norman T. Mason*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges. THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the Court.

Preliminary to any discussion of the numerous errors that have been assigned, it will be advantageous to state certain facts which are practically undisputed. The parties to the suit are the owners of adjoining mining claims in the state of South Dakota. It will suffice to say generally concerning the location of the claims that the Bonanza claim, which belonged to the plaintiff below, and on which the trespass was committed, lay immediately to the west and south of two claims the Silver Case and the Tilton, which belonged to the defendant company. Prior to August, 1891, the defendant had done a great amount of mining, not only on the Silver Case claim, which lay to the east of the Bonanza claim, but also on another claim which it owned, known as the "Golden Reward Claim," which latter lay immediately to the east of the Silver Case, and on certain other claims not necessary to be mentioned. It had extensive underground workings on both of the last-mentioned claims, consisting of tunnels, stopes, and levels, whereas the Bonanza claim was at that time practically undeveloped, no work of importance having been done thereon or thereunder. Subsequent to July, 1891, the defendant company extended two of the drifts or tunnels on its own property across the boundary line, and underneath the Bonanza claim, and there excavated two stopes, known as "Stope No. 2 West" and "Stope No. 3 West," from which it extracted a large amount of mineral-bearing

ore between the months of August, 1891, and August, 1892. The trespass so committed was not discovered by the plaintiff company until shortly prior to November 20, 1895, when the present action was brought; and the discovery at that time was due to the fact that the excavation of the aforesaid stopes ultimately caused the superimposed earth to settle, making depressions on the surface. As soon as the depressions became visible, the plaintiff company set on foot an investigation, which speedily developed the extent of the trespass. While the defendant company by its answer denied the trespass, yet on the trial such defense was practically abandoned, and the trial resolved itself into a consideration of three issues of fact: First, what was the quantity of the mineral taken from stopes Nos. 2 and 3 west, underneath the Bonanza claim? Second, what was the value of the mineral so abstracted? And, third, was the trespass committed knowingly and willfully? A large amount of testimony was taken on these issues, very little of which has been preserved in the bill of exceptions. . . .

During the progress of the trial, counsel for the defendant company inquired of a witness how many men were employed by the defendant in its mines upon the Golden Reward and the Silver Case claims at the time when ore was being extracted from stopes Nos. 2 and 3 west, underneath the Bonanza claim. This question was objected to, whereupon counsel for the defendant made the following statement, in substance: That they proposed to show that during the period in question, from September 1, 1891, to August 1, 1892, the defendant kept an accurate account of the number of men employed in all of its mines located within the territory which it was then working, and that they were all worked together, as constituting one property; that the

conditions under which mining was done in its own territory were the same as the conditions in stopes 2 and 3 west, and that the same number of men would break approximately the same amount of ore in the said stopes as in the stopes on its own claims; that during the period inquired about the total output from all the mines, including stopes 2 and 3 west, was from 25 to 40 tons per day; and that by dividing the whole output from all the mines by the total number of men employed, and thus ascertaining the average output per man, and by multiplying the average output per man by the number of men whom the jury might find were employed in stopes Nos. 2 and 3 west, while they were being worked, the jury could thus ascertain the number of tons of ore taken from said stopes Nos. 2 and 3 west, within the plaintiff's territory. The offer of proof was rejected, and an exception was saved. At another stage of the trial the defendant also offered in evidence a book kept by it, which was known as its milling or assay book, first having supplemented the offer by testimony to the following effect: That, during the period covered by the alleged trespass (that is to say, from about September 1, 1891, to about August 1, 1892), ores were received by the defendant by rail at its mill, which was some distance from the mines, in a mixed state, which came from different localities on the Golden Reward and Silver Case claims and from stopes Nos. 2 and 3 west, underneath the Bonanza claim; . . . and that a faithful record of these assays was kept by its milling or assay book during the entire period aforesaid. The cross examination of witnesses in connection with the offer of the assay book developed the fact, however, that the ores thus mixed and assayed came from all parts of the defendant's territory which it was then engaged in working, as well as from stopes Nos. 2 and 3 west, underneath the plaintiff's

claim, that some of the ores thus assayed came from a locality three fourths of a mile distant from stopes Nos. 2 and 3 west, and that 1000 feet intervened between those stopes and other localities from which ore was drawn which entered into the aforesaid assays. Besides, there was other evidence introduced, which tended to show that while the trespass was in progress the defendant company failed to keep a daily record of the number of cars of ore taken from its mines, and the locality from whence it was derived, as it had done prior to the commission of the trespass, and that it had also filled up stope No. 3 west, and had closed the entrance thereto, and had blasted out the timbers after the stope was exhausted, which was an unusual proceeding among miners. The assay or milling book was rejected, when the same was offered, and an exception was likewise saved. The two exceptions thus noted have been argued at considerable length in this court, and, as the merits thereof involve an application of the same general rules of evidence, it has been deemed most convenient to consider them together.

As a general rule, any evidence is admissible which has a reasonable tendency to establish a material fact in controversy, provided the evidence is not of a hearsay character or otherwise incompetent. . . . The professed object which the defendant had in view in tendering proof of the total number of men who were employed in its mines during the period of the trespass, and in offering its milling or assay book, was to show by the first item of proof the total amount of ore taken from stopes Nos. 2 and 3 west, and by the second item, or by the assay book, the richness or assay value of such ore. It is obvious that the probative value of the testimony which was thus offered depended altogether upon the assumption made in the one instance that

a miner could extract the same quantity of ore each day whether he worked in stopes Nos. 2 and 3 west, or in any of the numerous stopes and drifts where ore was being mined within the defendant's claims, and upon an assumption made in the other instance that all the ores which were mixed and assayed during the period in controversy were of about the same value, no matter from what source the same were derived. If the testimony in question had been admitted, therefore, it is clear that the plaintiff would have been entitled to show the fallacy of each of these assumptions, namely, that the character of the rock in which the ore was embedded, or the facilities for getting at it and extracting it, were such that more ore could be obtained in a single day from stopes Nos. 2 and 3 west than from other stopes within the defendant's territory, and that the ores taken from stopes 2 and 3 west were of much greater value than the other ores that were mined on the defendant's claims, with which they had been mixed. In other words, if the objectionable testimony had been admitted, it would have led necessarily to a lengthy inquiry before the jury as to the quantity and value of the ore found in all of the defendant's workings within the Golden Reward and Silver Case claims, and as to the character of the rock in which the ore within said claims was embedded, and as to the facilities which existed during the period of the trespass for extracting it. . . . In the present instance the evidence which was offered by the defendant company could not have been admitted with any propriety on the ground of necessity. The record shows that there was an abundance of direct evidence to establish both the quantity of the ore, and the richness of the same, that had been taken from stopes Nos. 2 and 3 west. The defendant offered direct

testimony (being that of its superintendent, and that of its miners who had worked in the two stopes on the plaintiff's claim) showing the quantity of ore taken from those stopes. It also introduced a record of assays, which were made by its own superintendent, of the ores in stopes Nos. 2 and 3 west while it was working the same. The quantity of ore contained in these stopes could also be computed with reasonable accuracy by reference to their dimensions. Moreover, both parties entered these stopes after the present suit was instituted, and selected samples from the side walls and had them assayed, and in this way were able to establish with great certainty the richness of the ore which the stopes had contained. Having such direct evidence at its command, the defendant company had no right to fortify it by evidence of the kind above indicated, which would have introduced numerous collateral issues, and lengthened the trial indefinitely.<sup>1</sup> We are of opinion, therefore, that the trial court properly excluded the testimony to which the foregoing discussion relates. . . .

Another exception was saved by the defendant to the introduction of certain evidence, which deserves a brief notice. The plaintiff company was allowed to show the average assay value, as made by a competent assayer, of certain samples of ore that had been taken, as it seems, by Professor Jenney and some other persons from the side walls of stope No. 3 west, and adjoining drifts in the Bonanza claim, after the trespass was discovered. The proof was offered, evidently, to establish the value of the ore body that had been removed by the defendant from stope No. 3, but its admissibility for that purpose is challenged by the defendant. It is insisted, in substance, that the admission of evidence showing that

<sup>1</sup> [This ground for excluding the evidence rests on a rule of Admissibility not considered in this volume. — Ed.]

the average value of samples of ore taken from the inside of stope No. 3 was \$41.75 per ton, and that the average assay value of other samples taken from places immediately adjoining the stope was \$48.69 per ton, was an error prejudicial to the defendant, which warrants a reversal. The record recites, however, that, before the average assay value of these samples was proven, it was shown that all the samples of ore taken from outside of the stope were taken immediately adjacent thereto, as it had been worked out by the defendant, and that the ore bodies from which said samples were derived were of the same general character as the ore mined out of said stope, and a continuation of the same ore body. The record also shows that, when the average assay value of the several samples was admitted in evidence, the trial judge

cautioned the jury that the average assay value was not to be taken as an absolute mathematical demonstration of what the value of the ore body in stope No. 3 was, but that the proof was admitted simply for their consideration, and that they should give it such weight as they thought it ought to receive; first considering whether the samples were fairly representative of the body of the ore that had been extracted from the stope. In view of the locality from which the ore samples were taken, and its proximity to the stope, and in view of the caution administered by the court when the objectionable testimony was admitted, it cannot be successfully claimed that an error was committed. The testimony certainly had a marked tendency to establish the grade of the ore which the defendant company had appropriated.

**11. CHICAGO, CINCINNATI & ST. LOUIS RAILWAY CO. v. DIXON.** (1892. APPELLATE COURT OF ILLINOIS. 49 Ill. App. 293.) . . .

Statement of the facts by the Court. Appellee's left hand near the wrist was crushed between the deadwoods of two cars at St. Francisville, on the 4th day of July, 1891, while, as brakeman for appellant, he was attempting to make a coupling. The injury was so serious that the arm had to be amputated. The declaration avers that "the couplers, by which said cars were fastened together, were out of repair and not sufficient for the purpose used, and the defendant by the exercise of reasonable care could have known of said defect, and while the plaintiff was in the performance of his duty as brakeman, with due care and without knowledge of the condition of said machinery, he had his left hand caught by and in the machinery used for coupling the said cars together, thereby injuring him," etc.

The plaintiff had been a railroad man about twenty-five years, and describes the accident substantially as follows: When his train — a

freight train — reached St. Francisville, some empty box cars had to be taken or moved from the side track. In doing so, there was a coupling to be made of the cars at the side track, which cars had iron deadwoods, located on each side of the drawbars and a little above. The couplings on these cars were what are called Ames couplers — bull tongues, commonly called. Both of the couplers were alike, except that the still car, to the right, had no bull tongue in; the tongue was out entirely; while the car to the left — the moving car — had a bull tongue in. As the running car was slowly pushed back by the engine to make the coupling, he stepped in front of that car, with his left side rather toward the car, and moved back with it. Just before the cars came together, he reached over the deadwood and caught hold of the iron pin, so as to push or drop it through the hole in the drawbar or drawhead and the hole in the

bull tongues, where the bull tongues should enter the drawhead of the right, or still car, and thereby make the coupling. He did not have to adjust the bull tongue in the drawhead of the left or moving car, so as to make it enter the aperture of the drawhead of the right or still car, as the cars were of the same height. The bull tongue projected straight out from the drawhead of the moving car and had a hole in it for the pin to drop through, thereby answering in the place of an ordinary car link. The pin which he had seized with his left hand projected through the upper part of the drawhead, and into the aperture entered by the bull tongue, so that as the bull tongue of the moving car entered the drawhead of the still car, the end of it struck the projecting end of the pin, thereby pressing the upper end of the pin outward toward and against the raised upper lip at the mouth of the iron drawhead, and thus caught the finger of the left hand between the pin and the lips of the drawhead and held him there, as he says, "until the car came ahead, and the car bounced away." When the cars came together the drawheads receded until the deadwoods of the cars came solidly together, and on the reaction, he says, the drawheads of the right or still car pulled out nine or ten inches, and he was still held fast. He says then "I grabbed hold of the pin with this — the right — hand to get loose, and it held me in that position until it (suppose he means deadwoods) got very near together again and it took up the slack and I got my hand loose and pulled it out but did not get it out quick enough and got it caught between the deadwoods."

The plaintiff was then asked by his counsel these questions: "*Q.* I will ask you to state to the jury what condition these couplers were in. *A.* The one to my left, it had a lever on, and the chain attached to this bull tongue, that was broken

off. *Q.* What was broken off? *A.* The lever. *Q.* Which part of it was broken? *A.* That was broken on the left; this link was in there so you could work it any way you wanted to, but the one to my right (the bull tongue in car to his right) was out entirely. *Q.* Now state, Mr. Dixon, in making a coupling of that kind, where the coupler is out on one side and in on the other, how the coupling is made? *A.* You can come back, and it is not necessary to catch hold of the pin (means link) at all, because it is all of one height." The bull tongue was in left or moving car and that was used for a link. "*Q.* State to the jury what condition as to repair the couplers were in, so they may understand it. *A.* The car to my right — the bull tongue was out entirely; the one to my left, the lever that works the bull tongue was broken, and this drawhead to my right certainly must have been out of order, for there was a great deal of lost motion there. It pulled out at least nine or ten inches; most generally it pulls out three or four inches." It is more dangerous to make couplings of cars that have deadwoods. He says such cars, however, were in general use.

On cross-examination he is asked: "*Q.* What defect was there about this coupling? *A.* I don't know, unless the springs were broken or the following plates out. *Q.* You can't testify positively as to that? *A.* Of course not. *Q.* You knew before you entered this car that the lever was gone — broken? *A.* Oh, yes; certainly. *Q.* You knew that coupling where the lever is gone is more dangerous than the other kind, didn't you? *A.* Oh, yes; more dangerous for a man to go in, of course." . . .

OPINION OF THE COURT, SAMPLE, J. The appellee's counsel does not insist that the appellant was negligent in furnishing cars with deadwoods, or with Ames couplers. Nor is such negligence based on

furnishing a car with a broken lever or chain; but the counsel says: "Plaintiff claims that the looseness of the drawbars, allowing it to recede sooner, and a greater distance than it could or would, had it been in repair, allowing the bull tongue to shy the pin in an unusual and unexpected manner, caught his fingers when he was not expecting such occurrence." The injury cannot be attributed to the receding of the drawbar of either car a greater distance than usual, for the reason that there is no evidence to sustain that theory. All of the evidence shows that the drawbars were constructed so that they would recede and permit the force of the concussion of the cars, as they came together, to be sustained by the deadwoods. That is the only purpose of the deadwoods. They are intended to receive the force of the concussion, and thus relieve and preserve the drawbars from being broken. In such case, the drawbars of cars having deadwoods cannot recede, or at least in this case the evidence does not show that they did recede further than was necessary for the deadwoods to receive the force of the shock of the cars as they came together. The evidence is not that the drawheads receded too far, but that the drawhead of the right or still car pulled out too far, as shown by the evidence of the plaintiff above quoted. He testified as follows: "This drawhead to my right (meaning the drawhead of the still car) certainly must have been out of order, for there was a great deal of loose motion there. It pulled out at least nine or ten inches. Most generally it pulls out three or four inches." It will be observed that he does not pretend to state how far the drawbars receded, or that either of them receded farther than usual. How the pulling out of the drawbars of the cars, or either of them, could have caused or contributed to this injury, we are unable to understand.

The pulling out of the drawhead of the right car occurred on the reaction, after the cars had come together. Before that time, according to the plaintiff's testimony, his fingers had been caught as heretofore described.

Even if the drawbar had receded farther than usual, we are at a loss to understand how that could have caused appellee's injury. Why should such receding cause the pin to be forced or canted over, so as to catch the appellee's hands? As a cause, the receding would naturally have the opposite effect. The bull tongue was in the left, or moving car; the pin, of which appellee had hold, was in the hole of the drawhead of the right or still car, with the lower end projecting into the aperture of that drawhead. The bull tongue being fastened, was stiff — therein differing from a link — and when it struck the lower end of the pin, the canting or shying would naturally occur, and the receding of the drawhead could not, as a cause, have operated to produce it.

It was incumbent on the appellee to prove, not only a defect in the coupler, but the defect that caused the injury. Merely proving that there was a defect, is not sufficient. Not only so, but under the averments of the declaration, the proof must also show that the defect causing the injury was known to the defendant, or by the exercise of reasonable care, it could have been known. There is an absence of proof as to when the defect, if it can be so called, in the spring or following plate, mentioned by the appellee, occurred, or that appellant knew, or could have known by the exercise of reasonable diligence, of such defect, even if it is assumed such defect was the cause of the injury. . . .

[We find] that John H. Dixon — the appellee — was injured while in the employ of the appellant and in the line of duty, in attempting

to make a coupling of cars that were supplied with the Ames coupler — commonly called bull tongue coupler — both couplers on the cars being at the time defective, which was known to appellee, but for which defect so known there is no claim for a recovery in this case, the recovery being based on the loose motion of one of the drawbars,

which in that respect was claimed to be defective, but which we find did not cause or contribute to the injury, even if defective in the respect claimed. We find there is no proof of a defect in the couplers of the cars, that caused the injury. The clerk will enter this in the final order.

**12. FOOD ADULTERATION CASES.** (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 218.) . . .

To the layman it may seem strange that a conflict of opinion should ever occur between analysts with regard to the genuineness of a sample of food, and that it should ever be possible for an accused salesman to bring rebutting scientific evidence. A consideration of the following points, however, will make this clear, and show how such different opinions may be honestly held. (1) Food products may consist of entirely dissimilar substances which may readily be distinguished by suitable tests, as, for instance, pepper and salt; or (2) the food may contain a special constituent which is either entirely wanting or only present in a smaller proportion in other allied products. It is mainly with foods of this latter description that the difficulties of the public analyst arise. For instance, butter fat contains a large proportion of certain volatile compounds, which are either absent or are present in much smaller quantity in the fats used to adulterate butter; and thus an estimation of these volatile compounds affords a means of judging of the purity of the butter. Thus, if only half the normal quantity of volatile compounds is present, the conclusion is drawn that the butter is adulterated with an equal quantity of foreign fat, and so on. The task would not be difficult if butter fat were always constant in composition; but, unfortunately, there are often wide variations in the proportion of ingredients, and it fre-

quently happens that the public analyst has to give his judgment upon a sample, which might either be a butter very rich in the characteristic volatile substances and adulterated with 10 per cent of foreign fat; or it might be a genuine butter that was very deficient in these volatile compounds. This, then, is the dilemma. If the analyst condemn such a sample on the strength of this and other tests, he may be confronted by the evidence of other analysts who will give their opinion that the butter is genuine; and if, then, the matter be referred to the Government analysts, their report may or may not corroborate his, and in the latter alternative the authority instituting the prosecution may have to pay heavy costs. It is well known that butters are scientifically blended with foreign fats so as to fall just on the border line between abnormal and adulterated samples, and the analyst is frequently compelled to pass such a butter as genuine, lest he should unwittingly do an injustice. . . .

These details have been given at some length, for they are typical of the problem which the public analyst has to solve in the case of many natural products, *i.e.*, to decide whether a food is adulterated or only naturally of poor quality. There is no special difficulty in the analyses; it is a question of interpretation of the results. The chief culprit in the matter of the

adulteration of butter is the small dealer, who buys margarine from the margarine manufacturer and skillfully blends it with butter in a proportion that is small in a single instance, but is sufficient to bring him in a handsome profit in the course of a year.

Owing to the difficulty of detecting such small additions of margarine to butter (which, as was explained above, is due to the variations in the natural product) a most ingenious device has been adopted in some countries. This is the addition of a small quantity of a "latent color" to the margarine, so that, although it appears yellow, like butter, its color can be changed by the application of a single reagent to pink or blue, and its presence thus revealed in a mixture of butter and margarine. Several years ago an attempt was made in some of the United States to compel manufacturers of margarine to color it pink, so that it could not possibly be palmed off as butter, but as this law was found to have the effect of stopping the sale of margarine altogether, it is no longer enforced. Various substances have been suggested as suitable for the latent coloring matter, such as starch, which turns blue on contact with iodine, and certain colorless coal-tar derivatives which change to pink upon the addition of an alkali or acid. There are numerous ob-

jections to the use of some of these compounds. Thus, starch may be washed out of the margarine by a simple treatment with water, while a coal-tar derivative that turns pink on contact with an alkali is too sensitive an ingredient for everyday use. A far more satisfactory substance than any of these was found in the oil derived from sesame seed. This is a wholesome oil with a fragrant odor and pleasant taste, which is largely used as a salad oil in certain parts of Europe. It is one of the few vegetable oils that can be detected by means of a special color reaction; for on treating the oil with a particular reagent it gives a bright rose color, and the test is so sensitive that it will detect the presence of even a small percentage of sesame oil in other fats. A compulsory addition of a small amount of sesame oil to all margarine, therefore, affords an absolutely certain means of recognizing the margarine subsequently. The first country to adopt this plan was Germany, where a few years ago a regulation was made that all makers of margarine must use 10 per cent of sesame oil with the other ingredients. Belgium has also adopted the same plan of earmarking the margarine produced in the country, and has thus simplified in one direction the problem of detecting petty adulteration.

### 13. POISON TESTS. (WILLIAM JAGO. *A Manual of Forensic Chemistry and Chemical Evidence*. 1909. ch. VI, p. 140.) . . .

*Character of Articles submitted to chemist.*—These may include the stomach or other organs of the body; urine or other secretions of the body; vomit; medicine; food; contents of drinking vessels, etc.

*Previous History of These.*—As a rule all these articles are first collected by some person other than the chemist, such as a policeman. A non-professional man should, if possible, touch nothing, and see that

nothing is touched. To this there is the exception of something that will be lost if not at once recovered. For example, a woman was found dead, with vomit near the mouth running away and soaking into the floor. This should be collected at once with a clean spoon in a clean vessel.

*An Expert Medical Man* will, on arrival, take note of everything, preserve all necessary articles, put



in proper vessels, seal, and arrange for personal delivery to the chemist. On *post mortem* examination the operator will take precautions for the proper packing of essential organs of the body and other substances therefrom requiring to be analyzed.

*Exact particulars of delivery and receipt of Articles.*—The chemist should ascertain as much as possible of the previous history of the case, such as the symptoms preceding death. He should also acquaint himself with the circumstances under which any articles were found, *e.g.*, articles of food, suspected poison, etc., whether in clean vessels or the reverse. Also vomit, whether in clean vessel or possibly collected from a dirty floor. The nature and efficiency of packages, how fastened, and what identifying marks or seals must also be noted. A record of when and where received and from whom must also be made and kept.

*Condition when received.*—Note minutely whether seals or packages are entire or show any sign of having been tampered with; also whether putrefactive or other changes have occurred in the contents.

*Custody during analysis.*—If possible, all articles should be kept in the direct personal custody of the chemist. They must be securely locked up during his absence; products, etc., must be labeled at each stage of the work. If any article or portion of article is given to any other chemist or expert, it must be handed over personally, together with a written description. A note must be made of the time, place, and person. At the close of the investigation any remainders must be sealed up in proper vessels, labeled, and kept in safe custody. Or if directions have been received to hand them to some other person, a note must be made of full particulars of the articles handed over, their nature and state, and time when, and place where, and person to whom so handed.

*Preservation.*—No antiseptics are admissible. Obviously one must not introduce a foreign matter. It is dangerous to heat since some of the substances may be volatile. Cold storage is permissible. If spirituous extracts are to be made, at an early stage one may macerate with the spirit, and thus incidentally preserve from putrefaction. . . .

*Accuracy of Analysis.*—The analyst should be able to speak as to the accuracy of his modes of analysis and their limitations. He should also have tested the accuracy of the calibration of his instruments, pipettes, burettes, flasks, hydrometers, etc.

*Substances obtained by analysis must be kept.*—The active substance may possibly be isolated, in that case it must be carefully preserved for production if necessary, *e.g.*, samples of arsenic, aconitine, etc.

*Form and strength of poison administered.*—If possible, the analyst should determine the form in which the poison was given, *e.g.*, if morphia, whether as opium, laudanum, or salt of alkaloid. In the matter of strength he should, if able, decide whether given in concentrated or in diluted condition.

*Organs or Secretions of body in which found.*—These must be noted, as thereby indications of the nature of the poison and the length of time during which it was being administered, are afforded.

*Amount of fatal dose.*—The analyst should be able to state the amount of fatal dose and its relation to the sex, age, and state of health of the deceased. He should ascertain the proportion such dose bears to the quantity found on analysis. He should further be able to state what relation this quantity found bears to the quantity administered.

*Possible existence of poison naturally in the body.*—The poison may have been given as a medicine; for example, arsenic, antimony, and strychnine are all recognized drugs. Or it may have been absorbed

during the natural avocations of the person; thus lead poisoning frequently occurs in the case of potters working with lead glaze.

Another alternative is that the poison may have been present in food. Thus prussic acid is formed from bitter almonds, and also may be obtained from other fruit kernels. A well-known anecdote is that of counsel who advanced the theory that a person, in whose body prussic acid was found, had himself introduced it by chewing and swallowing apple-pips. The defense was ineffective, except that for long after the barrister was familiarly known as "Apple-pip Kelly."

*Poison, the result of decomposition.*—As a result of certain obscure chemical changes which may occur within the body after death, there may be poisonous bodies produced from non-poisonous substances in the body. These are known as cadaveric alkaloids, or more usually as "ptomaines." As the naturally poisonous alkaloids may possibly be confused with ptomaines, evidence differentiating the two classes of bodies should be forthcoming.

*Introduction of poison by impure analytic reagents.*—This is not an unknown experience, thus arsenic has actually been introduced, by means of the reagents, into the Marsh's and Reinsch's tests by which substances were being examined for its presence.

*Introduction by improper wrappers.*—The obvious duty of the person forwarding articles for analysis is to see that they are packed in proper receptacles. The chemist can only deal with them as they reach him, but he should be on the alert for the discovery of any improper wrapper. Thus a case is on record of a stomach, suspected to contain arsenic, having been packed in a piece of wall paper. The wall paper itself on examination was found to contain arsenic in abundance.

*Chemical Evidence for Defense.*—

The first duty of a chemist who is acting for the defense is to scrutinize most closely the whole chain of evidence for the prosecution. The preceding directions as to the precautions necessary to insure its completeness should also furnish suggestions to the defense as to the tests to which it may be subjected in order to find any defects in case of their existence. If, for example, the circumstances of death point to a possibility of ptomaine poisoning having been the cause, this should be pressed in cross-examination of witnesses for the prosecution. Such a possibility should be supported by direct chemical evidence that the analytical results are compatible with death from such a cause. Granted any reasonable case for death being due to other causes, or that death by poison has resulted from any innocent source, the defense must be prepared with all the constructive evidence necessary to build up an affirmative case. This will include evidence in support of the whole chemical argument (and of course equally of the medical one, though the latter at present only indirectly concerns us).

*Illustrative Cases.*—In the following poisoning cases an account is given of the more important chemical evidence.

*R. v. Smethurst.*—On the 7th July, 1859, Smethurst was tried at the C. C. C. for the murder of Isabella Banks, who died on the 3d May, 1859. A motive for the alleged murder existed. The symptoms of illness preceding death were as follows:—diarrhœa and vomiting, dysentery, heat and burning throughout the whole alimentary canal. These pointed to the administration of some irritant poison. No poison was traced to the prisoner's possession, but he as a doctor would have no difficulty in procuring same. *Chemical Evidence for the Prosecution.* A part of a motion was analyzed by Dr. Taylor, who found it to contain

arsenic. The following report of the evidence is abstracted and condensed from Vol. 50, C. C. C., Sessions Cases, p. 552. Taylor in *examination in chief*, deposed that on the 1st May, he received a parcel delivered by Buzzard. This contained two bottles, which were sealed; he opened one and took out a portion.<sup>1</sup> Before commencing his analysis, he first tested his apparatus and reagents, copper wire, hydrochloric acid, water, and test tube; he found them all perfectly clean.<sup>2</sup> He then used the same reagents and apparatus, and tested some of the liquid from the bottle he had opened. The result was a metallic deposit of a grayish steel color on the copper. This might be arsenic or antimony, or possibly mercury. The bottle was then re-sealed in his presence, and taken away by Buzzard.<sup>3</sup> He made further experiments with some more of the liquid, and obtained a further deposit of gray matter. This he examined under the microscope, and found it to have the appearance of arsenic. He heated a piece of the copper on which was the deposit, and obtained crystals of arsenic. These he produced.<sup>4</sup> He had not the slightest doubt of their identity. There was no indication of the presence of antimony, mercury, or bismuth. He found that arsenic was contained in the blood. On the 5th May, he received a large jar from M'Intyre, sealed up — this contained viscera, stomach unopened, and other organs enumerated. On the 7th May, and on other specified dates he received other packages, labeled, and numbered them.<sup>5</sup> On examination he found no arsenic or antimony in the gullet or stomach. He found

antimony in two places in the intestine, and traces of antimony in blood taken from the heart. He was assisted by Dr. Odling.<sup>6</sup> He examined a number of articles of food and medicine. Bottle No. 5 contained 355 grains chlorate of potash — free from anything else — it is not muriate of potash (KCl). Bottle No. 21 contained a clear watery liquid of saline taste. Handed 1½ oz. from it to an assistant to boil for Reinsch's test. The copper was destroyed by being dissolved. He plunged a portion of fresh copper in the solution for a very short time, and found arsenic deposited on it. Subsequent examination showed no arsenic or antimony in the liquid, but that the arsenic found in the original test had come from the copper used for the experiment.<sup>7</sup> In the ordinary mode of applying the test, witness added, "We never dissolve the copper." On *cross-examination* by Parry. When giving evidence before the magistrate, he believed that this bottle contained arsenic. Subsequent examination showed that the original analysis was mistaken. On *re-examination* by Bodkin. If half a grain of copper was administered during life, there would not be any action of acid in the stomach that would account for the arsenic in the evacuation.<sup>8</sup> Slight traces of arsenic were found in the copper pills, but none in those of bismuth. Odling, on examination, stated that in a case where the copper is not dissolved there is no fallacy in Reinsch's test. *Chemical Evidence for Defense*. B. Ward Richardson was examined by Giffard. Slow arsenical poisoning is quite impossible without arsenic being found

<sup>1</sup> The witness states the time when, and the person from whom he received the articles for analysis, also the mode of packing, and that they were sealed.

<sup>2</sup> All apparatus was tested before use.

<sup>3</sup> States what was done with the bottle when finished with.

<sup>4</sup> Produced in court the substance isolated.

<sup>5</sup> All packages labeled and numbered.

<sup>6</sup> Gives name of assistant whose qualifications were well known.

<sup>7</sup> Example of the poison being searched for having been introduced in the reagents.

<sup>8</sup> Medicines administered could not have been the source of the poison found on analysis.

in the tissues.<sup>1</sup> He experimented on a dog, giving it white arsenic and potassium chlorate in excess, the latter being a diuretic—he subsequently found arsenic in the dog's tissues. Various medical witnesses averred that the symptoms were not those of slow poisoning, but of dysentery. The jury believed the chemical evidence for the prosecution and found the prisoner guilty.

STEPHEN, J., comments somewhat fully on this case in his "Criminal Law of England," p. 305. He remarks that Taylor's credit was attacked because on the copper gauze being dissolved by the potassium chlorate, and arsenic liberated, Taylor assumed that the arsenic came from the liquid being tested. The defense tried to draw the inference that his whole evidence was unreliable. But examining that evidence, altogether 77 experiments were made, in four no copper was dissolved and no arsenic was found. In two tests no copper was dissolved and arsenic was found. In one test, the copper was dissolved and arsenic from the copper was found, thus showing that the test will reveal arsenic. The 74 experiments show that when there is no solution of copper, the test does not reveal arsenic unless it is free in the liquid, as distinct from being combined with the copper. A second argument was based on Richardson's evidence, that arsenic must be found in the tissues in a case of arsenical poisoning. In the judge's opinion, absence of arsenic at death does not show that no arsenic was given during life, but that none was given for the last two or three days of life. The third argument of the defense was that Taylor found antimony and arsenic present in the medicines, which contained bismuth, and therefore in that way such arsenic as was found could be accounted for. An attack was made on the credit of the

witnesses for the defense, on the ground that they had also given evidence for the defense at Palmer's trial. Richardson then deposed that Cook's symptoms were those of angina pectoris, and Rogers that if death were due to strychnine, that poison ought to have been found in the body. After the sentence, petitions and other documents were sent to the judge (L. C. Baron Pollock), among them being a communication from Drs. Baly and Jenner on the medical evidence, they regarded the symptoms and post-mortem appearances as ambiguous, and thought they might be due either to natural causes or poison. The judge recommended the Home Secretary to refer the matter to the judgment of some independent medical and scientific persons selected by himself. Herapath meanwhile had written a letter to "The Times" asserting that Taylor had extracted more arsenic from the potassium chlorate and copper than could have been set free by the solution of the copper. The Home Secretary sent the papers to Sir Benjamin Brodie, the eminent surgeon, who reported on the materials supplied him, that there were six reasons for believing Smethurst guilty, and eight for doubting the same, and concluded—"I own that the impression on my mind is that there is not absolute and complete evidence of Smethurst's guilt." The Home Secretary thereon granted a free pardon. . . .

*R. v. Maybrick.*—On the 31st July, 1889, Florence Maybrick was tried at the Liverpool Assizes for the murder of James Maybrick, her husband, who died on the 11th May, 1889. The alleged motive was intimacy with a man named Brierley. The symptoms of the fatal illness were agreed to be those of gastritis or some similar disease. According to the theory of the prosecution the

<sup>1</sup> Defense attacks the evidence for the prosecution on the ground that absence of arsenic from the tissues is conclusive evidence of absence of slow arsenical poisoning. Different argument and conclusion based on facts as advanced by the prosecution.

gastritis was due to administration of arsenic. According to the defense it was due to irritant food or cold through wetting. *Chemical Evidence for the Prosecution.* Nokes, pharmaceutical chemist, had sold to the prisoner some fly papers containing arsenic, also at the time of purchases she paid for them, although she had a running account. They were delivered in the ordinary way by the boy. Hanson, pharmaceutical chemist, had also sold arsenical fly papers to the prisoner under the same circumstances of paying at the time, although she had a running account. At the same time he sold her a lotion containing benzoin and elder flower water, being the usual ingredients of a skin lotion. These mixed with the arsenic would make a good combination as a cosmetic.<sup>1</sup> Humphreys, surgeon, attended the deceased during his last illness, and gave him Fowler's Solution on 5th or 6th May. This contains arsenic, the total quantity thus administered was  $\frac{3}{1000}$  grain. On the 9th he applied Reinsch's test to the feces and urine — results negative; but he admitted inexperience in chemical testing, and hence possibly failed in detecting the presence of arsenic. Davis, analyst, deposed that a bottle of Valentine's Meat Juice handed to him contained  $\frac{1}{2}$  grain of arsenic in solution. The normal preparation contained no arsenic. Some arsenic was present in the glass of the bottle, but less than in that of another bottle, the contents of which were arsenic free.<sup>2</sup> He found no arsenic in the stomach or spleen, but it was present in the liver and intestines. A number of bottles present in the house con-

tained arsenic, as did also a box labeled "poison for cats." One bottle was filled with a saturated solution of arsenic. A tumbler in a hat-box contained milk in which was a handkerchief. This milk contained arsenic equal to from 20 to 30 grains in the whole tumbler. He found arsenic in a jug in which some lunch for the deceased had been taken to his office. A bottle of glycerin in the lavatory contained arsenic, as did also one of deceased's medicine bottles. Stock bottles of the drugs from which the medicine was dispensed contained no arsenic.<sup>3</sup> The fly papers contained arsenic. Witness produced tubes containing the characteristic sublimate from Reinsch's test, made respectively on the kidneys and liver. He calculated the quantity in the entire liver to be  $\frac{1}{2}$  grain. The amount found was half the smallest amount that the witness had ever found in a fatal case of arsenic poisoning. Stevenson, analyst, stated that he had examined the contents of the stomach, and found no arsenic. In the intestines he found about  $\frac{1}{4}$  grain of arsenic, and some arsenic in the kidneys. On examining the liver, 4 oz. yielded 0.027 grain of arsenic, equal to  $\frac{1}{2}$  grain (0.33) for the whole liver, which weighed 3 lbs. On making a duplicate test, 8 oz. yielded 0.049 grain equal to 0.29 grain of arsenic for the whole liver.<sup>4</sup> "The body at the time of death probably contained approximately a fatal dose of arsenic." He did not macerate the whole liver into one bulk.<sup>5</sup> *For the Defense.* Various witnesses stated that the deceased was in the habit of taking arsenic as a medicine. In particular, Stanton,

<sup>1</sup> Evidence of purchase of arsenic under suspicious circumstances, but one witness admitted that the arsenic would make a good cosmetic. The use as a cosmetic might explain the secrecy of the purchase.

<sup>2</sup> The evidence here given had evidently been prepared in anticipation of a defense that the arsenic in the meat juice had been derived from the glass of the bottle.

<sup>3</sup> Interesting as a tracing back of the history of the medicine, in order to prove that it contained no arsenic when originally prepared.

<sup>4</sup> A duplicate test served the double purpose of confirming the accuracy of the first test, and also that the poison was fairly evenly distributed throughout the whole liver.

<sup>5</sup> Evidently an answer given to a question foreshadowing one of the lines of defense.

a pharmaceutical chemist, sold the deceased a "pick-me-up" containing Fowler's Solution, 7 drops to the dose, sometimes as often as five times a day. The last occasion was in November, 1887; the quantity in the day was nearly  $\frac{1}{2}$  grain of arsenic. On going away from home he took with him 8 or 16 dose bottles. Arsenic is used as an aphrodisiac.<sup>1</sup> Tidy, chemist, was of opinion that the symptoms and appearances were not those of arsenical poisoning. Stevenson assumed the quantity present to be 0.3 grain, but witness did not think that warranted. It is not fair to infer that all the intestines or liver contained the same proportion of arsenic as a portion. They should have been mashed up, and a uniform sample taken.<sup>2</sup> Witness calculated the total quantity of arsenic found to be 0.082 grain.<sup>3</sup>

This does not point to over administration. He cited various medicinal cases. No. 1, arsenic was given three months before death, there was found 0.028 grain of arsenic. In No. 2, arsenic was given five months before death, there was found in the liver 0.174 grain of arsenic. In these cases there was no suggestion of arsenical poisoning. Paul, examiner in Toxicology, Victoria University, had examined similar pans to that mentioned by Davis, and found arsenic in the glaze, which arsenic was set free by acids.<sup>4</sup> *Prisoner's Statement.* She had used a cosmetic containing arsenic from fly-papers.<sup>5</sup> Her husband had been taking a powder, this she mixed in with the meat juice at his request.<sup>6</sup> The jury found the prisoner guilty. (*Times Report.*)

<sup>1</sup> Evidence of the deceased being an habitual arsenic taker.

<sup>2</sup> Goes to prove that the sample did not adequately represent the whole of the organ.

<sup>3</sup> The calculation by which the witness arrived at the figure 0.082 grain is not very clear. If the amounts found in the two portions analyzed by Stevenson be added together the sum is 0.076, which is only 0.006 grain short of Tidy's estimated total. That 12 oz. of the liver should contain 0.076 grain, and the remaining 2 lb. 4 oz. only 0.006 grain, is exceedingly improbable.

<sup>4</sup> It will be remembered that Davis found arsenic in the food sent to the deceased's office for his lunch. This is an attempt to prove that such arsenic was derived from the glaze of the containing vessel, from which it could be set free by any acids in the food.

<sup>5</sup> This was an explanation of the reason for purchasing the fly papers. Compare with Note 1.

<sup>6</sup> This was an explanation of the reason why arsenic was found in the meat juice. It would be strengthened by the evidence that the deceased was an habitual arsenic taker.

## **TITLE II: EVIDENCE TO PROVE IDENTITY**

14. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

*Other Principles discriminated.* In evidencing that proposition commonly spoken of as Identity, there is apt to be a confusion in thought with two other processes which are really not germane.

(1) It is perhaps natural to apply the notion of Identity or Identification to the general process of proving an accused person guilty. He is said to be "identified" as the murderer or the thief; *i.e.* the whole process of proof and the whole mass of evidence is thought of as involving the "identity" of the accused and the guilty person. From this point of view, all distinctions between the various sorts of evidence heretofore analyzed are merged and become useless. That the accused planned the act, had a motive for the act, bore traces of the act, and so forth, are all merely "identifying" facts; because the real guilty person also must have planned, had a motive, bore traces, and the like. Such an indiscriminate confusion and merger of all sorts of probative elements naturally excites suspicion of the propriety of the term "identification" as thus applied. In truth, there is no propriety in it. The very looseness of the term shows that, since the various sorts of evidence thus covered by it may be further analyzed and separated, there would remain no specific need for the term "identity" and no specific class of evidence to which it was distinctively appropriate. If this were the true meaning of the term, it might be discarded altogether as superfluous. Yet the term does have a distinctive application.

(2) In arguing from subsequent traces of an act to the doing of an act, the argument of Identity sometimes is necessarily involved and needs to be distinguished. Suppose, for example, to prove a murder, evidence is offered that a gun found three days later in the defendant's possession is exactly fitted by a bullet found in the body of the deceased. Here there are two inferences involved: (a) "Because the defendant possessed the gun when found later, therefore he probably possessed it at the time"; this inference is always open to doubt, since the defendant may have borrowed the gun since the killing, or some third person may have surreptitiously placed the gun on his premises; (b) "Because the gun, thus possessed by the defendant at the time of the killing, fitted the bullet found in the body, therefore the defendant's gun must be the one that shot the deceased"; here the inference is open to doubt because the bullet may fit other guns, *i.e.* the fitting of the bullet is not a necessary mark of the identity of the gun that shot it. Now the first inference is an inference from subsequent traces to the former act of possession or use of the gun; no question of identity is involved. It is the second inference that involves the element of the identity. This is why much of the evidence herein termed Traces, as pointing back to an Act (*post*, No. 139), may incidentally involve a question of Identity.

<sup>1</sup> Adapted from the same author's *Treatise on Evidence* (1905. Vol. I, §§ 410, 411).

*General Principle of Identity Evidence.* Identity may be thought of as a quality of a person or thing, — the quality of sameness with another person or thing. The essential assumption is that two persons or things are thought of as existing, and that the one is alleged, because of common features, to be the same as the other. The process of inference thus has two necessary elements: (1) it is a Concomitant one, in its logical scheme (*ante*, No. 3); and (2) it operates by comparing common marks, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the *necessariness of the association between the mark and a single object*. Where a certain circumstance, feature, or mark, may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of Relevancy (*ante*, No. 2, § 2), the other conceivable hypotheses are so numerous, *i.e.* the objects that possess that mark are numerous and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small. Hence, in the process of identification of two supposed objects, by a common mark, the force of the inference depends on the *degree of necessariness of association of that mark with a single object*.

For simplicity's sake, the evidential circumstance may thus be spoken of as "*a mark*." But in practice it rarely occurs that the evidential mark is a *single* circumstance. The evidencing feature is usually a group of circumstances, which as a whole constitute a feature capable of being associated with a single object. Rarely can one circumstance alone be so inherently peculiar to a single object. It is by adding circumstance to circumstance that we obtain a composite feature or mark which as a whole cannot be supposed to be associated with more than a single object. The process of constructing an inference of identification thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together can conceivably coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated. The process thus corresponds accurately to the general principle of Relevancy (described *ante*, No. 2, §§ 2-4). It may be illustrated by the ordinary case of identification by name. Suppose there existed a parent named John Smith, whose heirs are sought; and there is also a claimant whose parent's name was John Smith. The name John Smith is associated with so many persons that the chances of two supposed persons of that name being different are too numerous to allow us to consider the common mark as having appreciable probative value. But these chances may be diminished by adding other common circumstances going to form the common mark. Add, for instance, another name circumstance, — as that the name of each supposed person was John Barebones Bonaparte Smith; here the chances of there being two persons of that name, in any district however large, are instantly reduced to a minimum. Or, add a circumstance of locality, — for example, that each of the supposed persons lived in a particular village, or in a particular block of a certain street, or in a particular house; here, again, the chances are reduced in varying degrees in each instance. Or, add a circumstance of family, — for example, that each of the persons had



seven sons and five daughters, or that each had a wife named Mary Elizabeth and three daughters named Flora, Delia, and Stella; here the chances are again reduced, in varying degrees, in proportion to the probable number of persons who would possess this composite mark. In every instance, the process depends upon the same principle, — the extent to which the common mark is capable of being associated, in human experience, with more than one object.

In accordance with the general principle of *Explanation* (*ante*, No. 2, § 5), the party denying the identity may show that there are numerous objects equally possessing the evidential mark offered, so as to show that the chances of the two supposed objects being the same are very small. It may also be noted that a mark of identity may be *negative* as well as affirmative; *i.e.* where a certain circumstance would be necessarily associated with an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue, — in analogy with the argument from essential inconsistency (*post*, No. 55).

15. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. p. 356.)

In trying to arrive at the nature of Identity we are forced to a certain extent to discuss Metaphysics: this is unavoidable, and it is the neglect of what Metaphysics teaches which has in our opinion led to the confusion and contradictions on the subject which exist in the law.

We shall begin by insisting on a few propositions: *viz.* (1) that you cannot be aware of identity unless you have also diversity; (2) that you cannot ask whether a thing is generally the same, but you must confine your questions to a certain aspect of it; (3) that we select that aspect to suit our interests, and such interests are usually practical; (4) that identity or the relation of sameness is ideal, it lies in the view we take of things, and not in the nature of things themselves; (5) that the word "same" is used ambiguously and that it is a different problem when we ask whether an individual *remains* the same, and when we ask whether two things *are* the same.

(1) The first proposition applies whether we are speaking of the resemblance of two things or of the continuous identity of one. "In order that the mind may perceive the resemblance between two images," says Binet, "they must differ a little; if they do not, they become added together and form a single image."<sup>1</sup> . . . Professor Sully writes: "The visual recognition of a thing as identical with something previously perceived takes place by help of the idea of persistence. . . . (It involves) the comparison of successive impressions and the detection of similarity and diversity of change. Thus a child learns to recognize his hat, etc., by discounting a certain amount of dissimilarity."<sup>2</sup>

(2) If the persistence is in the object itself, this implies a sameness of character attaching to the thing itself, *i.e.* a qualitative sameness, and further the avoidance of any absolute break in its existence. When, however, it is asked in what the sameness of quality consists, it will be found that no reply can be given, unless the point or particular respect of which you were thinking is specified. A general reply cannot be given because we do not know the general character which is taken to make the thing's essence; it is not always material substance, nor shape, nor size, nor color. The identity lies

<sup>1</sup> Binet, *Psychology of Reasoning*, p. 120.

<sup>2</sup> Sully, *Outlines of Psychology*, p. 155.

really in the view we take of it, and that view is often a mere chance idea; the character therefore lies outside of and beyond the fact taken. . . .<sup>1</sup>

(3) How then do we determine in what respect we shall ask of a thing whether it is the same or not? Professor Stout seems to have answered this question in his remarks on what he calls "thinghood." It depends on interest: we take what answer for practical purposes as real, identical, etc.: on the perceptual level this interest is purely practical. It is the interest of the moment which determines how we look at a thing, and we look at it differently, according to the fluctuation of interest.<sup>2</sup> And this is why we say that the rule of convenience is the one to be followed in deciding whether events belong to the same transaction or not. Our interest here is solely as to how we shall dispose judicially of the charges brought against the accused in the most convenient manner, and the considerations which chiefly influence us are whether the same witnesses can speak to all the charges and whether those charges can be kept separate before the mind without risk of confusion or prejudice, if they are taken together. The fact that the events happened at different times and places and such like reasons are irrelevant in themselves save in so far as they hinder or promote our convenience. . . . To seek to convert such reasons into an objective general test of identity and difference seems to us both meaningless and irrational. . . .

(4) The relation of Similarity to Identity will now be described. "Similarity," says Bradley, "is nothing in the world but more or less unspecified sameness." "The feeling that two things are similar need not imply the perception of the identical point, but none the less this feeling is based always on partial sameness,"<sup>3</sup> and elsewhere he says that Resemblance is the perception of the more or less unspecified identity of two distinct things. It differs from identity in its lowest form, *i.e.* where things are taken as the same without specific awareness of the point or sameness and distinction of that from the diversity, because it implies the distinct consciousness that the two things are two and different. It differs again from identity in a more explicit form because it is of the essence of Resemblance that the point or points of sameness should remain at least partly undistinguished and unspecified. And, further, the feeling which belongs to the experience of similarity is different from that which belongs to the experience of sameness proper. But resemblance is based always on partial sameness, though the specific feeling of resemblance is not itself the partial identity which it involves, and partial identity need not imply likeness proper at all. The writer is aware that this view is disputed by more than one philosopher: they hold that Resemblance is not based on Identity, but is an ultimate idea, or even that Identity is based on Resemblance. Thus Binet writes, "to explain the resemblance between two states of consciousness by the *common* elements in the two states or by a partial *identity* of their elements, simplifies nothing at all. For it replaces the idea of resemblance by the ideas of identity and unity which are merely its derivatives. Resemblance is a single, ultimate, and irreducible idea."<sup>4</sup> Similarly Professor James says, "So here any theory that would base likeness on identity, and not rather identity on likeness must fail;" again, "likeness must not be conceived as a

<sup>1</sup> Bradley, *Appearance and Reality*, pp. 73-74.

<sup>2</sup> Stout, *Manual of Psychology*, pp. 327 *et seq.*

<sup>3</sup> Bradley, *op. cit.*, p. 348, and note 1.

<sup>4</sup> Binet, *op. cit.*, p. 129.

special complication of identity, but rather that identity must be conceived as a special degree of likeness, . . . likeness and difference are ultimate relations perceived. As a matter of fact no two sensations, no two objects of all those we know, are in scientific rigor identical. We call those of them identical whose difference is unperceived. Over and above this we have a *conception* of absolute sameness, it is true, but this, like so many of our conceptions, is an ideal construction got by following a certain direction of serial increase to its maximum supposable extreme. It plays an important part among other permanent meanings possessed by us in our ideal intellectual constructions. But it plays no part whatever in explaining psychologically how we perceive likenesses between simple things."<sup>1</sup> We remember to have read in a judgment of one of the Indian High Courts (unfortunately we cannot now give the reference) that the judges considered the case was not proved because the evidence only established likeness and not identity, and it is no uncommon thing to hear evidence given that a witness can swear that two things or two persons are very like, but he will not swear that they are the same: such testimony is usually considered to fall short of an identification. Now if identity is based on resemblance, what more is required than the assertion that two things are very like? It is the fact that such questions arise in law that is our excuse for pursuing this controversy concerning Resemblance and Identity a little further. The position of the one side is that Identity is nothing more than a special degree of resemblance with the difference between the two objects unperceived; the contention of the other is that all resemblance is partial identity, but the points of sameness are not fully specified, and that terms such as "exact likeness" "precise similarity" are misleading. For as soon as you have removed all internal difference, and resemblance is carried to such a point that perceptible difference ceases, then you have identity. As soon as you begin to analyze resemblance you get something else than it, and when you argue from resemblance, what you use is not the resemblance, but the point of resemblance, and a point of resemblance is clearly an identity.

The physiological explanation, when one state of consciousness is said to revive a similar state, doubtless is that the two similar states have a numerically single nerve element as their basis; the two images put a common cell element in vibration and this is called an identity of seat.<sup>2</sup> This appears to us to point to identity being the ultimate state. But for the purpose of our discussion it seems clear that what is really the important matter is the amount of difference which is perceived; and we think that in most cases when a witness is able to swear to great likeness between two objects or persons and can specify the points of likeness, in the absence of any specified points of difference it should be accepted as an identification even though the witness shrinks from using that term. If an advocate persists in asking, "Will you swear that they are the same?" many witnesses will answer, No, and on paper and to the unreflecting mind this will considerably weaken the effect of the evidence. Such an advocate should be asked in his turn to define what he means by "same," and if he attempts to do this, it will soon become apparent that his question as so addressed is not one that can be fairly given the direct answer, Yes or No. If the

<sup>1</sup> W. James, *Principles of Psychology*, Vol. I, pp. 532-533.

<sup>2</sup> Binet, *op. cit.*, pp. 125, 126.

witness attempts to give any other response, he is often charged with prevarication, whereas it is not his fault that he does so, but the form of his interrogator's question compels him to do it. In a case, *e.g.*, of the identification of stolen goods, the magistrate should not be influenced so much by the use of the words "like" and "same," but should rather get from the witness the points in which he is able to say that the objects correspond and those in which he is able to say that they differ. "Two objects are similar," says Wundt, "when certain of their characteristics correspond, while others are different"; and perfect likeness — to indicate which the term "identity" is sometimes used — whether of quality or of intensity, must be estimated for practical purposes by indistinguishableness when attention is closely directed to the two objects.

(5) At the same time it must be remarked that difference is not always fatal to identity. But here we are using "identity" in another sense. A quotation will explain this: "Real identity," says Dr. Ward, "no more involves exact similarity than exact similarity involves sameness of things; on the contrary, we are wont to find the same thing alter with time, so that exact similarity after an interval, so far from suggesting one thing, is often the surest proof that there are two concerned. Of such real identity, then, it would seem we must have direct experience; and we have it in the continuous presentation of the bodily self." . . . The same writer points out the ambiguity in the word "same" whereby it means either individual identity or indistinguishable resemblance: in the former we have mere oneness or singularity which entails no relation; in the latter there is a relation, for two individuals partially coincide. . . . Resemblance itself may be fatal to identification, when the law of being is changed. . . .

It is hardly necessary to concern ourselves further with this meaning of the term, though we have a few more remarks to make on the subject of Identification. One method of identification allowed in law is by showing the photograph of a person to the witness. . . . In the case of *R. v. Tolson*, 4 F. & F. 104, a photograph in a trial for bigamy was shown to two persons to identify on the ground that it was a permanent visible representation of the image made on the minds (the retinas of the eyes) of the witnesses by the sight of the person represented, so that it was "only another species of the evidence which persons give of identity, when they speak merely from memory." This reason does not appear to us to be correct; no photograph corresponds entirely to the mental image which we have of a man, but only contains certain elements which are the same. These elements not merely revive those corresponding to them in the image, but they further revive others which do not correspond but which were contiguous with the like ones in the past, and it is this whole often made up of many representations of the individual which is the mental image that we have of the person. It is a case of association of ideas both by similarity and contiguity, and not by similarity alone as the dictum quoted above implies. Hence Professor Stout, when explaining the uncertainty of revival says, "The points of difference in the given presentation preoccupy consciousness and have preformed associations of their own. The points of identity can only reproduce their contiguous associates by partially or wholly displacing the setting in which they are embedded in the given presentation, and by overcoming the reproductive tendencies

which attach to this presentation as a whole and to its specific constituents. In order that such obstructions may be overcome, the points of identity must have peculiar interest or impressiveness, or their performed association must in some other way be peculiarly favored, *e.g.* by frequent repetition, or by the general direction of mental activity at the moment." In short, the function of photographs, portraits, and the like is to call up not any image of the person as seen on one particular occasion, but the general idea or generic image that we have in our mind, and how that idea is formed has already been discussed in the chapter on the theory of the normal man. When, therefore, in the case of *Fryer v. Gathercole* (13 Jur. 542) PARKE, B., said, "In the identification of persons you compare in your mind the man you have seen with the man you see at the trial; the same rule of comparison belongs to every species of identification," the statement does not appear sufficient, for the words "the man you have seen" do not adequately describe the nature of the mental image employed. Nor do you compare generally: just as you must ask whether a man is identical in this or that respect, so you always compare in some special respect. Some theoretical or practical end is to be subserved by the comparison which takes place only in regard to the characteristics which happen to be interesting at the moment, other characteristics being set aside or disregarded as unimportant. This explains why persons often fail to observe suspicious facts or draw what appear to be obvious inferences. They do not make the necessary comparisons because they have not the necessary interest at the time: after they have been cheated, interest is aroused and in retrospect it looks very different. But judges overlook this and regarding the matter after the event, draw the conclusion that the complainant consented, was an accomplice, etc.

(6) Comparison of handwriting and identification by it next claims attention. Only two methods will be here considered, viz. that by which an admitted specimen of the person's handwriting is placed side by side with the handwriting in dispute, and compared by an expert, the jury, or the judge; and that by which a person who is acquainted with the handwriting of the individual through having seen it on previous occasions, is shown a writing in court and is asked to say from his general knowledge whether it is or is not that individual's handwriting. The methods are different.

(a) In the latter, which will be first discussed, the witness identifies the handwriting by reference to some general standard which exists in his mind. The general standard by which the witness recognizes the handwriting put before him must (it appears to the writer) be simply the general or universal idea which has already been fully discussed in the chapter on the theory of the normal man. It is in virtue of the common elements existing between the particular writing and the *general idea* of the handwriting in the witness's mind that the comparison is able to be made. "In comparison," says Professor Stout, "we first become conscious of the antithesis between the particular and the universal. The reason is that in it we become aware of the universal, as the common element which connects two clearly distinguished particulars. Thus the common element stands out in contrast to the differences; whereas in mere recognition no such contrast exists." We say the "general idea" and do not lay stress on the "generic image" because M. Binet has recently doubted the existence of

the latter. . . . It would, if this be so, be more correct apparently to say that it is in virtue of the general trend or channel of our ideas which is organized by thought on the occasion of each particular experience arising, that we recognize the particular handwriting shown us. It is the neural matter of the brain that is so affected by previous impressions made by the sight of such handwriting in the past that it responds at once to a similar impression now made by the sight of similar handwriting. But whether we speak of the influence of the trend of ideas or of awakening the generic image, it must be evident that the more examples of the handwriting which have been seen in the past, the deeper the impression which will have been made. . . . Perhaps it would more nearly express the nature of this general standard if we employ the term "general impression." Concerning these, Professor James says that they seem to be the impulsive result of summation of stimuli: they come about through the subject dispersing his attention impartially over the whole, surrendering himself to the general look. He thus gets a total effect in its entirety, which is lost upon the man who is bent on concentration, analysis, and emphasis. If the time is too short for the latter, it is best to abstain from analysis and be guided by the general look. The person who has the general impression does not give any reason for it, but he *feels* it is so. He is guided by a sum of impressions not one of which is emphatic or distinguished from the rest, not one of which is essential, not one of which is conceived, but all of which together drive him to a conclusion to which nothing but *that* sum total leads. The man, however, by seeking to make some one impression characteristic and essential, prevents the rest from having their effect. This remarkable passage is capable of many applications in law and is alluded to elsewhere in this work: it is here cited to assist in showing what the nature of the standard is, and to make it plain that it is idle to cross-examine a witness on the nature or composition of his general impression of a man's handwriting. From it we can also understand why the witness is able to give an opinion as to resemblance, for it was found that it was essential for the perception of resemblance, that there should be sameness in the two things, but that the points of the sameness should be partly undistinguished and unspecified (paragraph 4): and this appears to be exactly the basis of this species of identification. . . .

(b) In the other method, which is prescribed in §§ 45 and 73 of the Act (Indian Evidence Act), two or more writings are compared, and sometimes the opinion of an expert on handwriting is taken on them. What is important here is distinctness of the ground of comparison or common factor. . . . A difference in opinion of two persons concerning the identity of the handwriting on two papers may often be accounted for by the fact that one has a special aptitude for noting likenesses and the other for noting differences, and the practiced aptitude of each will further the detection of that relation. It is said, however, that more weight should be given to evidence of similitude than to that of dissimilitude, because it requires great skill to imitate handwriting, especially for several lines, while dissimilitude may be occasioned by a variety of circumstances, such as the health and spirits of the writer, the care used, the pen, ink, etc.<sup>1</sup> But there is another reason given which requires examination. "Handwriting,

<sup>1</sup> Lawson, *Expert Evidence*, 278.

notwithstanding it may be artificial, is always in some degree the reflex of the nervous organization of the writer. Hence there is in each person's handwriting some distinctive characteristic, which as being the reflex of his nervous organization, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own. Those skillful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship; that the tendency to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen and the strokes will be parallel if written by the same person, the nerves influencing the direction which he will give to the pen."<sup>1</sup> Whatever writing may be in the adult, it certainly was not reflex action in the child, but much that originally required conscious effort with practice becomes automatic and mechanical and, with this qualification, we do not object to the description. Ribot, however, distinguishes writing from reflex movements proper, and the following quotation will show to what extent: "Reflex movements, whether reflex action proper, natural and innate, or reflex actions that are acquired, secondary, and fixed by repetition and habit, are produced without volition, hesitation, or effort, and may continue a long time without fatigue. They call into action in the organism only those elements necessary to their effectuation, while their adaptation to ends is perfect. In the strictly motor order of things, they are the equivalent of spontaneous attention, which similarly is an intellectual reflex action that presupposes neither choice nor hesitation nor effort, and may likewise continue a long time without fatigue. But there are other classes of movements that are more complex and artificial; as, for instance, writing, dancing, fencing, all bodily exercises, and all mechanical handicrafts. In these instances adaptation is no longer natural, but laboriously acquired. It demands the exercise of choice, repeated endeavor, effort, and at the outset is accompanied by great fatigue."<sup>2</sup> It seems necessary to try and determine to what extent writing is reflex and to what extent it can be modified by will, for it is apparent that if the claim of the experts in caligraphy is really correct, considerably more importance should be attached to evidence of handwriting than is usually done. It is a test of automatic actions that they do not involve attention but are fixed and uniform responses to the fixed and uniform recurrence of similar modes of stimulation. Now it appears to us that it would be untrue to say that writing does not involve attention; though the attention given is not a close one, it is to a certain extent controlled by vision, and we soon become aware of this if we try to write in the dark. Practice dispenses with that close attention to the detailed elements of the composite train which was necessary at first, and so the sensory elements become indistinct as compared with the motor ones, and the final result of the repetition is a habitual or quasi-automatic action in which all the psychical elements, presentations, and representations alike become indistinct. We do not believe, however, that the movements become so independent of the will that in forging or deliberately disguising the handwriting, where attention is preëminently displayed, the attention would not be likely to counteract the effects of habit.

<sup>1</sup> Rogers, *Expert Testimony*, 291, 292, quoted on p. 389 of Ameer Ali & Woodroffe's *Indian Evidence Act*.

<sup>2</sup> Ribot, *Attention*, p. 57.

**16. THE CRANBERRY CASK CASE.** (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 179.)

At the Spring Assizes, at Bury St. Edmunds, 1830, a respectable farmer, occupying twelve hundred acres of land, was tried for a burglary and stealing a variety of articles. Amongst the articles alleged to have been stolen were a pair of sheets and a cask, which were found in the possession of the prisoner, and were positively sworn to by the witnesses for the prosecution to be those which had been stolen. The sheets were identified by a particular stain, and the cask by the mark "P. C. 84." inclosed in a circle at one end of it. On the other hand, a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side as being the prosecutor's. With respect to the cask, it was proved

by numerous witnesses, whose respectability left no doubt of the truth of their testimony, that the prisoner was in the habit of using cranberries in his establishment, and that they came in casks, of which the cask in question was one. In addition to this, it was proved that the prisoner purchased his cranberries from a tradesman in Norwich, whose casks were all marked "P. C. 84." inclosed in a circle, precisely as the prisoner's were, the letters P. C. being the initials of his name, and that the cask in question was one of them. In summing up, the learned judge remarked that this was one of the most extraordinary cases ever tried, and that it certainly appeared that the witnesses for the prosecution were mistaken. The prisoner was acquitted.

**17. DOWNIE AND MILNE'S CASE.** (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 73.)

On the trial of two men at Aberdeen autumn circuit, 1824, it appeared that a carpenter's workshop at Aberdeen was broken open on a particular night, and some tools carried off, and that on the same night the counting-houses of Messrs. Davidson and of Messrs. Catto and Co., in different parts of that city, were broken into, and goods and money to a considerable extent stolen. The prisoners were met at seven on the following morning in one of the streets of Aberdeen, at a distance from either of the places of depredation, by two of the police. Upon seeing the officers they began to run; and being pursued and taken, there was found in the possession of each a considerable quantity of the articles taken from Catto and Co., but none of the things taken from the carpenter's

shop or Davidson's. But in Catto and Co.'s warehouse were found a brown coat and other articles got from Davidson's, which had not been there the preceding evening when the shop was locked up; and in Davidson's were found the tools which had been abstracted from the carpenter's. Thus, the recent possession of the articles stolen from Catto and Co.'s proved that the prisoners were the depredators in that warehouse; while the fact of the articles taken from Davidson's having been left there, connected them with that prior housebreaking; and again, the chisels belonging to the carpenter's shop, found in Davidson's, identified the persons who broke into that last house with those who committed the original theft at the carpenter's. The prisoners were convicted of all the thefts.

**18. THE CHICAGO ANARCHISTS' CASE.** [Printed *post*, as No. 42.]



19. **WEBBER'S CASE.** (S. M. PHILLIPPS. *Famous Cases of Circumstantial Evidence.* No. LXX.)

On December 29th, 1876, a terrible disaster occurred at Ashtabula, Ohio, on the Lake Shore Railroad. The train fell through a bridge, and as the cars immediately caught fire, and a large number of the passengers were burned, the most of the bodies were so charred as to prevent recognition. Shortly after this accident, Mrs. Webber, who is a poor woman with two children, appeared in the office of a lawyer, in Rochester, N. Y., and stating that she had every reason to believe that her husband had been killed in that disaster, requested him to commence a suit against the railroad company on her behalf. The evidence which she offered to introduce in proof of her husband's sad fate was only of a circumstantial nature, as nothing was ever found of the body, which was supposed to have been consumed in the flames. She had been to Ashtabula, and in the débris of the wrecked train she had found a bunch of keys which she positively recognized as those having been in the possession of her husband. One of these keys, in further proof, she had ascertained exactly fitted the clock in her house, and an Auburn man was ready to swear that he had made such a key for the deceased. Another key fitted a chest which she had in her possession, while still another of the keys fitted the lock on the door. But the strongest proof of all which she had discovered was a piece of cloth, which she had recognized as having been part of her dead husband's coat. The proof by no means stopped here, however.

A physician of Rochester, who knew Mr. Webber, testified that he rode to Buffalo on the same train with the deceased on the fatal 29th of December; while another gentleman testified to seeing deceased take the train at Buffalo which went to ruin at Ashtabula. With this all but positive proof that the husband was among the victims of the disaster, the suit was commenced, the funds enabling her to carry it on being supplied by a kind-hearted gentleman. When the railroad company's attorneys were confronted with the proofs of the plaintiff's case, they advised a settlement with her for \$4000. But she wanted \$5000 or nothing, and the company's lawyers concluded to let the matter go before the Courts. The investigations concerning the fate of the husband were continued, and it was ascertained that he had been sent by Gen. Martindale, his former superior officer in the army, to the Pension Home in Wisconsin, several days previous to the Ashtabula disaster, and this fact soon brought to light the very important disclosure that a man of his name, answering his description exactly, and who stated that he had a wife and two children in Rochester, was still alive and safe in that institution, and that he was not near Ashtabula at the time of the disaster. The case is a most remarkable one, however, from the fact that no person doubted the truthfulness of the witnesses whose evidence formed the basis on which the suit was commenced.

20. **THE TICHBORNE CASE.** (CHARLES READE. *Readiana.* p. 72.)

*The Doctrine of Coincidences.* — [The general story of this case is stated *post*, in No. 147.] I proceed to state the leading principle, which governs the Tichborne case thus

narrowed, and — always implied, though unfortunately never stated — led our courts to a reasonable conclusion. That principle is: *the progressive value of proved coinci-*

dences all pointing to one conclusion. Pray take notice that by "proved coincidences" I mean coincidences that are: 1. Not merely seeming, but independent and real. 2. Either undisputed or disputable. 3. Either extracted from a hostile witness; which is the highest kind of evidence, especially where the witness is a deliberate liar; or 4. Directly sworn to by respectable witnesses in open court, and then cross-examined and not shaken — which is the next best evidence to the involuntary admissions of a liar interested in concealing the truth.

A single indisputable coincidence raises a presumption that often points towards the truth. A priori what is more unlikely than that the moon, a mere satellite, and a very small body, should so attract the giant earth as to cause our tides? Indeed for years science rejected the theory; but certain changes of the tide coinciding regularly with changes of the moon wore out prejudice, and have established the truth. Yet these coincident changes, though repeated ad infinitum, make but one logical coincidence. On the other hand, it must be owned that a single coincidence often deceives. To take a sublunary and appropriate example, the real Martin Guerre had a wart on his cheek; so had the sham Martin Guerre. The coincidence was genuine and remarkable: yet the men were distinct. But mark the ascending ratio — see the influence on the mind of a double coincidence — when the impostor with the real wart told the sisters of Martin Guerre some particular of their family history, and reminded Martin's wife of something he had said to her on their bridal night, in the solitude of the nuptial chamber, this seeming knowledge, coupled with that real wart, struck her mind with the force of a double coincidence; and no more was needed to make her accept the impostor, and cohabit with him for years.

Does not this enforce what I

urged in my first letter as to the severe caution necessary in receiving alleged, or seeming, or manipulated coincidences, as if they were proved and real ones?

However, I use the above incident at present mainly to show the ascending power on the mind of coincidences when received as genuine. I will now show their ascending value when proved in open court and tested by cross-examination. A was found dead of a gunshot wound, and the singed paper that had been used for wadding lay near him. It was a fragment of the *Times*. B's house was searched, and they found there a gun recently discharged, and the copy of the *Times*, from which the singed paper aforesaid had been torn; the pieces fitted exactly. The same thing happened in France with a slight variation; the paper used for wadding was part of an old breviary subsequently found in B's house. The salient facts of each case made a treble coincidence sworn, cross-examined, and unshaken; hanged the Englishman, and guillotined the Frenchman. In neither case was there a scintilla of direct evidence; in neither case was the verdict impugned. I speak within bounds when I say that a genuine double coincidence, proved beyond doubt, is not twice, but two hundred times, as strong, as one such coincidence, and that a genuine treble coincidence is many thousand times as strong as one such coincidence. But, when we get to a five-fold coincidence real and proved, it is a million to one against all these honest circumstances having combined to deceive us. . . .

We have only to subject this hodge-podge of real and sham [in the Claimant's case] to the approved test laid down in my first letter, and we shall see daylight; for the Claimant's is a clear case made obscure by verbosity and conjecture in the teeth of proof!

A. He proved in court a genuine

coincidence of a corporal kind — viz., that Roger Tichborne was in-kneed, with the left leg turned out more than the right, and the Claimant was in-kneed in a similar way. This is a remarkable coincidence, and cross-examination failed to shake it. But when he attempted to prove a second coincidence of corporal peculiarities like the above, which being the work of nature, cannot be combated, what a falling off in the evidence. *B.* They found in the Claimant a congenital brown mark on the side; but they could only assert or imagine a similar mark in Tichborne. No viva voce evidence by eyewitnesses to anything of the sort. *C.* They proved, by Dr. Wilson, a peculiar formation in the Claimant; but instead of proving by some doctor, surgeon, or eyewitness a similar formation in Tichborne, they went off into wild inferences. The eccentric woman, who kept her boy three years under a seton, had also kept him a long time in frocks; and the same boy when a moody young man, had written despondent phrases, such as, in all other cases, imply a dejected mind, but here are to be perverted to indicate a malformed body, although many doctors, surgeons, and nurses knew Tichborne's body, and not one of all these ever saw this malformation which, in the nude body, must have been visible fifty yards off. In short, the coincidences *B* and *C* were proved incidences with unproved "Co's."

Failing to establish a double coincidence of congenital features or marks, the Claimant went off into artificial skin marks. Examples: Roger had marks of a seton; the Claimant showed marks of a similar kind. Roger had a cut at the back of his head, and another on his wrist; so had the Claimant. Roger had the seams of a lancet on his ankles; the Claimant came provided with punctures on the ankle. Roger winked and blinked; so did

the Claimant. . . . These doubtful coincidences were also encountered by direct dissidences on the same line of observation. Roger was bled in the temporal artery, and the Claimant showed no puncture there. Roger was tattooed with a crown, cross, and anchor by a living witness, who faced cross-examination, and several witnesses in the cause saw the tattoo marks at various times: and it was no answer to all this positive evidence to bring witnesses who did not tattoo him, and other witnesses who never saw the tattoo marks. . . .

But the Claimant also opened a large vein of apparent coincidences in the knowledge shown by him at certain times and places of numerous men and things known to Roger Tichborne. These were very remarkable. He knew private matters known to Tichborne and A, to Tichborne and B, to Tichborne and C, &c., and he knew more about Tichborne than either A, B, C, &c., individually knew. It is not fair or reasonable to pooh-pooh this. But the defendants met this fairly; they said these coincidences were not arrived at by his being Tichborne, but by his pumping various individuals who knew Tichborne: and they applied fair and sagacious tests to the matter. They urged as a general truth that Tichborne in Australia would have known just as much about himself, his relations, and his affairs as he subsequently knew in England. And I must do them the justice to say this position is impregnable. They went into detail and proved that when Gibbs first spotted the Claimant at Wagga-Wagga, he was as ignorant as dirt of Tichborne matters; did not know the Christian names of Tichborne's mother, nor the names of the Tichborne's estates, nor the counties where they lay. They then showed the steps by which his ignorance might have been partly lessened and much knowledge picked up; they showed a lady, who longed to

be deceived, and all but said so, putting him by letter on to Bogle — Bogle startled, and pumped — the Claimant showing the upper part of his face in Paris to the lady who wanted to be deceived, and, after recognition on those terms, pumping her largely; then coming to England with a large stock of facts thus obtained, and in England pumping Carter, Bulpitt, and others, searching Lloyd's, &c. Having proved the gradual growth of knowledge in the claimant between Wagga-Wagga and the Court of Common Pleas, they took him in court with all his acquired knowledge, and cross-examined him on a vast number of things well known to Tichborne. Under this test, for which his preparations were necessarily imperfect, he betrayed a mass of ignorance on a multitude of things familiar to Roger Tichborne, and he betrayed it not frankly as honest men betray ignorance, or oblivion of what they have once really known, but in spite of such fencing, evading, shuffling and equivocating, as the most experienced have seen in the witness box. Personating a gentleman he shuffled without a blush; personating a collegian, he did not know what a quadrangle is. The inscription over the Stonyhurst quadrangle, "*Laus Deo*," was strange to him; he thought it meant something about the laws of God. He knew no French, no Latin. He thought Cæsar was a Greek. . . . To judge his whole vein of coincidences, and their neutralising dissidences, the jury had now before them three streams of fact: 1. That at Wagga-Wagga the Claimant knew nothing about Tichborne more than the advertisements told him; 2. That in England he knew an incredible number of things about Tichborne; 3. That in England he took Mrs. Towneley for Roger's sweetheart, and even at the trial was ignorant of many things Tichborne could not be ignorant of. Now, in all cases,

where there are several facts indisputable, yet seemingly opposed, science declares the true solution to be that which, setting aside the doubtful facts, reconciles all the indisputable facts. This maxim is infallible. . . .

I will now show, in contrast, the indisputable coincidences, which, converging from different quarters, all point to one conclusion — that the Claimant is Arthur Orton, of Wapping.

Arthur Orton, born September 13th, 1832, was the youngest son of George Orton, a shipping butcher and an importer of Shetland ponies. He used to ride the ponies from the Dundee steamers, and so got a horseman's seat. . . . The Claimant in Australia lived by riding, and slaughtering, and dressing beasts. On this point, his own evidence agrees with that of every witness who knew him. And when he came up the Thames in the "*Cella*" to personate Tichborne, he asked the pilot what had become of Ferguson, the man who used to be pilot of the Dundee boats. All this taken together is rather a strong coincidence. It may seem weak; but apply a test. To whom does all this, as a whole, apply? The riding — the slaughtering — and the spontaneous interest in an old Dundee pilot? To Castro? To Tichborne? To any *known* man not an Orton?

In 1848, Arthur Orton, aged 16, sailed to Valparaiso, and subsequently, in June, 1849, made his way to Melipilla. He was young, fair, the only English boy in the place, and the good people took to him. He made friends with Dona Hayley, wife of an English doctor, and with Thomas Castro and his wife, and many others. They were very kind to him in 1849 and '50, particularly Dona Hayley, and in these gentle minds the kindly feeling survived the lapse of time, and his long neglect of them. Not foreseeing in 1850 his little game in

1866, Arthur Orton told Dona Hayley he was the son of Orton, the Queen's butcher, and as a child had played with the Queen's children. Not being a prophet, all this bounce at that date went to aggrandise Orton. He spoke of Arthur's sisters by name, and Dona Hayley, twenty years after, remembered the names with slight and natural variations. . . . Tichborne's alibi during Arthur Orton's whole visit to Melipilla is proved by a cloud of witnesses, and his own writing, and is, indeed, admitted; he sailed late in 1852, and reached Chili in 1853. Arthur Orton was back in England, June, 1851. Now so much of this as respects Arthur Orton is the first branch of a pure, unforeseen coincidence. The second branch is this — The Claimant on the 28th August 1867 wrote from his solicitor's office, 25 Poultry, to prepare the good Melipillians for a new theory — that Arthur Orton, 17 years old to the naked eye, was not Castro — (that cock might fight in Hobart Town, but not in Melipilla); not Castro, but Tichborne, age 23. He wrote to Thomas Castro, complained he was kept out of his estates, and begged to be kindly remembered to Don Juan Hayley, to Clara and Jesusa, to Don Ramon Alcade, Dona Hurtado, to Senorita Matilda, Jose Maria Berenguel, and his brothers and others, in short, to twelve persons besides Castro himself. . . . The whole coincidence is this: The Claimant stayed a long time at Melipilla in 1849 and 1850, and called himself Arthur Orton, by giving full details of his family, and left Chili in 1850, during all which time an alibi is proved for Tichborne, but none can be proved nor has ever been attempted, for Arthur Orton. On the contrary, a non-alibi

was directly proved for him. He was traced from Wapping to Valparaiso, and Melipilla, in 1848. His stay there till 1850 was proved, and then he was traced in 1850 into the "Jessie Miller," and home to Wapping in 1851 just as he had been traced out — by ships' registers and a cloud of witnesses. The coincidence rests on the two highest kinds of evidence, the Claimant's written admission, and the direct evidence of respectable witnesses unshaken by cross-examination (see scale of evidence), and it points to the Claimant as Arthur Orton. Those who can see he is not Tichborne, but are deceived by the falsehoods of men into believing he is not Orton, should give special study to this coincidence; for here the Claimant is either Tichborne or Orton. No third alternative is possible. At Melipilla, in 1850, he was either Orton, who was there, aged 17, or Tichborne, who was in England, aged 23. . . .

Your readers, especially those who have paid me the compliment of drawing the circle with radii converging to one center, can now fill the interstices of those radii, and so possess a map of the fifteen heterogeneous and independent coincidences, converging from different quarters of the globe, and different cities, towns and streets, and also from different departments of fact, material, moral, and psychological, towards one central point, that this man is Arthur Orton. Then, if you like, apply the exhaustive method, of which Euclid is fond in his earlier propositions. Fit the fifteen coincidences on to Roger Tichborne if you can. . . . You will conclude with Euclid, "in the same way it can be proved that no other person except Arthur Orton is the true center of this circle of coincidences."

21. JOSEPH LESURQUES' CASE. [Printed *post*, as No. 359.]

22. THOMAS HOAG'S CASE. [Printed *post*, as No. 362.]

**23. KARL FRANZ' CASE.** [Printed *post*, as No. 388.]**24. THE WEBSTER-PARKMAN CASE.** (S. M. PHILLIPPS. *Famous Cases of Circumstantial Evidence*. No. VIII.)

This was an instance in which the guilt of a crime was brought home to the perpetrator through the indentifying of a body after it had been separated limb from limb, submitted to chemical processes, and to the inordinate heat of a furnace, and mingled with the countless bones of anatomical subjects in their common burying-place. One Professor Webster was brought to trial for the murder of Dr. Parkman. It was shown that the professor had urgent pecuniary motives, at the time when the crime was committed, to get Dr. Parkman out of the way. The prisoner had a residence at the Medical College, Boston. He made an appointment to meet the deceased at this place at two o'clock on Friday, the 23d of November, 1849, in order to discuss certain money matters. Dr. Parkman was seen about a quarter before two o'clock apparently about to enter the Medical College, and after that was never again seen alive. The prisoner affirmed that Dr. Parkman did not keep his appointment, and did not enter the college at all on that day. For a whole week nothing was discovered, and when search was made the prisoner interfered with it, and threw hindrances in the way.

On the Friday week and the day following there were found in a furnace connected with the prisoner's laboratory in the college, fused together indiscriminately with the slag, the cinders, and the refuse of the fuel, a large number of bones and certain blocks of mineral teeth. A quantity of gold, which had been melted, was also found. Other bones were found in a vault under the college. There was also discovered in a tea chest, and embedded in a quantity of tan, the entire trunk of a human body and

other bones. The parts thus collected together from different places, made the entire body of a person of Dr. Parkman's age, about sixty years, and the form of the body when reconstructed had just the peculiarities shown to be possessed by Dr. Parkman. In no single particular were the parts dissimilar to these of the deceased, nor in the tea chest or the furnace were any duplicate parts found over and above what was necessary to compose one body. The remains were further shown to have been separated by a person possessed of anatomical skill, though not for anatomical purposes.

Finally, three witnesses, dentists, testified to the mineral teeth found being those made for Dr. Parkman three years before. A mold of the doctor's jaw had been made at the time, and it was produced, and shown to be so peculiar that no accidental conformity of the teeth to the jaw could possibly account for the adaptation. This last piece of evidence was conclusive against the prisoner, and he was convicted. Without this closing proof the evidence would certainly have been unsatisfactory. The character of the prisoner, the possible confusion throughout the college of the remains of anatomical subjects, the undistinguished features, and the illusiveness of evidence derived from the likeness of a reconstructed body, were all facts of a nature to substantiate assumptions in favor of the prisoner's innocence. It is singular that the block of mineral teeth was only accidentally preserved, having been found so near the bottom of the furnace as to take the current of cold air, whose impact had prevented the thorough combustion that would otherwise have taken place.

25. **FINGER-PRINT IDENTIFICATION.** (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 51.)

The system of identification by bodily measurements, which has now come to be known as "bertillonage," was first introduced as a method of police registration in Paris in 1882. During the first year of its employment it detected forty-nine criminals giving false names, while in the following year the number rose to 241. In 1889, M. Bertillon stated that there had not been a single case of mistaken identity since the system had been introduced, and that in the previous year 31,849 prisoners had been measured in Paris, 615 of whom were in this way recognized as former convicts, while 14 were subsequently recognized in prison. Of the latter, 10 had never previously been examined, so that the failures were only 4 in 32,000, or 1 in 8000. The system, as described by M. Bertillon himself in a pamphlet on *The Identification of the Criminal Classes*, consists in taking the measurements of the body structure of each individual. Although such measurements might be indefinitely extended, the number is usually restricted to 12, including the height, length, and width of the head, length of the middle finger, of the foot, etc. These measurements are rapidly taken with standard instruments by a special staff, and are recorded upon a card upon which are pasted full-face and profile photographs of the prisoner. The data obtained enable the photographs to be classified into different groups of short, medium, and tall men, and these, again, may be subdivided into groups of short, medium, and long heads, while further subdivisions are afforded by the width of the head, width of the arms outstretched at an angle of the body, and so on. The color of the eyes affords the means for a further subdivision, while special birthmarks or peculiarities differen-

tiate the individuals still further. In this way alone, M. Bertillon claims that 100,000 persons can be classified into groups of ten each, the portraits in which would offer no difficulty in examination. M. Bertillon undoubtedly puts the position too favorably here, in assuming division into equal groups; for out of his hypothetical 100,000 individuals, 75 per cent might conceivably be tall men, and 75 per cent of these, again, have long heads, so that the final groups would in some cases have no representatives, while in the other groups there might be 1000 individuals. . . . A similar method is employed in the United States for recognizing deserters. . . . During the first five months after the system was instituted (1891) sixty-two men were suspected of concealing their identity, and in sixty-one of these cases the suspicion was justified and the identity acknowledged. A drawback of the Bertillon system of identification is that much depends upon the accuracy of the person who takes the measurements, and that, therefore, a permissible error must be admitted. In the United States Army an error of one inch in either direction is allowed for the recorded height. In addition to this, some degree of natural variation will take place in the course of years, and due allowance must also be made for this influence upon the measurements.

Striking as has been the success of M. Bertillon's system of anthropometrical measurements as a means of identification, it has been altogether surpassed in certainty by the methods of recording the impressions of the fingers. From time to time in the past, use has been made of a finger or thumb impression as a seal or to give a personal mark of authenticity to a document. One of the earliest ex-

amples extant of the use of the manual seal is to be seen on one of the Assyrian clay tablets in the British Museum. This is imprinted in cuneiform characters, and contains a notice of the sale of a field, which concludes with the imprint of a finger nail, and the statement that this had been made by the seller of the field as his nail mark. . . . The first attempt by Europeans to make use of the characteristic ridges of the fingers to record the identity of individuals appears to have been that of Sir William Herschel, who introduced a method officially into Bengal. His system arose out of the difficulty of checking forgeries by the natives in India, and his having made two of them record their finger impressions upon contracts, so that he might be able to frighten them should they subsequently deny their signatures. This was in 1858, and the device proved so unexpectedly successful, that for several years Sir William Herschel made a study of the use of finger prints in identification, and finally found them so satisfactory that, in 1877, he gave instructions for their systematic use in the Hooghly. . . .

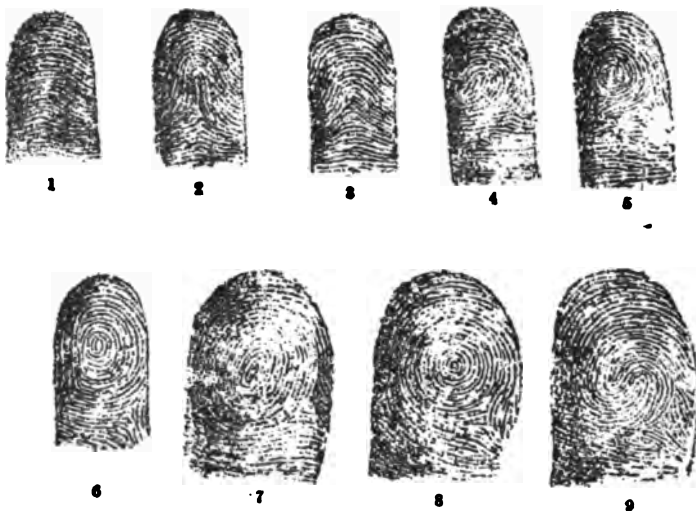
The curious markings upon which are based these systems of identification are not confined to the human race, but are also shown by monkeys and to a less pronounced extent by other animals. The pattern upon the surface of the skin on the palms of the hands and soles of the feet is formed by the arrangement of what is known as the papillary ridges. It is readily recorded by carefully coating the finger-tips with a fine layer of printing or ordinary ink and pressing them upon paper so as to leave an imprint of the markings upon the finger. The uses of these ridges is to assist the delicacy of touch, and also to excrete perspiration through the minute pores with which they are covered. The effect of rough work upon the ridges is to increase

their height, and eventually they may become covered up by the horny accretions known as callosities. On the other hand, the ridges upon the palms of people who do very little manual labor are much less apparent, and when the skin is thin are very low. Hence, in the hands of bedridden invalids there is only a slight development of the ridges. Several circumstances may lead to a temporary obliteration of the ridges, such as, for instance, the constant puncturing of the skin by the head of a needle in sewing and the imprint of the forefinger of a tailor will therefore often present a very characteristic mottled appearance. . . . A most important point in the application of finger prints to the identification of the individual is the persistence of the main details throughout life, since otherwise much of the value of the method would be lost. . . . As is the case with all the other measurements of the human body, alterations will occur in the size of the markings; for the pattern as a whole increases with the growth of the finger, but this growth does not affect the arrangement of the loops and ridges that make up the markings upon the skin.

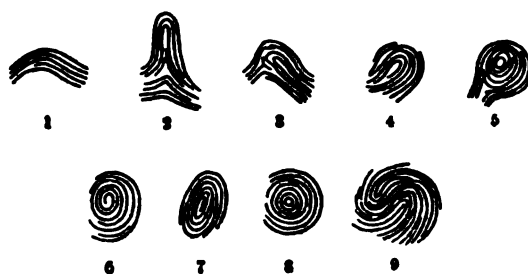
In no other way than a study of the finger prints is it possible to find over a thousand points of comparison upon which to establish the identity of an individual. In estimating the value of finger prints as evidence of identity, Sir Francis Galton found that out of 1000 thumb prints the collection could be classified into 100 groups, each containing prints with a more or less close resemblance to one another. . . . On studying the minutiae of the patterns, and calculating the chances that the print of a single finger should agree in all particulars with the print of another finger, he concluded that it was as one is to about sixty-four millions; so that the chance of two persons giving similar prints from a single finger would







THE STANDARD PATTERNS OF PURKENJE



CORES OF THE ABOVE PATTERNS

- |                               |            |
|-------------------------------|------------|
| 1. Transverse flexures.       | 5. Almond  |
| 2. Central longitudinal stria | 6. Spiral  |
| 3. Oblique stria              | 7. Ellipse |
| 4. Oblique sinus              | 8. Circle  |
| 9. Double Whorl               |            |

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be less than one in four. If the comparisons were extended to two fingers, the improbability of agreement in all details would be squared, "reaching a figure altogether beyond the range of imagination." The general conclusion drawn from these numerical results was that even after making all allowance for ambiguities and for possible alterations caused by accident or disease, a complete, or nearly complete, agreement between two prints of one finger and infinitely more so between two or more fingers, afforded evidence, which did not stand in need of corroboration, that the prints were derived from the fingers of one and the same person. In finger prints, therefore, we have the only means of proving the identity of an individual beyond all question. . . .

The first attempt to classify the various patterns formed by the ridges was that of Purkenje, a doctor of medicine, who, in 1823, delivered a thesis upon the subject at the University of Breslau. He concluded that all the varieties of curves might be grouped under nine main heads or standard types, which he described as follows: (1) Transverse curves. (2) Central longitudinal stria. (3) Oblique stria. (4) Oblique sinus. (5) Almond. (6) Spiral. (7) Ellipse or elliptical whorl. (8) Circle or circular whorl; and (9) Double whorl. The differences between these different types are best shown by diagrams, and the accompanying figure,<sup>1</sup> reproduced by permission of Sir Francis Galton, represents the cores of the nine standard patterns. This classification, resting as it does upon merely superficial appearances, does not afford a certain means of separating the types, since factors, such as the depth of printing, the size of the patterns, and the prominence of secondary details may have an undue influence in the placing of a particular print in one or the other group.

After numerous futile attempts to make use of Purkenje's system, Sir Francis Galton discarded it in favor of a system in which the triangular space or spaces found in the majority of finger impressions was made the basis of classification. Starting upon the two divergent ridges from these spaces an outline was then drawn as far as it could be traced, the course of each ridge being followed with minute fidelity. In this way a series of sharply-defined outline figures were obtained. The various patterns may, as a rule, be classified into the three main groups of arches, loops, and whorls, while some of the transitional forms may be grouped under more than one of these heads. Other patterns, again, which are of rare occurrence, are not suitable for inclusion in any of the three groups. A system of indexing based upon this method of classification was also devised in which letters represented the varieties of patterns. Thus *a*, *a*, *a* indicate that the outline upon the fore, middle, and ring fingers consists of arches, while *a*, *w*, *l* indicate an arch upon the forefinger, a whorl upon the middle finger, and a loop upon the ring finger. The letters *i* and *o* are also used, the former indicating a loop with an inward slope and the latter one with an outer slope upon the forefinger. The possible variations in such a classification of the impressions of the three fingers of the right hand cannot exceed thirty-six, and a thousand prints may therefore be indexed into one of these thirty-six groups. Subdivisions of these main groups may then be based upon the characteristics of the prints of the fingers of the other hand and of the thumbs, while differences in the cores of the patterns afford a means of forming smaller divisions of the loop patterns.

From observations of the 5000 prints of 500 individuals, Sir Francis

<sup>1</sup> [See plate A, reproduced by consent of the publishers, Macmillan & Co., Ltd. — Ed.]

Galton found that arches were present in 6.5 per cent; loops in 67.5 per cent; and whorls in 26.0 per cent. Each digit and hand, however, had its own peculiarities, and the variations in the percentage of arches upon different digits ranged from 1 to 17; that of the loops from 53 to 90; and that of the whorls from 13 to 45. Loops occurred with most frequency upon the little finger and then upon the middle finger, while whorls were rarely met with upon these fingers, but were of common occurrence upon the thumb and ring finger. The classification employed by the English police was devised by Sir Edward Henry and is a modification of that of Sir Francis Galton, from which it differs in making use of four types instead of three. The impressions are grouped into arches, loops, whorls, and composites. The last group includes patterns made up of combinations of the other three, or those which might be classified either as loops or whorls. There are also numerous subdivisions of the group into patterns with characteristics in common, such as "central pockets" and "accidentals," and further differentiation is effected by counting the number of ridges between two fixed points in the patterns. Examples of these four groups are shown in the plate facing p. 82.<sup>1</sup> . . .

<sup>2</sup> Finally, the Argentine Vucetich has simplified the system so successfully that his method has spread everywhere. Vucetich distinguishes only the following four main types: *a.* Arch (A, or 1). *b.* Internal loop (I, or 2). *c.* External loop (E, or 3). *d.* Vertical (V, or 4). An impression of the five fingers of each hand is made upon the card; then, in view of the dactylogram obtained, one can establish the dactylographic formula of the subject, representing the

type to which each finger corresponds by preëstablished figures. The thumb is excluded and is designated always by the letter of the type to which it belongs. Take, for instance: V 3242, I 3343. This formula represents a subject with the following papillary structures:

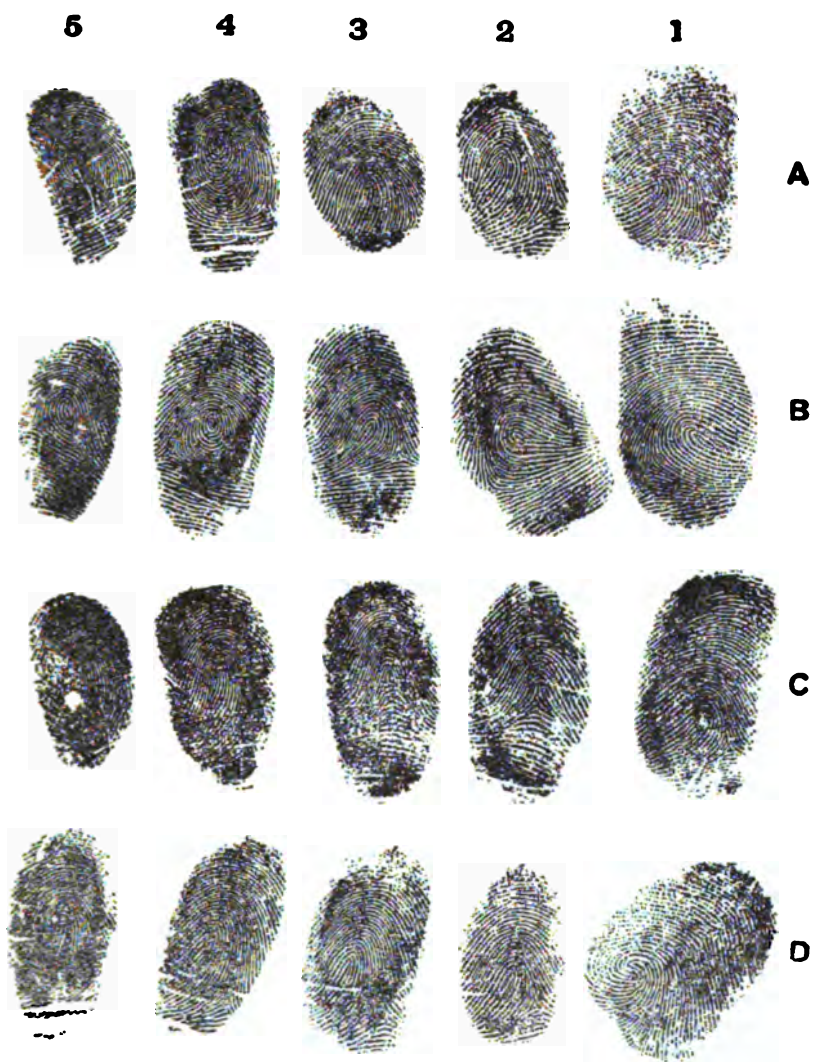
Right Hand	Thumb — Vertical (V).
	Forefinger — External loop (3).
	Middle finger — Internal loop (2).
	Ring-finger — Vertical (4). Little finger — Internal loop (2).
Left Hand	Thumb — Internal loop (1).
	Forefinger — External loop (3).
	Middle finger — External loop (3).
	Ring-finger — Vertical (4). Little finger — External loop (3).

The combined ten alphabetical or numerical designations yield a large number of formulæ which allow and facilitate the classification of the cards.

But how can we compare two different prints of the same type and obtain the identification? Stockis sums up the various methods in his *Investigation and Identification of Finger Prints*. According to him, Windt enumerates the papillary lines from the delta to the bifurcations, the ends of the lines, and the points or lines fastened among the others. Galton and Henry, tracing a line, join the center of the print with the delta and count the lines thus crossed, the points touching one another, etc. Sarachaga bases his comparison of the distinct types of the vertical on the number of lines, the elevation of the loop, the inclination (horizontal, oblique, vertical), and the direction

<sup>1</sup> [See plate B, reproduced by consent of the publishers, Sir Isaac Pitman & Sons, Limited. — Ed.]

<sup>2</sup> [The following passage is added from p. 214 of C. B. de Quiros' *Modern Theories of Criminality* (transl. De Salvio, 1911, Modern Criminal Science Series).]



**TYPES OF FINGER PRINTS**

**PLATE B**



(rectilinear or curvilinear) of the axis of the drawing, the opening of the central angle of the print, and, finally, on the apparent scars. Roscher and Gasti emphasize the number of the lines and the configuration of the crests composing the delta. Vucetich compares, above all, the directive lines and the characteristic points (bifurcations, pitchforks, islands, etc.). Daae also investigates the characteristic points. Giribaldi distinguishes the varieties of verticals, the scars that can possibly cross the print, and the details of the lines. Pottecher bases his observation mainly on the enumeration of the lines. Niceforo recommends the investigation of the directive lines, the number of the furrows, the characteristic points (starting point of the lines, bifurcations, rings, points), and the casual or anomalous peculiarities (scars,

pustules, syndactylæ, etc.). Finally, Reiss calls attention to the photographic method of the superposition of the two enlarged pictures, the first on paper and the second on a transparent film, or by passing simultaneously in the projecting lantern two photographic plates of the two prints natural size, one on glass and the other on stiff film. In either case the identification is obtained from the matching of the lines. It is impossible to discuss the advantages and the inconveniences of all these methods. Their multiplicity offers a serious obstacle for international investigations. Yet, the advantages offered by Vucetich's system are such as to win him popularity in both hemispheres. A place seems to be reserved for his system in the international dactyloscopic catalogue which some are planning.

26. **PEOPLE v. JENNINGS.** (1911. SUPREME COURT OF ILLINOIS. 252 Ill. 534, 96 N.E. 1077.)

Error to Criminal Court, Cook County; MARCUS KAVANAGH, Judge. Thomas Jennings was convicted of murder, and he brings error. Affirmed. *William G. Anderson* and *F. L. Barnett*, for plaintiff in error. *W. H. Stead*, Atty.-Gen., and *John E. W. Wayman*, State's Atty. (*John E. Northrup*, of counsel), for the People.

CARTER, C. J. Plaintiff in error, Thomas Jennings, was found guilty in the criminal court of Cook county of the murder of Clarence B. Hiller, the jury fixing the penalty at death and judgment being entered on the verdict February 1, 1911. This writ of error is sued out to review the record in that case. . . .

At the time of the murder, September 19, 1910, Clarence B. Hiller, with his wife and four children, lived in a two-story frame house facing north on West 104th street, just east of Waldon parkway in Chicago. Immediately west of Waldon parkway, which runs north

and south, and separated from the street by a wire fence, are the suburban tracks of the Chicago, Rock Island & Pacific Railway Company. East of the Hiller house was a vacant lot, and east of that was the residence of a family named Pickens. South of the Hiller house was a vacant space, beyond which were two houses facing west on Waldon parkway, the southern one being occupied by the McNabb family. The north or front door of the Hiller house leads into a hallway on the east side of the house and from the south end or rear of this hallway a stairway leads up to the second floor. The south bedroom nearest the head of the stairs was occupied by the daughter Florence, 13 years of age. Then came the bedroom of the daughter Clarice, 15 years of age, and at the north or front end of the second floor was a bedroom occupied by Mr. and Mrs. Hiller and the two younger children. At the head of the stairs, near the door

leading to Florence's room, a gas light was kept burning at night. Shortly after 2 o'clock on Monday morning of September 19, 1910, Mrs. Hiller was awakened and noticed that this light was out. She called her husband's attention to the fact and he went in his night clothes to the head of the stairway, where he encountered an intruder, with whom he grappled, and in the struggle both fell to the foot of the stairway, where Hiller was shot twice, dying in a few moments. Just a little before the shooting the daughter Clarice had seen the form of a man at her doorway, holding a lighted match by his body, but not so as to show his face. As it was the practice of her father to get up and see if the children were all right in the night, she was not frightened. The form disappeared from her doorway, and she heard footsteps shuffling toward the room of her sister Florence, after which she heard a little sound made by Florence. She next heard her father going through the hallway. Then came the struggle and the shooting. . . . The Pickens family were awakened by the screams of Mrs. Hiller and her children, and the father, John C. Pickens, partially dressed and ran to the Hiller house. He reached there at about the same time as his son, Oliver Pickens, and Officer Beardsley. The son had been visiting friends on the north side in Chicago and had left the train at the suburban station, about a block away, and was walking towards home when he heard the screams from the Hiller house and ran there, meeting a police officer, Floyd Beardsley, who had also heard the screams, and was searching for the cause. They were let in by the daughter Clarice, and found the body of Mr. Hiller lying near the bottom of the stairway, his nightgown saturated with blood. The shooting occurred about 2.25 A.M. The witnesses who reached the house shortly after found three

revolver cartridges undischarged and two leaden slugs. Neither of the shots fired had lodged in the body of the deceased, one entering the upper part of the left arm and passing out through the shoulder and neck, and the other entering the right breast and passing out through the lung and heart. Shortly thereafter Mrs. Pickens, going upstairs to get a cover for the body, found particles of sand and gravel on Florence's bed near the foot.

About three quarters of a mile east of the Hiller house is Vincennes road, running southerly, with a slight inclination to the west, and which is occupied by a street car line. This street is intersected at 103d street by the tracks of the Panhandle railroad, which run southerly, with a slight inclination to the east. The street car line connects with the Chicago City Railway system at Seventy-ninth street, and extends in a southerly direction from 103d street through Blue Island to Harvey, about 8½ miles south of 103d street. On the west of Vincennes road, at 103d street, is a crossing gate. Early in the morning on which the murder occurred, four police officers, who shortly before had gone off duty in that neighborhood, were sitting on a bench just north of the gate, waiting for a north-bound street car. The gate was up, so that the officers were not easily seen by one approaching from the south. About 2.38 A.M., Jennings approached the place from the south. The officers spoke to him, and he continued walking for a few steps with his right hand in his trousers pocket, holding a loaded revolver. They searched him and took the weapon away. They did not know at this time of the murder. Jennings was perspiring, and the officers testified that fresh blood appeared at different places on his clothing. About three inches above his left wrist they found a slight wound, fresh and bleeding slightly. Jennings told



the policemen that the blood came from a wound on his left little finger, received from falling off the street car at Seventy-ninth street the evening before, when he was on his way to Harvey. Dr. Clement, who examined Jennings about half past 3 that morning at the police station, found the wound on the little finger scabbed over and not of recent origin. He also found the wound on the left arm fresh and bleeding, clean cut, with recent blood coming from it, not coagulated. The doctor testified that it looked like a bullet wound and not like an injury received from falling off a street car. Dr. Springer also examined Jennings, and his testimony, so far as it covered the same ground, was practically to the same effect. It was testified that the holes in the sleeves of the shirts, which were introduced in evidence as exhibits, were continuous with this fresh cut in the arm. The officers took Jennings to the station on the street cars, and when examined there, sand was found in his shoes. Jennings, when arrested, first told the officers that he lived at 1244 State street, Chicago, and later 577 Twelfth street; that he left for Harvey about 7 or 8 o'clock the evening before to visit friends, and that when he started to return from Harvey, about 12 o'clock, not finding a street car, he had walked back to that point.

In August, 1910, Jennings had been released on parole from the penitentiary at Joliet, where he had been sentenced on a charge of burglary. He had been paroled before, but had been returned for a violation of the parole. Two weeks after his second parole, on August 16, 1910, he purchased a new 38 caliber revolver, giving his name as Will Jones, of Peoria. On September 9th following he had pawned this revolver for \$2 under the name of Will Jackson, getting it back September 16th. On the 18th he pawned it to Elroy Jones, a saloon-

keeper, getting it back about 7 P.M. on the night of September 18, 1910. It was this revolver that the officers found on Jennings' person when he was arrested. It was loaded with five cartridges, which were marked, "A. P. C. 38 Smith & Wesson." The testimony showed that these cartridges were identical in appearance, size, and markings with the three undischarged cartridges found in the hallway of the Hiller house near the dead body. Jennings testified that he had not fired the revolver since he owned it and knew of no one else firing it. The officers testified that in their judgment it had been fired twice within an hour before his arrest, arriving at this conclusion from the smell of fresh smoke and the burned powder in two chambers of the cylinder. Later, chemical tests and the evidence of a gunsmith corroborated this testimony that the chambers contained burned particles of powder.

Over the objection of the plaintiff in error evidence was admitted to the effect that about 2 A.M., September 19, 1910, just before the shooting of Hiller, some one entered the McNabb house. Mrs. McNabb was awakened and saw a man standing in the door with a lighted match over his head. The man was tall, broad shouldered, and very dark. . . . Jessie McNabb, a daughter, who occupied the same bed with her mother, was awakened and saw the intruder. She testified he wore a light-colored shirt and figured suspenders; that he was large, with broad shoulders. From the shirt and suspenders which were introduced in evidence, and from the build of Jennings, she was of the opinion he was the man that was in their room. Mrs. McNabb also testified that she thought the man in the room was Jennings, from his size and build and from what she saw of him. Jennings was 6 feet tall and weighed about 175 pounds. . . .

While Jennings told several wit-

September 18th to go to Harvey about 7 o'clock, he testified on the trial, and one or two other witnesses also testified, that he did not leave the downtown part of the city until after 10 o'clock on Sunday evening, September 18th. He stated once or twice after his arrest that he went to Harvey to visit acquaintances named Robinson, and gave the officers to understand that after visiting with them he missed the street car and walked back. The state proved by the Robinsons that he did not call on them on the night in question, and later Jennings testified in his own behalf that he knocked at the Robinsons' door and no one responded, so he went to a place called Phoenix, a short distance from Harvey, where he visited a saloon. No other witness corroborated him as to his presence in Harvey, Phoenix, or at any other point south of the Halsted residence on the night in question. He denied being at the Halsted house, the McNabb house, or the Hiller house, or having anything to do with the shooting. When arrested he denied that he had ever been arrested before, giving his name as Will Jones.

Mrs. Hiller testified that their house had but recently been painted, the back porch, which was the last part done, being completed on the Saturday preceding the shooting. Entrance to the house had been gained by the murderer through a rear window of the kitchen, from which he had first removed the window screen. Near the window was a porch, on the railing of which a person entering the window could support himself. On the railing in the fresh paint was the imprint of four fingers of some one's left hand. This railing was removed in the early morning after the murder by officers from the Chicago police force bureau of the Criminal Identification and enlarged photographs were made

violation of his parole, in March, 1910, had a print of his fingers taken and another print was taken after this arrest. These impressions were likewise enlarged for the purpose of comparison with the enlarged photographs of the prints on the railing. Four witnesses, over the objection and exception of counsel, testified that in their opinion the prints on the railing and the prints taken from Jennings' fingers by the identification bureau were made by the same person. . . .

It is contended that the evidence as to the comparison of photographs of the finger marks on the railing with the enlarged finger prints of plaintiff in error was improperly admitted. While the courts of this country do not appear to have had occasion to pass on the question, standard authorities on scientific subjects discuss the use of finger prints as a system of identification, concluding that experience has shown it to be reliable. 10 Ency. Britannica (11th Ed.), 376; 5 Nelson's Ency. 28. See, also, Gross' Crim. Investigation (Adams' Transl.), 277; Fuld's Police Administration, 342; Osborn's Questioned Documents, 479. These authorities state that this system of identification is of very ancient origin, having been used in Egypt when the impression of the monarch's thumb was used as his sign manual, that it has been used in the courts of India for many years and more recently in the courts of several European countries; that in recent years its use has become very general by the police departments of the large cities of this country and Europe; that the great success of the system in England, where it has been used since 1891 in thousands of cases without error, caused the sending of an investigating commission from the United States, on whose favorable report a bureau was established by

the United States government in the war and other departments.

Four witnesses testified for the state as to the finger prints. William M. Evans stated that he began the study of the subject in 1904; that he had been connected with the bureau of identification of the Chicago police department in work of this character for about a year; that he had personally studied between 4000 and 5000 finger prints and had himself made about 2000; that the bureau of identification had some 25,000 different impressions classified; that he had examined the exhibits in question, and on the forefinger he found 14 points of identity, and on the second finger 11 points; that in his judgment the finger prints on the railing were made by the same person as those taken from the plaintiff in error's fingers by the identification bureau.

Edward Foster testified that he was inspector of dominion police at Ottawa, Canada, connected with the bureau of identification; that he had a good deal to do with finger prints for six years or more; that he had special work along that line in Vancouver and elsewhere in Canada; that he had studied the subject at Scotland Yard; that he began the study in St. Louis in 1904 under a Scotland Yard man and had taken about 2500 finger prints; that he had studied the exhibits in question and found 14 points of resemblance on the forefinger; that the two sets of prints were made by the fingers of the same person.

Mary E. Holland testified that she resided in Chicago; that she began investigation of finger-print impressions in 1904, studied at Scotland Yard in 1908, passed an examination on the subject, and started the first bureau of identification in this country for the United States government at Washington; that they have over 100,000 prints at Scotland Yard; that she also had studied the two sets of prints and believed them to have been

made by the fingers of the same person.

Michael P. Evans testified that he had been in the bureau of identification of the Chicago police department for 27 years; that the bureau had been using the system of finger-print impressions since January 1, 1905, and that they also used the Bertillon system; that he had studied the question since 1905 or 1906 and had made between 6000 and 7000 finger prints; that he had charge of the making of the photographs of the prints on the railing; that in his judgment the various impressions were made by the fingers of the same person.

All of these witnesses testified at more or less length as to the basis of the system and the various markings found on the human hand, stating that they were classified from the various forms of markings, including those known as "arches," "loops," "whorls," and "deltas."

It was further insisted on oral argument and in the briefs of the plaintiff in error that the evidence is not sufficient to support the verdict.

We deem it not improper to say that all the incriminating proof points to the accused. There is absolutely nothing in the record tending to show that the crime was committed by any one else. Among the many circumstances which must have convinced the court and jury that the plaintiff in error was the criminal agent were his statements, so inconsistent with the testimony of many other witnesses, in explaining his whereabouts on the night in question; also his statements as to how the blood came to be on his clothing, how he received the wound on his arm, and the tearing of his coat pocket. Then, too, they must have considered his lack of motive in going to Harvey and almost immediately turning around and coming back; the improbability, when he had sufficient money to pay his car fare, that he should walk that

distance at that time of the night when the cars were running each hour and one left within an hour after he claims he started; the condition of his clothing when arrested; the sand in his shoes and on the young girl's bed; the evidence that his revolver had recently been discharged; the testimony of three witnesses that he was seen in the neighborhood of the crime just before its commission; the fact that

the bullets which had inflicted the mortal wounds were of the same size and kind as those in his revolver. No one of these circumstances, considered alone, would be conclusive of his guilt, but when all the facts and circumstances introduced in evidence are considered together, the jury were justified in believing that a verdict of guilty should follow as a logical sequence.

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### **TITLE III: EVIDENCE TO PROVE A HUMAN TRAIT, QUALITY, OR CONDITION**

27. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

The reasons for dividing into four groups the whole subject of Circumstantial Evidence have been already stated (*ante*, No. 3). The groups being distinguished according to the probanda to be proved, the third group is now to be considered, namely, Evidence to prove a Human Quality, Condition, or other attribute. This group of Probanda separates itself from the fourth (Human Acts) with fair distinctness, because the circumstances available as evidence are usually distinct for the two groups. Though the distinction between the two groups is only a rough and practical one, nevertheless, it is in essence a real and unavoidable one, and by no means artificial.

The chief kinds of human qualities or conditions to be proved may be reduced to the following sorts: Moral Character or Disposition; Physical and Mental Capacity; Design or Plan, and Intent; Knowledge, Belief, or Consciousness; Motive or Emotion; Habit or Custom.

It will be understood that we are here *not concerned how the above human qualities come to be probanda*. We are concerned only to learn what facts will be evidential to prove the quality proposed for proof. For instance, character may be in issue through the pleadings in a suit for slander on a plea of justification, or in an action for personal injury as an element of the defendant's liability for an incompetent servant; or it may be used, not as in issue through the pleadings, but as evidential to prove a human act, for example, the good character of a defendant in a criminal case or his bad character in rebuttal. So, also, knowledge may be in issue in a suit to set aside a purchase in fraud of creditors, or it may be evidential only, as when it is offered to prove the doing of a past act as a mark of identity. In all these instances the quality which is termed character, knowledge, or the like, has somehow come into the case as a proposition to be proved; and the question how to evidence it presents itself equally whether the probandum, when once proved, is going in turn to be used itself evidentially to show some other fact, or is one of the very ultimate propositions made material by the pleadings.

Three species of evidential facts are available to show a human quality or condition: (1) *Conduct*; this is the expression, in outward behavior or acts, of the quality or condition operating to produce effects. These results are the traces by which we may infer the moving cause. In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless, the indication is strictly not a concomitant, but a retrospectant one (*ante*, No. 3), because the argument is backwards in time from effect (conduct) to cause (internal condition). (2) *External facts* pointing for-

<sup>1</sup> Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 190.)

ward to the probable coming into existence of the quality; for example, the victim's gold, as pointing forward to the defendant's probable desire to rob him, or the reputation of A's insolvency, as pointing forward to B's probable receipt of knowledge of it. In using this evidence, we take our stand beforehand and argue that the evidential fact probably gave rise to the emotion, knowledge, or intent to be proved. The indication is thus prospectant; while that of conduct is retrospectant. (3) There is also a third sort of fact, having either a prospectant or a retrospectant indication, and not exactly corresponding to either of the preceding sorts, namely, *prior or subsequent condition*, as showing condition at a given time.

Thus, to prove insanity, we may offer (1) conduct as the effect illustrating its cause, mental aberration, (2) circumstances of unsuccessful business, domestic troubles, and the like, tending to bring on insanity; and (3) prior or subsequent insanity, pointing forwards or backwards to insanity at the time in question. So also, to show a husband's desire or motive to get rid of his wife, we may offer (1) his conduct exhibiting such a desire, (2) the existence of a paramour, tending to create such a desire, and (3) a prior desire, as pointing forward to its continued existence at the time in question.

**TITLE III (continued): EVIDENCE TO PROVE A HUMAN TRAIT, QUALITY, OR CONDITION**

**SUBTITLE A: EVIDENCE TO PROVE MORAL CHARACTER**

28. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

Inasmuch as heredity and environment are not yet defined enough, in their known influences, to be available as evidence, there is for the *prospectant* class of evidence practically nothing to be considered under this head.

Under the *retrospectant* class, on the other hand, there is an abundance, namely, the conduct of the person, exhibiting his moral traits. But for present purposes it will be sufficient to note several distinctions, which in practice limit the scope of the subject.

At the outset of this entire class of inferences, it must be noted that, where the doing of an act is the ultimate proposition to be proved, there can never be a direct inference from an act of former conduct to the act charged; there must always be a double step of inference of some sort, a "tertium quid." In other words, it cannot be argued: "Because A did an act X last year, therefore he probably did the act X as now charged." Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once, and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies that may intervene are too numerous.

Thus, whenever resort is had to a person's past conduct or acts as the basis of inference to a subsequent act, it must always be done *intermediately through another inference*. It may be argued: "A once committed a robbery; (1) therefore he probably has a thieving disposition; (2) therefore he probably committed this robbery"; or "(1) therefore he had some general design to commit certain robberies; (2) therefore he probably carried out that design and committed this robbery." Or it may be argued: "A gave money to his poor friend B; (1) therefore A probably is of a benevolent disposition; (2) therefore A probably did not commit the present robbery"; or "(1) therefore he probably had a kindly feeling towards B; (2) therefore he probably did not rob B." The impulse to argue from A's former bad deed or good deed directly to his doing or not doing of the bad deed charged is perhaps a natural one; but it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. This intermediate step is always implicit, and must be brought out.

<sup>1</sup> Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 192.)

To make available such evidence of past conduct or acts, some use for it must be found as evidencing character, design, or other quality.

*Moral Character of an Accused.* — That specific acts of misconduct have probative value in leading to a belief as to the existence of a moral trait of more or less constant nature is undoubted :

*State v. Lapage.* (1876. 57 N. H. 275, 299). On a charge of murder committed in an attempt to rape, the fact of the defendant's recent rape of another person was offered ; Mr. Norris, arguing for the defense : "Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise to be proved : he committed a rape, in no way, except in kind, connected with this crime. Inference : a general disposition to commit this kind of offense. Next premise : this general disposition in him. Inference : he committed this particular offense. . . . It may be tried by the common test of the validity of arguments. Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes ; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes ; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty : if more likely to be guilty of rape, and if there was a murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder ; a sort of an 'ex-parte' conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes, in order to help them out in presuming the commission of another rape as a motive or occasion of the murder. We can find nothing like it in the books." LADD, J. : "It is argued on behalf of the State (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, as matter of fact, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. . . . I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature — the teaching of human experience. If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . . Suppose the general character of one charged with crime is infamous and degraded to the last degree ; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort : does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before ? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt ?"

Inasmuch, however, as the settled rule of law of Admissibility prohibits the use of this class of evidence for an *accused's* character, blame, there is at present no



utility in seeking for its principles of proof; nor is there adequate material for studying them. At some future stage of the law, such principles may be developed. In its present stage we are confined to using the moral trait itself (*post*, No. 84). This we usually arrive at by reputation. To the extent that the accused's former specific misdeeds become disclosed at the trial, our inference nominally is still from his supposed trait; though actually it may be a hazy double inference from conduct to trait and from trait to act in issue.

*Moral Character of Other Persons.* The above-named exclusionary rule of law applies to an accused's character only. What of other persons' moral character? In two not uncommon classes of cases, the moral trait may be evidentially relevant to the *doing of an act*, and not prohibited by any artificial rule,—the woman-complainant in rape, and the civil party charged with negligence. Here the probative force would naturally be dependent somewhat on the circumstances of each former act, the number of them, and the similarity of them to the trait involved in the case in hand. But as mere Admissibility has almost invariably been the subject of the judicial rulings, practically no material exists for studying the probative value of such evidence.

The same is true of conduct evidence when the moral trait is *in issue* under the pleadings. Hence, no further consideration of the subject is here feasible.

**TITLE III (continued): EVIDENCE TO PROVE A HUMAN  
TRAIT, QUALITY, OR CONDITION**

**SUBTITLE B: EVIDENCE TO PROVE MOTIVE**

29. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> *Motive*.

The term "motive" is commonly used in a confusing way, as if there were but one thing and one evidential question involved. But there are two things, and two distinct evidential steps. (1) We may argue, first, that since a specific emotion or passion is likely to lead to the doing of the appropriate act — for example, desire for money to theft or robbery, or angry hostility to an act of violence — the presence of such an emotion in the person in question is likely to lead to the deed in question. In this step of the argument we assume the emotion as a fact, proved somehow or other. Just as a specific sort of disposition, of habit, of plan, is likely to lead to the appropriate act, so a specific sort of emotion or passion has a similar evidential bearing. The basis of this inference is the living, impelling, active emotion, seeking for an outlet in volition. (2) But this emotion must in its turn be proved, — just as character, design, capacity, must be proved. This is the next step, and evidential by a very different one. Usually the evidence is circumstantial; and of two sorts, (a) conduct of the person, and (b) events about him tending to excite the emotion. In (a) his conduct is the expression and effect of the existing internal emotion. In (b) the outward facts are such as may be the stimulus and cause of the emotion. But whether a person's conduct or outer events have shown the existence of the emotion is a different question from the question whether a proved emotion did actually culminate in an act induced by it.

The unfortunate ambiguity in the word "motive" thus reveals itself. That which has value to show the doing or not doing of the act is the inward emotion, passion, feeling, of the appropriate sort; but that which shows the probable existence of this emotion is termed — when it is of the sort (b) above, *i.e.* some outer fact — the "motive." For example, the prosecution of A by B in a suit at law may be said to have been a "motive" for A's subsequent burning of B's house. But in strictness the external fact of B's suit cannot be A's "motive"; for the motive is a state of mind of A; the external fact does tend to show the excitement of the hostile and vindictive emotion, but it is not identical with that emotion. This use of the word "motive" thus tends to obscure the double evidential step involved; for when it is said that B's suit may be offered in evidence as the "motive" for A's burning, we are apt to conceive ourselves as inferring directly from the suit (as the evidentiary fact) to the burning (as the proposition to be proved); when in truth there are two steps involved, — from

<sup>1</sup> Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 117.)

the lawsuit to the emotion, and the emotion to the act. It ought, therefore, to be clearly understood that the "motive," in the correct sense, is the emotion supposed to have led to the act, and that the external fact is merely the possible exciting cause of this "motive," and not identical with the "motive" itself.

The opportunities for erroneous inference being therefore of a double nature, the illustrative cases can therefore not well be separated; the skill to distinguish the precise point of weakness of the inference can best be cultivated by studying them together. Accordingly they are all placed *post*, Title IV, Doing of a Human Act, Subtitle B, Prospective Circumstances, Topic 2, Motive (Nos. 101-115).

**TITLE III (continued): EVIDENCE TO PROVE A HUMAN  
TRAIT, QUALITY, OR CONDITION**

**SUBTITLE C: EVIDENCE TO PROVE KNOWLEDGE, BELIEF, OR  
CONSCIOUSNESS**

30. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

*General Analysis of the Subject.* The notions of Knowledge, Belief, and Consciousness are not precisely identical; but they have a common feature, which is the typical one so far as concerns the modes of evidencing these mental states. That feature is most nearly expressed by the term Consciousness, *i.e.* presence in the mind of an impression as to a given fact. Thus, a person's Knowledge of a city's streets may be inferred from his conduct in finding his way through them unerringly; his Consciousness of guilt may be inferred from his conduct in fleeing from arrest; his Belief in a friend's innocence of embezzlement may be inferred from his conduct in trusting him with money. The term Belief is used commonly when the impression is thought of as bearing on a past, present, or future external fact, Consciousness when thought of as bearing on past action, and Knowledge when thought of in connection with a present or past external fact. We are here not concerned, in theory at least, with the way in which one of these states of mind has come to be an object of proof, either as being in issue or as being itself evidential of something else. It is assumed that somehow this kind of state of mind — impression, consciousness, knowledge, belief — is in the case, either as material to the issue or as relevant to prove something; and the question is how it is in its turn to be evidenced.

Of the three modes of evidencing a state of mind (*ante*), the first two are here the commonest. (A) External circumstances, calculated by their presence or occurrence to bring about the state of mind in question, are also available to show the probability that consciousness, knowledge, or belief subsequently ensued. (B) Conduct or behavior (including language not used assertively) illustrates and points back to the state of mind producing it. (C) A prior or subsequent state of mind indicates, within certain limits, its existence at the time in question.

(A) *External Circumstances, as evidencing Knowledge, Belief, or Consciousness.* There are, in a broad analysis, four kinds of circumstances (events or things) which may point forward to the probability that a given person received a given impression (*i.e.* obtained knowledge, formed a belief, or was made conscious): (1) The *direct exposure* of the fact to his sense of sight, hearing, or the like; (2) The *express* making of a *communication* to him; (3) The *reputation* in the community on the subject, as leading probably to an express communication; (4) The *quality of the occurrence*, as leading either to actual perception by his senses, or to express

<sup>1</sup> Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, §§ 244, 265.)

communication. Throughout all these four modes there run two considerations, affecting some modes more strongly than others: (a) The probability that the person received an impression of any fact at all; and (b) The probability that from the particular occurrence he would gain an impression as to the specific fact in question. Doubt may arise upon either of these points, and the various modes above are stronger or weaker in one or the other of these considerations. The four modes may now be examined more in detail.

(1) *Direct exposure of the fact to the senses.* Here there is seldom any doubt as to the element (b) above; the question usually is whether the fact in question was brought within the range of the senses so as probably to be perceived at all. The typical case is the possession of a document. If a deed or a notice was laid on A's desk, the probability (greater or less according to circumstances) is that A read it. But actual possession by A is not necessary; the posting of a placard in a street through which A habitually passes is some evidence that A ultimately came to see and understand its contents. Occasionally the element (b) above is the emphatic one; for example, where A is charged with selling liquor to B, a minor, the appearance of B, as indicating A's knowledge of B's minority or his belief in B's maturity, was the fact brought before A, and the question is whether it would probably have informed him as to the further specific fact, namely, B's age.

(2) *Express communication.* Little difficulty can arise here. There may be a question as to whether the communication came from a source which the person was fairly bound to consider authentic; but this would be a question of substantive law, involving the elements of good faith, constructive notice, or the like.

(3) *Reputation.* Here the element (a) is the important one. The probative considerations are that, when a matter is so much talked of in a community that a reputation arises about it, a member of that community, in his ordinary intercourse with others, will come to hear it mentioned, *i.e.* by express communication; and the question is whether the probability is that there would be such a general discussion and whether the person is likely to have learned of that discussion.

(4) *Quality of the occurrence, in general.* Sundry cases here combine the considerations of all the preceding modes, as well as of both the elements (a) and (b) above. Thus, a former accident to apparatus owned by A may indicate that A learned of the defect in the apparatus, either because he probably observed the former accident or because he probably was told of it by his subordinate having charge of the apparatus, or because complaint was probably made to him; and not only is the probability (a) of his having learned of the former accident thus involved, but also the probability (b) that the former accident would have revealed to him specifically the existence of the defect. So, also, a former act of violence by the deceased, in order to have any value to show the slayer's ground for apprehension of an attack, must (a) not only have been communicated to the slayer, (b) but also must be such as would create a belief in the deceased's probable aggression.

Such being the various modes in which the evidence may operate, nevertheless in a given situation (as where an employer is to be charged with

knowledge of an employee's incompetency, or a defendant accused of murder is to show belief in the deceased's probable aggression) the knowledge, belief, or consciousness may be sought to be evidenced by more than one of the above modes.

(B) *Conduct, as Evidence of Knowledge, Belief, or Consciousness.* In this sort of evidence, we argue from an observed effect — conduct — to the probable cause — a specific mental state; and not, as in the preceding sort, from cause to effect, *i.e.* from outward events to an ensuing mental state. Conduct and word utterances may betray the knowledge or belief of the actor or speaker, in so far as the specific act or utterance is of a tenor which cannot well be supposed to have been willed without the inner existence of that knowledge or belief. For example, A's act of boarding a railroad train is some evidence of his belief as to the destination of the train; B's act of taking a purse, found by him in the street, to the house of X, is some evidence that he knows or believes X to be the loser of the purse. So, also, for the verbal utterance; A's mention of Charles the Great or Roentgen rays or the Klondike is some evidence that he knows or is aware of the existence of such a person, thing, or place. Ordinary experience usually suffices, without controversy, to tell us whether the inference is a strong one.

§ 267. *Same: Conduct as Evidence of Belief, and thus of the Fact Believed.* In the foregoing cases the knowledge or belief — *i.e.* the mental condition — to be evidenced was of itself material to the issue as a *factum probandum*, — *e.g.* whether an insured knew of his illness, or whether the public were made to believe in a certain defamatory meaning. There is, however, a large class of cases where the belief or knowledge or consciousness is of service only evidentially, as forming a second step of inference to some other fact which forms the ultimate object of the trial, — usually an act done by the person. For example, on an issue of the existence of a lost will, suppose the fact to be offered that the deceased on his death bed told his daughter, "My will was made in town yesterday"; or, on an issue of legitimacy, suppose the fact to be offered that the parents always treated the child as their own. In these instances suppose it to be argued that the deceased's utterance indicates circumstantially his belief in the will's execution, and that his belief in turn indicates the fact of the will's execution; or that the parents' conduct leads to the inference that they believed the child to have been born to them after marriage, and that this belief evidences the fact of such birth. Such a double circumstantial inference is in theory perfectly possible and proper. But in practice it opens up two possibilities of error, one for each of the two inferences. Hence it can best be considered in dealing with the second inference, *i.e.* Mental Traces of an Act (*post*, No. 147).

### 31. EUGENE ARAM'S CASE. (W. WILLS. *Circumstantial Evidence*. (Amer. ed. 1905. p. 104.)

In the memorable case of Eugene Aram [*post*, No. 95], who was tried in 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of his accomplice led to his conviction and execution. About thirteen years after the time of Clark's being missing, a laborer,

employed in digging for stone to supply a limekiln near Knaresborough, discovered a human skeleton near the edge of the cliff. It soon became suspected that the body was that of Clark, and the coroner held an inquest. Aram and Houseman were the persons who had last been seen with Clark, on the night before he was missing. The latter was summoned to attend the inquest, and discovered signs of uneasiness: at the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression, "This is no more Daniel Clark's bone than it is mine"; from which it was concluded, that if he was so certain that the bones before

him were not those of Clark, he could give some account of him. He was pressed with this observation, and, after various evasive accounts, he stated that he had seen Aram kill Clark, and that the body was buried in St. Robert's Cave, with the head to the right in the turn at the entrance of the cave, and upon search, pursuant to his statement, the skeleton of Clark was found in St. Robert's Cave, buried precisely as he had described it. Aram was consequently apprehended and tried at York in 1759, Houseman being the sole witness against him. He was convicted and executed.

### 32. THE PERREAUS' CASE. [Printed *post*, as No. 361.]

### 33. Lord Chancellor MACCLESFIELD'S CASE. (1725. HOWELL'S *State Trials*. XVI, 870).

[The Chancellor was impeached on the charge of having exacted money as the price of appointments to masterships in chancery and other offices. Whether the Chancellor was privy to the dealings and bargains had by some of these appointees beforehand with the Chancellor's secretary, Mr. Cottingham, and others, was a part of the issue.]

Mr. *Elde* called.

Mr. *Lutwyche*. — My lords, we desire that Mr. Elde be sworn. (Sworn accordingly.)

Mr. *Lutwyche*. — My lords, we desire Mr. Elde may be asked when it was he was admitted a Master in Chancery?

*Elde*. — My lords, I was admitted the first day of February last was twelvemonth.

Mr. *Lutwyche*. — We desire he may be asked, whether he applied in person to my lord Macclesfield to be admitted into this office, and whether it was upon death or resignation?

*Elde*. — Upon the death of Mr. William Fellowes some of my friends came to me, and put it into my head

that this office might be a proper office for me, and I took some time to consider of it. I had some encouragement at the bar, and was very unwilling to quit it, but after two days' consideration I went to my lord himself; I told his lordship an office was fallen by the death of Mr. Fellowes; if his lordship thought me a proper person; and I should be glad to have it. I was come to wait upon him about it. His lordship said, he had no manner of objection to me, he had known me a considerable time, and he believed I should make a good officer.

Mr. *Lutwyche*. — What further discourse was there?

*Elde*. — My lord at that time desired me further to consider of it, and come to him again: and so I did. I went back from his lordship, and I came again in a day or two, I believe it was the second after I came back from his lordship, and told him I had considered of it, and desired to know if his lordship thought fit to admit me; and I would make him a present of 4 or 5000 *l*. I cannot say which of the

two I said, but I believe it was 5000 *l*.

Mr. *Lutwyche*. — What answer did my lord return, when you made him that proposal?

*Elde*. — My lord said, Thee and I, or you and I, my lord was pleased to treat me as a friend, must not make bargains.

Mr. *Lutwyche*. — My lords, we desire he may be asked, whether my lord Macclesfield said in what manner he would treat with him, whether in a more beneficial manner than anybody else?

*Elde*. — My lord Macclesfield did say, that if I was desirous of having the office, he would treat with me in a different manner than he would with any man living; those were the words my lord used, to the best of my remembrance.

Serj. *Pengelly*. — After this answer of my lord Macclesfield, that they must not make bargains, what further application did he make?

*Elde*. — I made no further application at all, but spoke to Mr. Cottingham, meeting him in Westminster-hall and told him I had been at my lord's, and my lord was pleased to speak very kindly to me, and I had proposed to give him 5000 *l*. Mr. Cottingham answered, Guineas are handsomer.

Mr. *Lutwyche*. — We desire to know what he paid, and in what manner, and in what specie?

*Elde*. — My lords, I paid my lord — I cannot say I paid it *him*, but I paid 5000 guineas.

Mr. *Lutwyche*. — In what manner? Who did you pay it to?

Serj. *Pengelly*. — After this agreement with Mr. Cottingham to make it guineas, as being handsomer: we desire he may inform your lordships what he did pursuant to this, and what he carried with him?

*Elde*. — Upon this, I immediately went to my lord's; I was willing to get into the office as soon as I could. I did carry with me 5000 guineas in gold and Bank notes: I am not certain whether there was

3000 guineas in gold, or 2000, but I think there was three, and the residue of the money was in Bank notes. This I brought to my lord's house.

Serj. *Pengelly*. — My lords, we desire he may be asked, what they were put into, or in what they were carried?

*Elde*. — I had the money in my chambers. I could not tell how to convey it: it was a great burthen and weight; but recollecting I had a basket in my chamber, I put the guineas into the basket, and the notes with them; I went in a chair and took with me the basket in my chair. When I came to my lord's house I saw Mr. Cottingham there, and I gave him the basket, and desired him to carry it up to my lord.

Serj. *Pengelly*. — What answer did he return?

*Elde*. — I saw him go upstairs with the basket, and when he came down he intimated to me that he had delivered it.

Mr. *Lutwyche*. — My lords, we desire he may be asked, whether he acquainted Mr. Cottingham with what was in the basket?

*Elde*. — I did not.

Serj. *Pengelly*. — After Mr. Cottingham came and acquainted you he had delivered the basket, how long after that was it before you saw my lord?

*Elde*. — I did not see my lord after that till I was sworn in.

Serj. *Pengelly*. — How long was that after?

*Elde*. — I cannot be positive; but it was within a day, either the same day, or if not, it was the next day after.

Serj. *Pengelly*. — I desire he may be asked, when Mr. Cottingham returned downstairs, after the delivery of the basket, what he said to him about the time of his being admitted?

*Elde*. — I do not remember he said anything to me about my being admitted: I took that for granted.

Serj. *Pengelly*. — And when he



was admitted, whether he was admitted in the closet, or in what room?

*Elde.*—When I was to be admitted, my lord invited me to dinner, and some of my friends with me; and he was pleased to treat me, and some members of the House of Commons, in a very handsome manner: I was after dinner sworn in before them.

*Serj. Pengelly.*—I desire to ask, whether he had the basket again?

*Elde.*—Some months after I spoke to my lord's gentleman, and desired him, if he saw such a basket, that he would give it me back; and some time after he did so.

*Serj. Pengelly.*—Was any money returned in it?

*Elde.*—No, my lords, there was not. . . .

*Sir William Strickland.*—I desire to know what Mr. Cottingham did say, after he had carried up the basket and came down again?

*Elde.*—To the best of my remembrance, he said nothing to me, but (as I repeated before) he intimated to me that he had delivered it to my lord Macclesfield. I cannot say as to any particular discourse; but I understood that he had delivered it. . . .

(*Mr. Cottingham* called again.)

*Serj. Pengelly.*—My lords, we left the basket in the hands of Mr.

Cottingham; therefore it is necessary that Mr. Cottingham inform your lordships what became of it afterwards; what he did with the basket after he had it from Mr. Elde?

*Cottingham.*—My lords, I carried it up to my lord, and set it down in his study.

*Serj. Pengelly.*—What did you say to my lord?

*Cottingham.*—Nothing. Mr. Elde ordered me to carry up the basket; I carried it up, and there I set it down: I never saw it afterwards.

*Serj. Pengelly.*—Whether do you remember what answer my lord Macclesfield made at that time?

*Cottingham.*—None that I remember.

*Serj. Pengelly.*—Whether did he open the basket?

*Cottingham.*—No; the basket was covered up, and I set it down in my lord's closet.

*Serj. Pengelly.*—Whether, after that time, he appointed any time for Mr. Elde to be admitted?

*Cottingham.*—I think he was admitted that very same day.

*Serj. Pengelly.*—I desire this witness may be asked, whether he received anything from Mr. Elde, besides what was in the basket?

*Cottingham.*—Not a farthing, except my fees: nor no more of any of the Masters than my usual fees.

### 34. MARY BLANDY'S CASE. (1752. *HOWELL'S State Trials*. XVIII, 1148.)

[The accused's father had refused to let Captain Cranstoun pay court to the accused, his daughter Mary. The Captain was an adventurer, and turned out later to have had a wife already. Nevertheless, Mary Blandy was in love with him, and corresponded clandestinely. The father was taken ill, and died of arsenic poisoning. Some said that the daughter had threatened his life, and poisoned him to obtain the estate and marry Captain Crans-

toun. The daughter herself admitted putting a white powder into his tea and gruel, but insisted that the powder had been sent to her by Captain Cranstoun as a love powder to change her father's mind. A domestic testifies.] . . .

What conversation passed between Miss Blandy and her father [when he became ill]?—She fell down on her knees, and said to him, "Banish me, or send me to any remote part of the world; do what

you please, so you forgive me; and as to Mr. Cranstoun, I will never see him, speak to him, nor write to him more so long as I live, so you will forgive me."

What answer did he make? He said, "I forgive thee, my dear, and I hope God will forgive thee; but thee shouldst have considered better, than to have attempted anything against thy father; thee shouldst have considered, I was thy own father."

What said she to this?—She answered, "Sir, as for your illness, I am entirely innocent." I said, "Madam, I believe you must not say you are entirely innocent, for the powder that was taken out of the water-gruel, and the paper of powder that was taken out of the fire are now in such hands, that they must be publicly produced." I told her, I believed I had one dose, prepared for my master in a dish of tea, about six weeks ago.

Did you tell her this before her father?—I did.

What answer did she make?—She said, "I have put no powder into tea; I have put powder into water-gruel, and if you are injured, I am entirely innocent, for it was given me with another intent." . . .

Did he treat her, as if she herself was innocent?—He did, Sir.

Then all he said afterwards was as thinking his daughter very innocent?—It was, Sir.

As to the ruin of his daughter, did he think it was entirely owing to Cranstoun?—Mr. Blandy said, he believed his daughter entirely innocent of what had happened. . . .

Do you imagine, from the whole conversation that passed between her father, and her, that she was entirely innocent of the fact, of the powder being given?—I do not think so; she said she was innocent.

What was your opinion, did the father think her wholly unacquainted with the effect of the powder?—I believe he thought so; that is as much as I can say. . . .

*King's Counsel.*—What did he mean when he said, "Poor unfortunate girl! That ever she should be imposed upon, and led away by such a villain, to do such a thing!" What do you suppose he meant by such a thing?

*Gunnell.*—By giving him that which she did not know what it was. . . . Here Dr. Addington is appealed to by the Counsel for the Prisoner. . . .

*Prisoner's Counsel.*—Did not Miss Blandy declare to you, that she had always thought the powder innocent?—Yes.

Did she not always declare the same?—Yes.

The *King's Counsel* then interposed, and said, that he had not intended to mention what had passed in discourse between the prisoner and Dr. Addington; but that now, as her own counsel had been pleased to call for part of it, he desired the whole might be laid before the Court.

*Dr. Addington.*—On Monday night, August 12th, after Miss Blandy had been secured, and her papers, keys, etc., taken from her, she threw herself on the bed and groaned . . . saying that she had mixed a powder with the gruel, which her father had drank on the foregoing Monday and Tuesday nights; that she was the cause of his death, and that she desired life for no end, but to go through a painful penance for her sin. She protested at the same time, that she had never mixed the powder with anything else that he had swallowed; and that she did not know it to be poison, till she had seen its effects. She said, that she had received the powder from Mr. Cranstoun, with a present of Scotch pebbles; that he wrote on the paper that held it, "The powder to clean the pebbles with"; that he had assured her it was harmless; that he had often taken it himself; that if she would give her father some of it now and then, a little and a little

at a time, in any liquid, it would make him kind to him and her. . . .

*King's Counsel.* — Was anything more said by the prisoner and you?

*Dr. A.* — I asked her, whether she had been so weak as to believe the powder that she had put into her father's tea and gruel to be so harmless as Mr. Cranstoun had represented it? Why Mr. Cranstoun had called it a powder to clean pebbles, if it was intended only to make Mr. Blandy kind? Why she had not tried it on herself before she ventured to try it on her father? Why she had flung it into the fire? Why, if she had really thought it innocent, she had been fearful of a discovery, when part of it swam on top of the tea? Why, when she had found it hurtful to her father, she had neglected, so many days, to call proper assistance to him? And why, when I was called at last, she had endeavored to keep me in the dark, and hide the true cause of his illness?

What answers did she make to these questions? — I cannot justly say; but very well remember, that they were not such as gave me any satisfaction.

*Prisoner's Counsel.* — She said then, that she was entirely ignorant of the effects of the powder.

*Dr. Addington.* — She said, that she did not know it to be poison, till she had seen its effects. . . .

*Mr. Baron LEGGE.* [Summing up the evidence for the jury]. — Gentlemen of the jury: Mary Blandy, the prisoner at the bar, stands indicted before you for the murder of Francis Blandy, her late father, by mixing poison in tea and water-gruel, which she had prepared for him. To which she has pleaded, that she is Not Guilty. . . . Thus far is undeniably true and agreed on all sides, that Mr. Blandy died by poison; and that that poison was administered to him by his daughter, the prisoner at the bar. What you are to try, is reduced to this single question, Whether the prisoner, at

the time she gave it to her father, knew that it was poison, and what effect it would have? If you believe that she knew it to be poison, the other part, viz. that she knew the effect, is consequential, and you must find her guilty. On the other hand, if you are satisfied, from her general character, from what has been said by the evidence on her part, and from what she has said herself, that she did not know it to be poison, nor had any malicious intention against her father, you ought to acquit her. But if you think she knowingly gave poison to her father, you can do no other than find her guilty.

The jury consulted together about five minutes, and then turned to the Court.

*Cl. of Arr.* — Gentlemen, are you all agreed on your verdict?

*Jury.* — Yes.

*Cl. of Arr.* — Who shall say for you?

*Jury.* — Our foreman.

*Cl. of Arr.* — Mary Blandy, hold up thy hand (Which she did). Gentlemen of the jury, look upon the prisoner: How say you, is Mary Blandy guilty of the felony and murder whereof she stands indicted, or Not Guilty?

*Jury.* — Guilty. . . .

On Monday, April 6th, 1752, the day destined for her execution, . . . about nine o'clock she came out of her bedchamber, and was attended by the minister to the place of execution. . . . She then addressed herself to them, with a clear and audible voice, in the following terms:

"Good people, give me leave to declare to you, that I am perfectly innocent, as to any intention to destroy, or even hurt my dear father; that I did not know, or even suspect, that there was any poisonous quality in the fatal powder I gave him; though I can never be too much punished for being even the innocent cause of his death." . . .

35. DAVID DOWNIE'S CASE. (1794. *HOWELL'S State Trials*. XXIV, 89).

[Indictment for treason by a conspiracy to subvert the government by force; one of the issues was whether Downie knew anything of the pikes prepared by order of the Committee of which he was a member.] . . . *Robert Orrock* sworn.

Mr. *Solicitor-General*. — You live at the Water of Leith? — At Dean.

Were you a member of the British Convention that met last winter? — Yes. . . .

Did you ever hear of such a thing as a Committee of Union? — Yes.

Who composed it? — I do not know.

Do you know any of them at all? — Yes. . . .

Who else? — Mr. Watts, Mr. Downie, Mr. Stoke.

Were you yourself a member of that committee? — Yes, I was.

Where did the committee meet when the society was sent to? — I do not know whether word came to, but our society met, and delegated me for to go.

Where was that? — At George Ross's.

Were you ever present at more than one meeting? — I was present at many — at different ones. I was not present every night there; often from business I could not get to attend.

Were you there when there was any conversation about arming? — Yes I was. . . . Some one there said that we had better apply for arms, and it was said again, by whom I cannot say, there need no application; for, if the Friends of the People applied to government, they would get none. It was then said, I believe by Mr. Watt, I could not, as I have now sworn, say he was the person, that there was no law in existence to hinder us from getting arms for the defense of the country; at the time upon which I was saying this conversation passed, I said I would make one. . . .

Tell now who were present. Was Downie present at this meeting of the committee? — Yes, Mr. Downie, Mr. M'Ewan, Mr. Bonthron. . . .

You accordingly made such a weapon? — Yes, I did. . . . After I had made it, I was in the Committee of Union.

Did you produce the two weapons in the committee or the other room? — In the other room.

Who desired you to come there? — A lad came to me, I am sure I could not recollect his name; I produced them in the other committee, not the Committee of Union.

What do you call the Committee of Union? — It was the Sub-Committee. There was Watt, Downie, Bonthron, M'Ewan, and another man I did not know. . . .

You were desired to make some more? — They asked me what would be the price.

Who asked you? — Mr. Watt: after that, Mr. Downie said not a word, he spoke no more, and the conversation was carried on by Watt, it was not long, it was a few minutes. Watt said, what is the price of them? I said, I cannot say; I had only made that on the stick, and this part of it; I had not made any more of them, I desired to go out, which I did, and I went into the other room, and he told me, says he, you will make a few of these. . . .

Was Downie with you, when Mr. Watt gave you orders to make a few? Yes, says he, make a few. . . .

*Court*. — Were you paid by anybody? — I was paid, not then: I suspected Watt to be my paymaster, but M'Ewan came to me that night, and said, I was to be paid by Mr. Downie, and he was to pay me the whole I had the commission for, which was 5 dozen; he brought me that word.

Did you ever go to Downie's in consequence of that order? — No.

You made those pikes in consequence of that order?—The only order, when Downie was present, was only to make a few.

*Court.*—You say now to make two or three dozen. Robert Orrock, I beg you will pay attention, for you said “only a few.”

Did you ever go to Mr. Downie?—No.

Did you ever deliver any to Mr. Watt?—No more than the two to the committee. . . .

*William Brown* sworn.

*Mr. Anstruther.*—Mr. Brown, had you ever an order to make any of these things?—Yes.

Did you ever make any?—Yes.

How many did you make?—I made 14 of that kind, and one like this.

Show which?—I made 14 of that kind, and one of that (the single spear 14, the other the halberd).

Did you deliver these pikes? Yes, I took them to Mr. Watt one afternoon; Mr. Watt, when I took them in, told me he was sorry he had not money to pay me; I told him I was needing the money; he seemed as if he would borrow the money—he said Mr. Downie would pay me; he gave me a line to Mr. Downie to pay me. . . .

Was there no other order?—No order what it was for.

Had you any conversation about it with Mr. Downie?—I am not certain but Mr. Downie might have asked me how Mr. Watt was, but there was no altercation between Mr. Downie and me. I got the money upon Mr. Watt's line.

You did not say to Downie what it was for?—No, he never asked me.

*Cross-examination.*

*Mr. Clerk.*—Did Downie ask you what the money was for?—No, he did not.

*Mr. Anstruther.*—Your evidence is this—Watt gave you an order upon Downie, and Downie paid you the money; is not that it?—Yes.

Downie paid you the money? Yes. . . .

*Defense.*

*Mr. Cullen.*—Gentlemen of the Jury;— . . . With regard to the circumstance of making these arms, I will endeavor to state to you the substance of the evidence; and I trust I shall do it fairly. The first witness is William Orrock, a smith, who was a member of the society of the Friends of the People, at the Water of Leith, and one of their delegates to the Committee of Union. He gives you a history of these pikes from the beginning. . . . Orrock next tells you, of his being one day sent for by Watt to come and speak to him in the house of Arthur M'Ewan at the Water of Leith, and he then told Watt what kind of weapon he had made. Upon this, Watt said, a different one would be better, and accordingly Orrock made one agreeable to Watt's directions. . . . He next tells you, that after he had left the room, and before he quitted the house, Watt came to him, and repeated the same directions, and that Downie was then along with Watt; and he farther says, that afterwards Watt came to him at his own house, and desired him to make towards three dozen of them. The next witness was William Brown, likewise a smith; and he tells you, that, by the orders of Mr. Watt, he made fourteen pikes of one kind, and one of another kind, and brought them all home to Watt. Upon asking payment, Watt said, he was sorry he had not money then to give him, but the witness mentioning that he needed money at the time, Watt said, that although he had not then money himself, he would get it from another person, and accordingly he wrote, and gave him an order upon Downie, for the money, which was 1*l.* 2*s.* 6*d.* This order did not in the least mention what the money was for, and when Brown went to Downie and got the money, he tells you, that he did not say a single word to Downie

as to what the money was for, nor did Downie ask him. It was an order in the same way, as if Watt had been borrowing the money from Downie. . . . Brown tells you, that all those which were made by him, he carried home to Watt. Those again made by Orrock, were seized while they were still in Orrock's own possession. The sheriff-officers tell you, that although they made the strictest search, yet they could find no such thing in Downie's house. . . . Brown tells you, that it was Mr. Watt alone who employed and directed him to make those pikes, and that no other person ever spoke to him on the subject. He made them for Watt, and when they were made, he carried them home to Watt. Downie was not present when the order was given, nor is there the least reason to suppose that he knew anything at all of the matter. As to the circumstance of Brown's receiving payment from Downie, you have heard how it happened. Watt, not having the money when Brown pressed for it, gave an order upon Downie for it; but that order did not express what the money was for; and Brown expressly tells you, that he neither told Downie what it was for, nor did Downie ask him. In short, it was nothing more than the trifling sum of 1*l.* 2*s.* 6*d.* which Downie advanced for Watt, without inquiring or knowing what it was for; and you have no reason to suppose, and still less any right to conclude, that Downie knew the money he thus advanced was for making pikes.

Anything said by Brown, therefore, does not, in the most distant degree, affect Mr. Downie. . . . As to his afterwards bringing up two to George Ross's, and showing them there one evening in a company where Mr. Downie was present, you will remark, he does not say that he had been desired to do so, nor that he had any sort of orders for these pikes, either from the Committee of Union, or from the Subcommittee of Ways and Means. Indeed, you have not the least evidence, that either of those committees did ever authorize any such thing, or know anything about the making these weapons; and you have not only no evidence, but you have not even the shadow of reason to suppose, that Mr. Downie ever heard of, or knew anything about the pikes, till they were accidentally brought in the way I have mentioned, and shown to the company in which he happened to be at Ross's. . . . And it is of great importance for you to remark, gentlemen, that, excepting upon this single occasion at George Ross's, there is not so much as a word in the evidence, either of Orrock, or of any other witness, which can tend to show that Mr. Downie gave any orders, had any concern, or knew anything whatever regarding those pikes. In short, if you are to fix any guilt upon him as to this business, it must be founded on the solitary testimony of this Mr. Orrock, swearing to casual words passing at a tavern meeting, where Mr. Downie happened to be present.

36. *Lord COCHRANE'S CASE.* (ARTHUR GRIFFITHS. *Mysteries of Police and Crime.* 1898. Vol. I, p. 223.) . . .

The prosecution and conviction of Lord Cochrane in 1814 may well be classed under this head, for it was distinctly an error of "la haute police," of the Government, which as the head of all police, authorizes the pursuit of all wrongdoing, and sets the criminal law in motion

against all supposed offenders. It has now been generally accepted that the trial and prosecution of Lord Cochrane (afterwards the Earl of Dundonald) was a gross case of judicial error.

He was charged with having conspired to cause a rise in the public

Funds by disseminating false news. There were, no doubt, suspicious circumstances connecting him with the frauds of which he was wrongfully convicted, but he had a good answer to all. His conviction and severe sentence, after a trial that showed the bitter animosity of the judge (Ellenborough) against a political foe, caused a strong revulsion of feeling in the public mind, and it was generally believed that he had not had fair play. The law, indeed, fell upon him heavily. He was found guilty, and sentenced to pay a fine of £500, to stand in the pillory, and to be imprisoned for twelve months. These penalties involved the forfeiture of his naval rank, and he had risen by many deeds of conspicuous gallantry to be one of the foremost officers in the British navy. His name was erased from the list of Knights of the Bath, and he was socially disgraced. How he lived to be rehabilitated and restored to his rank and dignities is the best proof of his wrongful conviction.

The story as told by Lord Cochrane himself in his affidavits will best describe what happened. Having just put a new ship in commission, *H. M. S. Tonnant*, he was preparing her for sea with a convoy. He was an inventive genius, and he had recently patented certain lamps for the use of the ships sailing with him. He had gone into the city one morning, the 21st of February, 1814, to supervise their manufacture, when a servant followed him with a note. It had been brought to his house by a military officer in uniform, whose name was not known, nor could it be deciphered from the illegible scrawl of the letter. Lord Cochrane was expecting news from the Peninsula, where a brother of his lay desperately wounded, and he sent back word to his house that he would come to see the officer at the earliest possible moment. When he returned he found a person he barely knew, who gave the name

of Raudon de Berenger, and told a strange tale. He was a prisoner for debt, he said, within the rules of the King's Bench, and he had come to Lord Cochrane to implore him to release him from his difficulties and carry him to America in his ship. His request was refused—it could not be granted, indeed, according to naval rules; and de Berenger was dismissed. But before he left he urged piteously that to return to the King's Bench prison in full uniform would attract suspicion. It was not stated how he had left it, but he no doubt implied that he had escaped and changed into uniform somewhere. Why he did not go back to the same place to resume his plain clothes did not appear. Lord Cochrane only knew that in answer to his urgent entreaty he had lent him some clothes. The room was at that instant littered with clothes, which were to be sent on board the *Tonnant*, and he unsuspectingly gave de Berenger a "civilian's hat and coat." This was a capital part of the charge against Lord Cochrane.

De Berenger had altogether lied about himself. He had not come from within the rules of the King's Bench but from Dover, where he had been seen the previous night at the Ship hotel. He was then in uniform, and pretended to be an aide-de-camp to Lord Cathcart, the bearer of important dispatches. He made no secret of the transcendent news he brought, viz., that Bonaparte had been killed by the Cossacks, Louis XVIII proclaimed, and the allied armies were on the point of occupying Paris. To give greater publicity to the intelligence, he sent it by letter to the port-admiral at Deal, to be forwarded to the government in London by means of the semaphore telegraph. The effect of this startling news was to send up stocks 10 per cent, and many speculators who sold on the rise realized enormous sums. De Berenger, still in uniform, followed in

a post chaise, but on reaching London he dismissed it, took a hackney coach, and drove straight to Lord Cochrane's. He had some slight acquaintance with his lordship, and had already petitioned him for a passage to America, an application which had been refused. There was nothing extraordinary, then, in de Berenger's visit. His lordship, again, claimed that de Berenger's call on him, instead of going straight to the Stock Exchange to commence operations, indicated that he had weakened in his plot, and did not see how to carry it through. "Had I been his confederate," says Lord Cochrane, in his affidavit, "it is not within the bounds of credibility that he would have come in the first instance to my house, and waited two hours for my return home, in place of carrying out the plot he had undertaken, or that I should have been occupied in perfecting my lamp invention for the use of the convoy, of which I was in a few days to take charge, instead of being on *the only spot* where any advantage to be derived from the Stock Exchange hoax could be realized, had I been a participator in it. Such advantage must have been immediate, before the truth came out; and to have reaped it, had I been guilty, it was necessary that I should not lose a moment. It is still more improbable that being aware of the hoax, I should not have speculated largely for the special risk of that day."

We may take Lord Cochrane's word, as an officer and a gentleman, that he had no guilty knowledge of de Berenger's scheme; but here again the luck was against him, for it came out in evidence that his

brokers *had* sold stock for him on the day of the fraud. Yet the operation was not an isolated one made on that occasion only. Lord Cochrane declared that he had for some time past anticipated a favorable conclusion to the war. "I had held shares for the rise," he said, "and had made money by sales. The stock I held on the day of the fraud was less than I usually had, and it was sold under an old order given to my brokers to sell at a certain price. It had necessarily to be sold." It was clear to Lord Cochrane's friends — who, indeed, and rightly, held him to be incapable of stooping to fraud — that had he contemplated it he would have been a larger holder of stock on the day in question, when he actually held less than usual. On these grounds alone they were of opinion he should have been absolved from the charge.

Great lawyers like Lords Campbell, Brougham, and Erskine have commented on this case, all of them expressing their belief in Lord Cochrane's innocence. The late Chief Baron, Sir Fitzroy Kelly, in criticizing the trial, ends by expressing his regret that "we cannot blot out this dark page from our legal and judicial history." These are the opinions of legal luminaries in the fullest mental vigor and acumen at the time of the trial. They were intimately acquainted with all the facts, and we may accept their judgment that a great and grievous wrong has been done to a nobleman of high character, who had not spared himself in the service of the State. Their view was tardily supported by the Government in restoring Lord Cochrane to his rightful position.

**37. FORBES v. MORSE.** (1896. SUPREME COURT OF VERMONT. 69 Vt. 220.)

Case for enticing away the plaintiff's servant. Plea, the general issue. Trial by jury at the March Term, 1896, Rutland County, TAFT,

J., presiding. Verdict directed, and judgment thereon rendered, for the defendant. The plaintiff excepted.

On July 30, 1890, a contract was



made between the plaintiff and Lucy Wells that she should keep the plaintiff's house and look after his children so long as they should need a home there and that the plaintiff should treat her kindly and discontinue certain law suits between them. She was not to begin until her parents ceased to need her care. Her father having died September 24, 1890, she entered upon her performance of the contract November 8, 1890, and continued thereunder until about May 1, 1891, when she left the plaintiff's service without his consent. The plaintiff testified that he found the letter recited below upon a stand in Miss Wells' room during her stay at his house; that it was in the defendant's [her brother's] handwriting, and that the copy produced was made by him and is correct; that many letters passed between the defendant and Miss Wells while she was at his house; that there was an envelope with the letter in question which was new in appearance, but that he did not copy it and could not remember its date. The plaintiff produced no other testimony as to the time when the letter was written or received. The letter read as follows: "Home, Sabbath P.M. My Dear Sister:— Having a postal to send you, thought you would pardon me if I should add a few lines. I am lonely to-day and should be so happy if you were here to chat with me. Since I wrote you I have taken a very short vacation. Left home Thursday at 3.40 for Holyoke, Mass., stopped over night with cousins in North Adams. Next day went on to Holyoke and returned last eve. I had as pleasant a time as one would naturally have all alone. Bought quite a bill of stationery. Saw Mr. Dr. Hemner a few moments. Weather was terrible hot and some rain. Tuesday has been more comfortable. My dear sister, it does seem so strange to have you away from here and Castleton too. It grows more lonely each day. It

seems some times as if I never was to see you again. Saw Judge Bromley on the train last eve., says he heard from pretty good source that Prof. Leavenworth and Miss Wardsworth were to be married before school opened. This is all a secret. What do you think about it, wouldn't we have some talking to do if — was to carry you to Castleton to-night? Must not write more now. Wish you could see my sweet peas; they are just immense. Wish I could pick you some to-night. Lucy, I wish you could have heard Mr. B. last night. It seemed just the thing for you. Of course we always find some one else for the coat to fit. He said rash promises were far better broken than kept. I do so wish you were back at Castleton. You cannot think how strange it seems to me coming through there one week ago Sunday eve., to think I could perhaps never stop there as I have so many times and receive your pleasant welcome. I think you had better come back. I mean just what I say and I am sure unless you feel different from what I think you do that it is your solemn duty to come. Wouldn't we all try to be happy once more? You do not know how much I miss you. But I must not say so, must I? Would send you some sweet peas if it would do. We have lots of them and they do look so fine from my window where I am writing. But I must close. I will only add, that if you do not like Mr. Forbes I think it very unkind in him to ask you to leave your school and sacrifice so much for him. Love to Herbert and much for yourself, from Brother Frank." The court ruled that there was no evidence tending to show that the letter was written or received between July 30, 1890, when the contract was made, and the May following, when Miss Wells left the plaintiff's service, and excluded the letter; to which the plaintiff excepted. The court also

excluded, against the plaintiff's exception, the deposition of B. G. Howe, the substance of which is stated in the opinion. Miss Wells and a deceased wife of the plaintiff and a deceased wife of the defendant, were sisters. The defendant was married to Miss Wells in May, 1892.

*Horace W. Love*, for the plaintiff.  
*Henry A. Harman and George E. Lawrence*, for the defendant.

MUNSON, J.—On the thirtieth day of July, 1890, Lucy Wells contracted with the plaintiff to become his housekeeper upon the happening of a certain contingency. She entered the plaintiff's service under this contract on the eighth day of November, 1890, and remained in it until the first of May, 1891. The plaintiff claims that she was enticed from his service by the defendant. The plaintiff offered evidence of the contents of an undated letter in the defendant's handwriting, which was found on a stand in Miss Wells' room during her stay at the plaintiff's, having with it an envelope which had the appearance of being new. The court excluded this evidence on the ground that there was no testimony tending to show that the letter was written after the thirtieth of July, 1890, the date of Miss Wells' contract with the plaintiff. It doubtless might have been held that there was no evidence tending to show that it was written after the eighth of November, the day Miss Wells entered upon her service; for the

letter itself shows that it was written just after a period of extreme heat, and while the sweet peas visible from the writer's window were in full bloom. But a further consideration is necessary to determine whether there was evidence tending to show that it was written after July thirtieth, the date of the contract. The whole burden of the letter is the writer's regret for Miss Wells' absence, and for the prospect of her continued absence from Castleton, where she had been teaching. The last sentence connects the plaintiff by name with the subject matter of the writer's regret. "If you do not like Mr. Forbes, I think it very unkind in him to ask you to leave your school and sacrifice so much for him." If this stood alone, it might seem to point to some proposition made, rather than to an arrangement actually entered into. But the writer had just before expressed his regret that she had not heard the recent remark of another, that "rash promises were far better broken than kept," saying, "it seemed just the thing for you." When the two are taken together they seem to refer to something which Miss Wells has agreed to do for the plaintiff which is inconsistent with the continuance of her work as a teacher. It must therefore be held that the letter itself affords evidence that it was written after the contract above referred to was made. . . .

Judgment reversed and cause remanded.

### 38. WILLIAM BARNARD'S CASE. (1758. HOWELL'S *State Trials*. XIX, 824).

[Attempted blackmail by sending threatening letters. The Duke of Marlborough had received three threatening letters, in close succession, demanding benefits, and appointing an interview. The Duke kept the appointments. Each letter showed apparently a knowledge of the Duke's conduct at the prior

occasion. The accused being present on all three occasions, and no other person, he was arrested and charged]. . . .

The *Duke of Marlborough* sworn.  
*Duke of Marlborough*.—I received this letter from an unknown hand, dated the 29th of November, and directed to me, appointing me

to meet the writer on a certain spot in Hyde Park.

The first Letter read: "To his Grace the Duke of Marlborough.— With care and speed. My lord: November 29th. As ceremony is an idle thing upon most occasions, more especially to persons in my state of mind, I shall proceed immediately to acquaint you with the motive and end of addressing this epistle to you, which is equally interesting to us both. You are to know, then, that my present situation in life is such, that I should prefer annihilation to a continuance in it; desperate diseases require desperate remedies; and you are the man I have pitched upon, either to make me, or to unmake myself. . . . It has employed my invention for some time to find out a method to destroy another, without exposing my own life; that I have accomplished, and defy the law. Now for the application of it. I am desperate, and must be provided for; you have it in your power; it is my business to make it your inclination, to serve me; which you must determine to comply with, by procuring me a genteel support for my life; or your own will be at a period before this sessions of parliament is over. I have more motives than one for singling you out first upon this occasion; and I give you this fair warning, because the means I shall make use of are too fatal to be eluded by the power of physic. If you think this of any consequence, you will not fail to meet the author on Sunday next, at ten in the morning, or on Monday (if the weather should be rainy on Sunday), near the first tree beyond the stile in Hyde Park, in the foot-walk to Kensington; secrecy and compliance may preserve you from a double danger of this sort; as there is a certain part of the world, where your death has more than been wished for, upon other motives. I know the world too well to trust this secret to any breast but my own.

A few days determines me your friend or enemy. Felton." "You will apprehend that I mean you should be alone; and depend upon it, that a discovery of any artifice in this affair will be fatal to you; my safety is insured by my silence; for confession only can condemn me."

Q. What did your grace do upon receipt of this letter?

*Duke of Marlborough.*—I went to the place at the time appointed. It was at the first tree near the stile in Hyde Park, in the way to Kensington, at the end of the Serpentine water, betwixt that water and a little pond. I was there some time, and saw nobody stop that I could suspect to be the person; upon which I was going away; but as I came to Hyde Park corner, I turned my horse, and saw a person stand loitering, and looking at the water over the bridge. This was, I believe, within twenty yards of the tree, and this induced me to go back again. I rode up to the person very gently, and passed by him once or twice, expecting him to speak to me, but he did not. I made him a bow, and asked him, if he had something to say to me? He said, No, I don't know you. I said, I am the Duke of Marlborough; now you know me, I imagine you have something to say to me. He said, No, I have not. Then I rode away.

Was your grace armed?—I had pistols before me.

Had your grace any great coat on?—No, I had not. My star might easily be seen.

Does your grace see anybody here that you saw there?—It was the prisoner at the bar.

Had your grace any servant or attendant with you?—I had no servant with me; there was a person, a friend of mine, at a good distance in the Park. A day or two after, I cannot be sure whether it was the next day, or the day after that, I received a second letter.

*Counsel for the prisoner.*—I am under a great difficulty, whether

I shall object against this letter being read or not. . . .

*Court.*—The use made of this letter is to support the evidence of the first letter, let the contents be what they will. The use they make of it is to show, that the prisoner at the bar was the writer or sender of the first letter.

The second Letter read :

"To his grace the Duke of Marlborough.—My lord; You receive this as an acknowledgment of your punctuality as to the time and place of meeting on Sunday last, though it was owing to you that it answered no purpose. The pageantry of being armed, and the ensign of your order, were useless, and too conspicuous; you needed no attendant; the place was not calculated for mischief, nor was any intended. If you walk in the west-isle of Westminster Abbey, towards eleven o'clock on Sunday next, your sagacity will point out the person, whom you will address by asking his company to take a turn or two with you. You will not fail, on inquiry, to be acquainted with the name and place of abode, according to which directions you will please to send two or three hundred-pound Bank notes the next day by the penny-post. Exert not your curiosity too early; it is in your power to make me grateful on certain terms. I have friends who are faithful; but they do not bark before they bite. I am, &c. &c. F."

*Q.* What did your grace do upon the receipt of this second letter?

*D. of Marlborough.*—I went to Westminster Abbey at the time the letter appointed. I had been walking there about five or six minutes before I saw anybody that I suspected; then I saw the person I had seen before in Hyde Park, and another person who seemed to be a good-looking man, a substantial tradesman; they came in and looked on the monuments. I, knowing the person again, went and stood by them; but the prisoner said

nothing to me; soon after they both of them went towards the choir; the stranger, I may call him, went into the choir, and the prisoner turned back and came towards me, but did not speak to me. Then I asked him, if he had anything to say to me, or any commands for me? He said, No, my lord, I have not. I said, Sure you have? He said, No, my lord. He walked up and down one side the isle and I the other to give him a little more time; but he did not speak; then I went out at the great door and left him in the Abbey. I looked back to see if he watched me going out, but I did not see him.

*Q.* Had your grace anybody with you in the Abbey? *A.* There were two or three people placed in disguise, ready, if I had given them the signal, to have him taken up. Though I was certain it was the same person whom I had seen and spoken to in the Park, I thought not proper to give the signal, but to run a little longer risk rather than to take up an innocent man. Very soon after this I received another letter; this is it.

The third Letter read: "To his Grace the Duke of Marlborough.—My lord.—I am fully convinced you had a companion on Sunday. I interpret it as owing to the weakness of human nature; but such proceeding is far from being ingenuous, and may produce bad effects; whilst it is impossible to answer the end proposed. You will see me again soon, as it were by accident, and may easily find where I go to. . . . These and the former terms complied with, insure your safety; my revenge, in case of non-compliance (or any scheme to expose me) will be slower, but not less sure. . . . The family of the BLOODS is not extinct, though they are not in my scheme."

*Duke of Marlborough.*—At about two months after the receipt of this, I received another letter; this is it.

The fourth Letter read: "To his Grace the Duke of Marlborough. — May it please your grace; I have reason to believe, that the son of one Barnard, a surveyor in Abingdon buildings, Westminster, is acquainted with some secrets that nearly concern your safety; his father is now out of town, which will give you an opportunity of questioning him more privately. It would be useless to your grace, as well as dangerous to me, to appear more publicly in this affair. Your sincere friend, Anonymous." "He frequently goes to Storey's Gate coffee house."

*Duke of Marlborough.* — There is no date to this letter. About a week or ten days after I received this letter, I sent a message to the coffee-house, by Mr. Merrick, who returned and told me he found Mr. Barnard there, and that he said, "What could the Duke of Marlborough want with him?" He had spoke with him once in Hyde Park, and another time in Westminster Abbey. The messenger told me, he said he would wait on me, which he did at Marlborough House, about half an hour after ten o'clock, I think, on the Friday following.

*Prisoner.* — It was Thursday, my lord.

*Duke of Marlborough.* — I cannot be sure as to the day. When he came in, I knew, at first sight, it was the same person that I had seen in the Park and in the Abbey. I desired him to walk with me into a room, and immediately shut the door when we were in. I asked him as before; he said, he had nothing to say to me; then I told him of the last letter I received, that it mentioned his name, and that he knew something concerning my safety; he said he knew nothing of it. Then I recapitulated all the letters, beginning with the first, and remarked to him, that it was strange to me, that a man that wrote so very correct, without false English in any shape, should be guilty of so low an action; he said,

A man may be very learned and very poor. I then took notice of the second letter, and said, there must be something very odd in the man; he said, I imagine the man must be mad. I said, he seems surprised that I should have pistols; said he, I was surprised to see your grace with pistols, and your star on. I said, why was you surprised at that? His answer was, after stopping a moment, it was so cold a day; I wondered you had not a great coat on; then I afterwards showed him the letter again where his name was mentioned, and walked with him to the window; and as I read it, when I came to that part where it said his father was out of town, he said, it is very odd, my father was then out of town. I said nothing to him of that, though it struck me a good deal, as there was no date to the letter. I said, if you are innocent, it behooves you much more than me to find out the author of those letters, particularly the last; for it was an attempt to blast his character behind his back; he seemed to give me a smile, and away he went. I did not apprehend him then. . . .

*Counsel for defense.* — In consequence of the first letter, your grace went into the Park on horseback, and was there some time without seeing anybody you suspected. Were there not people there? — *D. of Marl.* I saw several people on horseback, and some few walking in a hurry on foot.

Pray, my lord duke, after you had seen this person loitering, was there anything going forward, such as hunting a duck, or the like? No, nothing in the world as I saw; it was a very cold day.

Your lordship said there was another person at a distance, an attendant on your grace; How far might that person be off when you was speaking to the prisoner? I cannot tell exactly. I had spoke to him to keep a great way off.

Was he in view of your grace? I dare say he was.

he had met the duke of Marlborough, and these circumstances of his grace's taking notice of him; he mentioned it as an extraordinary thing. I asked him, if he had not looked a little impudently (as he has a near sight) at him, or pulled his glass out? He said, he saw another gentleman at a distance, and the duke was armed; and he imagined there might be a duel going forwards; he has from that time to this mentioned it as a very strange event several times in my house, without any reserve at all.

*Cross-examination.* . . .

Did you hear him mention his seeing the duke of Marlborough in Westminster Abbey?—I have very often, and very publicly, and with some surprise; as he has that in Hyde Park. I said to him, I would not have you be public in speaking of things of this kind, lest a use be made of it to your disadvantage.

*Thomas Barnard sworn.*

*T. Barnard.*—I am first cousin to the prisoner at the bar. On Saturday, the 3d of December, I was at Kensington, and lay at my uncle's house there and dined there. On the Sunday the prisoner came there before dinner, he said he had been to do some business that way. He dined with us; there were my uncle, aunt, he, and I; he related that circumstance to us of meeting with the duke of Marlborough in Hyde Park; he said he rode up to him, and asked if he knew who he was; he answered, No; he replied, I am the duke of Marlborough. He related it with some cheerfulness, though as a matter of surprise.

How long have you known the prisoner?—From his birth; he is in business with his father; I always understood he would succeed his father; I never knew him to behave any otherwise than well in my life. I never thought him extravagant, nor never heard so; I had always looked upon him to be an honest man; his father is in very great business. . . .

*Joseph Barnard sworn.*

*J. Barnard.*—I am uncle to the prisoner at the bar; I live at Kensington; my nephew Thomas Barnard lay at my house on the Saturday night, and dined with the prisoner at the bar on the Sunday. I remember he then mentioned having met with the duke of Marlborough in Hyde Park, while we were sitting at dinner. I said I was surprised he should meet with him that day; he said he saw but one gentleman at a distance, and that the duke was armed; and his grace looked him full in the face, very earnestly (which he seemed to speak with a great deal of pleasure to me); he is very nearsighted, he can see nothing at a distance without the use of a glass. I have heard him since speak four or five times of seeing the duke in Westminster Abbey. . . .

*Thomas Calcut sworn.*

*T. Calcut.*—I live at Kensington; I remember the prisoner coming there on a Sunday morning; a very cold, foggy morning; with some message from his father to me, to know whether the solicitor had paid some money or not. He was under his father, as I am under mine; he desired me to go with him; I said, stay and dine with me; he said, he could not promise, because he had promised to dine with his uncle Joseph; he went into the parlor, and said, it is vastly cold; there has been the oddest accident happened as I came over the Park! the duke of Marlborough came up to me, and asked me, if I knew him? I said, No; He asked me, if I wanted anything with him? I told him, No. He said, I am the duke of Marlborough, if you want anything with me; then the duke went away, and he came there. He expressed a great surprise at it, and I thought it a very odd affair. . . .

*Mrs. Mary Wilson sworn.*

*Mrs. Wilson.*—I dined at Mr. Barnard's on Thursday, the 8th of December; the prisoner I remem-

ber said he had been in Hyde Park some days before, and there he saw a gentleman on horseback come up to him, and asked him, if he had anything to say to him? He said, No; then he said, I am the duke of Marlborough, now you know me, have you anything to say to me? He said, No. He talked of this very freely to us all.

*James Greenwood* sworn.

*Greenwood.*—I live at Deptford, with a relation in the brewing way; I came from Deptford on Saturday to the prisoner's father's; and on the Sunday following I was there at breakfast; I solicited the prisoner to get himself dressed to go with me into the Park, being to meet a person at twelve o'clock; I with a good deal of difficulty got him to dress himself; I put my shirt on in the parlor, and after that he put on his; I fancy we breakfasted about nine o'clock; when we got to the end of Henry VII's chapel, the prisoner would have gone the other way into the Park without going through the Abbey; I took hold of his sleeve, and said, Barnard, you shall go through the Abbey. . . . After we had stayed there some time, I saw his grace the duke of Marlborough, who was got pretty near us; upon seeing the duke, I jogged him by the elbow, and said, step this way; he seemed to look at him.

Had you heard what happened in Hyde Park previous to this?—I had; I believe it was told me by the prisoner at the bar; on my jogging him we walked up the middle isle towards the choir. I said, did you see that gentleman in the blue coat, or do you know him? No, said he, not I. No? said I, it is the duke of Marlborough; we will walk to the monument again. The duke came, and placed himself pretty near me a second time; after this we walked away. . . .

Why did you jog him?—Because he is very nearsighted. At last I think it so happened, we passed the duke between two of the pillars;

and as I had hold of his arm walking together, there was barely room for three people to pass abreast; the duke rather gave way, and made, as I thought, a kind of bow. Upon this I said, the duke of Marlborough's behavior is extremely particular; he certainly has something to say to you; I suppose he does not choose to say it while I am with you, I will go into the choir, and do you walk up and down here, and he will possibly speak to you. While I was there, I looked; the first thing I saw was the duke of Marlborough and the prisoner at the bar, with their heads bowing together, as if it was the first salutation.

Had the prisoner the least inclination to go into the Abbey before you proposed it to him?—No; he did not discover any.

Did he discover any inclination to be left alone, when you proposed to go into the choir?—No, he did not in the least; in some few minutes after, the prisoner and I met together, he told me the duke of Marlborough was gone out of the Abbey, he had seen him go out. I said, What passed? To which he replied, the duke said, did you speak to me? or who spoke first I cannot tell.

In this transaction did the prisoner appear openly, or as if he had some secret transaction to do with the duke?—No, it was open and clear.

Did you see the duke come in?—No, I did not; we were employed in looking at the monuments; we looked at several. . . .

Where did you go when you went out of the Abbey?—We went immediately into the Park; and after walking there, we met with two ladies whom I knew, and to whom Mr. Barnard was not unknown, to whom we related this affair; he always related these things, that is, this and that in Hyde Park, as matter of great curiosity.

How long have you been acquainted with him?—I have been acquainted with him seven years.

What is his character? — I know nothing to the contrary but that he is an industrious, sober young man.

Did you ever hear that he was a profligate, expensive young man? — No, never.

His father is in great business, is he not? — His father's business is a very considerable thing. . . .

*The Rev. Dr. Markham* sworn.

*Dr. Markham.* — I have known the prisoner some years; I have always considered him as a young man of remarkable sobriety and attention to business. I have had some experience of him; I intrusted him with the execution of some matters of importance relating to myself. . . . If he had come to me wanting money, he might easily have imposed on me; he might have had anything of me; he is one of the chief persons I trusted, and I don't know a man on whom I would have had a greater reliance; I thought him remarkably able in his business, and very likely to be a considerable man; and I never was more astonished in my life than when I heard this strange story. . . .

*Mr. Serjeant Davy* (for the prosecution):

My lord, and gentlemen of the jury; I am sorry to take up any more of your time; but the defense consisting of various parts, I would beg leave to trespass a little longer on your patience. . . . I do not mean to draw your attention back to the several circumstances of the prosecution; they are all before you, and they are too strong and striking to be easily forgot. . . . It will remain for your consideration, it is now the capital question, whether these circumstances laid before you, consisting of five or six parts on the part of the prisoner, may be reconciled with the suspicion of his guilt? Because, if they may, it is no defense at all. Gentlemen, the first is, the prisoner being sent by his father to Kensington on this Sunday on which he met the duke in Hyde Park. . . . His father

talked of his going; he did go — what does that prove? Does it prove he was not to go to Hyde Park any other way? Whoever was the writer of these letters, certainly intended to have a meeting on both the Sundays, in the Park and in the Abbey, in a very public manner. . . . Gentlemen, the next part of the defense is, that he at several times and to several people related the meetings he had had with the duke, and the extraordinary occurrences. This indeed corresponds with the observations I made: the writer of these letters proposed to meet the duke at a time that people were walking out on a Sunday, and in the Abbey, the most public places, and at the most public times: is that irreconcilable with the suspicion that the prisoner (if he was the author of these letters) might have been contriving with other persons, telling people of the several meetings he had had with the duke, and the substance of those meetings? . . . The next circumstance is, Mr. Greenwood's evidence of going with him to Westminster Abbey. . . . There is not a circumstance in all that part of the story of Mr. Greenwood's evidence, which suits so well as this of his guilt; first he wanted to get rid of Mr. Greenwood, and when he could not do that, then making no secret of having seen the duke, and make that tally with his telling him he had met him. . . .

These are all the circumstances that they have insisted upon as proofs of his innocence, except one, that is his character. . . . Gentlemen, when you come to consider that, character goes but a very little, and indeed no way at all, towards proving his innocence. . . . Might it not happen that, a man betwixt twenty and thirty years of age, dependent in some measure upon his father, might have a secret call for money, which he would wish his father, and those friends that are fond of lending money, not to be acquainted with? We know very



well, there are certain circumstances, some in this capital city of London, where a man might be very hard driven for the want of money, which he would choose to hide from his friends. . . . Gentlemen, he is safe in your hands. I doubt not but that you will do your duty;

if you think him guilty, you will find him so; if not, you will acquit him. With regard to the duke, his grace has discharged his duty which he owed to the public, which he will at all times do, and is perfectly indifferent about the issue of it. The jury acquitted the prisoner.

#### SUBTITLE D: EVIDENCE TO PROVE PLAN (DESIGN, INTENTION)

39. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

*General Principle.* The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act designed or planned (*post*, Nos. 121–129). The question here is how such a design or plan may be evidenced circumstantially. Of the three conceivable sorts of circumstantial evidence (*ante*, No. 3), only two are practically available, viz. : (1) Conduct, as indicating the inward existence of a design ; (2) Prior or subsequent existence of the design, as indicating its existence at the time in question.

Design or Plan is to be carefully distinguished from Intent. In many parts of the substantive law, particularly in the criminal law, the state of mind accompanying an act becomes legally important, and is for such purposes one of the propositions in issue. This may be termed Intent. It is not used evidentially to prove something else ; it is one of the ultimate parts of the issue. Design or Plan, on the other hand, has almost invariably (except where a conspiracy is charged) a purely evidential use ; the inference is to be from the Design to the Act, and thus the Design must in its turn be evidenced.

Design must also be distinguished from Emotion or Motive (anger, jealousy, and the like). Thus, threats of violence may evidence both a Design and an Emotion.

*Sundry Instances (Tools, Materials, Liquor Licenses, Preparations, Journeys, Experiments, Inquiries, Prophecies, and the Like).* The kinds of conduct which may evidence a design are innumerable in their variety.

The acquisition or possession of instruments, tools, or other means of doing the act, is admissible as a significant circumstance ; the possession signifies a probable design to use ; *e.g.* the possession of the apparatus or a license for gaming or for selling liquor, evidences a design to game or to sell. The presence of a person at a place or a journey towards it, together with behavior showing a desire for secrecy, may indicate a design to commit an unlawful act there. Where a person makes inquiries, either by word of mouth or by messenger, or by experimentation searches for knowledge, it is natural to infer that he designs to use the knowledge thus sought ; and if the knowledge is needed or is adapted to help in doing the act in question, the inquiries or experiments are thus evidential of a design to do the act. Obscure intimation and allusions are often significant ; words of a person, uttered beforehand, indicating a knowledge that an event is about to occur or an act to happen, tend to show a design to do it or to coöperate in it, so far as it was not definitely expected or foreknown by others, because

<sup>1</sup> Adapted from the same author's *Treatise on Evidence* (1905, Vol. I, §§ 237, 238).

in that case the knowledge could be possessed only by the one planning it or privy to the plan; and the probative value of such evidence would vary with the particularity and exclusiveness of the foreknowledge thus indicated.

Explicit threats to do injury, and other express declarations of a design or plan, have of course probative value, but are rather to be classed as testimonial evidence.

Note that we are here not yet concerned with the use of Design or Plan as evidence of the Doing of an Act (*post*, No. 121), but only with conduct as circumstantial evidence that a Design or Plan existed.

40. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. p. 545.)

*Infirmative Hypotheses explaining away the Evidence of an Intention.* . . .

2. In regard to *predictions* of approaching mischief to an individual who is afterwards found murdered, it may have been the fact that the accused was really speaking the conviction of his own mind, and without any criminal intention. And it has been well remarked that idle prophecies of death are quite as frequently the offspring of superstition, as of premeditated assassination.

3. *Expressions of ill will.* . . . Supposing them to have been actually uttered as proved, they may have been uttered on some sudden provocation, or in the extremity of momentary passion, or during a state of intoxication, without any real, settled, and abiding feeling of malice against the subject of them.

4. *Declarations of intention.* . . . It does not necessarily follow, because a man has avowed an intention to commit a crime, that such intention really existed in his mind. The words may have been spoken in mere bravado, or with the view of alarming or annoying the object of them; or, like expressions of ill will, may have been uttered in a moment of passion, or state of intoxication, without any settled evil purpose.

5. *Threats.* The infirmative suppositions applicable to these circumstances are the same with those just enumerated; with the addition of the following. Threats being considered to be either uttered in the presence and hearing of the person threatened, or intended to come to his knowledge, the sole intention may have been to *alarm* and intimidate him. If the accused really intended the mischief avowed and threatened, it is not *reasonable* that he would *make it known* to the object, and thereby naturally put him on his guard against the intended act. . . .

6. *Preparations for crime.* The infirmative suppositions applicable to circumstances of this class comprise the following. . . . The appearances indicative of preparation may have been correctly observed, . . . and yet may have no real connection with the accused, having emanated from no conduct on his part, but having been wholly *fabricated* by the real criminal or some other person; as by conveying into the possession of the accused (so as to become a subject of observation) a poison of the same description as that afterwards used in committing the crime, or perhaps the identical instrument used in committing it. . . . Again, the appearances supposed to be indicative of preparation may be . . . devoid of any real criminal quality whatever. Thus, it may be true not only that the accused had the poison in his possession before the crime, but that he had it knowingly, having actually procured it with his own hands. And yet, even in this case, the important psychological fact of *intention* may be wholly wanting.

41. THE CASE OF THE *DRYAD*. (ARTHUR GRIFFITHS. *Mysteries of Police and Crime*. 1898. Vol. I, p. 389.)

Frauds upon underwriters and marine insurance officers cannot be said to have ceased to this day. A story of the sea that would serve as the foundation of an exciting sea romance is to be found in the loss of the brig *Dryad*, in 1840. The plot was cleverly laid, and proved perfectly successful for a time. The ship was lost, the insurances paid; the delinquents—two brothers named Wallace, one a merchant, the other a sea captain—might have enjoyed their ill-gotten gains to the end, but for the inconvenient return of some of the crew. Then suspicions that had been only vague became certainty, and one brother, Patrick Wallace, was forthwith arrested. The other, Michael, who had been living in the Commercial Road, absconded, abandoning his house and furniture. He was traced, in due course, to Lancaster, where he was taken. . . .

The brothers had set about their fraud with all the skill of old hands. Michael purchased the preponderating share in the brig *Dryad*—three fourths, in fact, £1600 in all—and had expended another £600 making her “a first-class ship.” Patrick Wallace took the part of securing a complaisant shipmaster, and found him in Edmund Loose, who was appointed to the *Dryad* with the clear understanding that he should lose her somewhere, somehow, the sooner the better. While these essential preliminaries were being settled, Michael Wallace sought out a merchant to ship a cargo, and the Messrs. Zulueta chartered the *Dryad* to carry goods to the value of £300 to Santa Cruz, in the West Indies. Heavy insurances were next effected on the ship and the freight. The owners got a policy for £2200 from the Marine Insurance on the first, and £300 on the latter. But the Wallaces insured the *Dryad* and her cargo further in other offices,

and these policies standing in their names amounted to £6617, a sum far exceeding their actual holding in the ship and what she carried. The chief testimony against the Wallaces was that of the mate of the *Dryad*, who escaped the shipwreck, and who described the whole proceeding. He described the lading of the ship at Liverpool, and how, when Messrs. Zulueta's goods were all on board, quite one third of the hold remained unfilled. Michael Wallace was to have shipped a consignment of flannels, cloths, beef, pork, butter, and earthenware, but never did so, although Captain Loose had signed bills of lading as having received them. A suspicious circumstance was the insufficient quantity of provisions sent for the crew. It was usual to send enough for both outward and homeward voyages, but barely enough for the first was provided. The ship was also badly found. There was no proper log-line on board; the pump was never made to suck; the longboat was fitted with tackle, and ready to launch at a moment's notice. Nothing happened, as the weather continued “set fair,” but they steered a strange course, northward, deviating from the customary track, and first sighted land at Virgin Gorda, and, holding on, ran close to the breakers off Anagada, both of them rocky reefs on the outer fringe of the West Indies. The captain was called up from below, while the mate put the ship's head about. But the captain, coming on deck, seized the helm and ran her straight for the breakers. Now the crew interposed, swearing they did not mean to lose their lives for the captain's pleasure, whereupon he left the wheel, and one of the crew raking it, put the ship's head round. Two days the course was between the Silver Keys and the north of St. Domingo, but so much

too near the former, which are dangerous rocks, that the *Dryad* struck upon one of them, but again she escaped, this time with the loss of her rudder. They then coasted along the coast of St. Domingo, close in shore, and after passing Cape Hayti struck on a reef at Cape Cruz. She might have been got off, for she was making no water, but no efforts were made. The

crew with the captain deserted her, but not before one of them had detected a large hole under her stern which could not have been made by a rock, but was, no doubt, the captain's work from one of the state-rooms. He was never brought to trial, however, for he died before proceedings were taken.

Both the Wallaces were found guilty and sentenced for life.

**42. THE CHICAGO ANARCHISTS' CASE.** (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905, p. 154.)

In the Chicago Criminal Court, eight anarchists were found guilty of murder, seven of them being condemned to death. [The judgment was affirmed in 122 Ill. 1.] The seven were August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg. The other, condemned to fifteen years' imprisonment, was Oscar W. Neeffe.

On May 1, 1866, many workmen in Chicago struck to obtain a reduction of their working day to eight hours. There was great excitement, and many meetings and speeches. On the 4th of May, such a meeting was held at the Haymarket on Randolph St., in Chicago. This meeting was addressed by several of the defendants, and during the address of Spies a charge was made on the crowd by 180 policemen. Bombs were thrown and guns fired at the policemen, and six policemen were killed and six wounded. The defendants were tried for the murder of one of these policemen, Michael J. Degan.

The *corpus delicti* was established by undisputed evidence. Degan was killed by a bomb; of that there was no doubt. It seemed equally well established that not one of the defendants threw the bomb, but they were charged as accessories.

It was shown that they were all members of several anarchistic societies, particularly one known as

the International Arbeiter Association, often called the "Internationals" and the "I. A. A." This association was divided into groups, of which there were about eighty in the United States. Certain members of each group were armed and drilled regularly. The most proficient of these armed groups, including the defendants, were also members of a more exclusive organization known as the "Lehr und Wehr Verein." Each member had a Springfield rifle and other weapons, and each was known by number only. The object of these societies was the destruction of organized society and the right of private property. The members openly and secretly advocated the destruction of property, the murder of officers of the law and of property owners, and the general use of deadly weapons, dynamite, bombs, and other explosives.

The group of defendants published three incendiary newspapers, — *The Arbeiter Zeitung* in German, published by Spies, Schwab, Fischer, and Neebe; *The Alarm* in English, published by Parsons and Fielden; and a still more inflammable sheet called *The Anarchist*, published by Engel. These papers published the signals by which the anarchists were called together at various times, the signal for the meeting of May 4th being "Ruhe." They constantly advocated social revolution and war upon the police and the militia.

Their articles, written by the defendants, contained hundreds of expressions like the following: "Daggers and revolvers are easily to be gotten, hand-grenades are cheaply to be produced; explosives too can be obtained." "Workingmen, arm yourselves." "We wonder whether the workingmen will at last supply themselves with weapons, dynamite, and prussic acid." "If we do not bestir ourselves for a bloody revolution, we cannot leave anything to our children but poverty and slavery." "One man armed with a dynamite bomb is equal to one regiment of militia." "Dynamite is the emancipator." "Assassination will remove the evil from the face of the earth." Articles were published on "How to use dynamite properly," "Manufacturing Bombs," "Exercise in Arms," and extracts were published from the book of Herr Most, giving detailed instructions in the manufacture and use of bombs and other weapons. In many public speeches the defendants had advocated the killing of the police and the militia, using the same arguments and the same language as in their written editorials. The date for beginning the "social revolution" was May 1, 1886, for the reason that various labor unions were to strike at that time for the eight-hour day. These defendants did not approve of the eight-hour agitation, except as a means that they could use to bring about total destruction of society. They expected the discontent and want accompanying the strike to drive many workmen to the ranks of the Internationals. The defendants urged all to procure arms for the successful resistance of the authorities during the continuance of the strike. They even made arrangements to purchase guns in large quantities.

In the meantime they had all been experimenting in the manufacture and explosion of bombs. Particularly the defendant Lingg had been

so employed. It became material to show that the bomb with which Policeman Degan was killed had been manufactured by Lingg. To this end it was proved first that the bomb was round. Several witnesses who saw it thrown so described it, and moreover, it was not of the material of which ordinary gas-pipe bombs are made. The manufacture of round bombs requires greater skill and greater secrecy. Lingg was shown to have manufactured such round bombs in large numbers. It was also shown that a basketful of his bombs had been carried to the Haymarket meeting. In the next place, the bomb was exploded by means of a fuse. The bombs that Lingg had constructed were all made of two semiglobular shells fastened together, filled with dynamite, and fired by means of a fuse passed through a hole bored for the purpose and attached to a fulminating cap. Further, the pieces of the bomb taken from Degan's body were of the same chemical composition as the bombs made by Lingg. They were composed of tin and lead, with traces of antimony, iron, and zinc. There is no commercial substance containing all these ingredients. In Lingg's bombs the tin had been added to the lead to procure sufficient resistance for explosion.

The bomb that exploded had on it a small iron nut, which was extracted from the body of a bystander. This indicated that the two semiglobular halves of the bomb had been fastened together with a bolt. Practically all of the bombs made by Lingg, and later discovered, were made of the two semiglobular halves, bolted together, and this nut taken from the body of the bystander exactly fitted those bolts. Lingg himself had been seen making such bombs, with a handkerchief over his face to prevent the inhalation of gas. He had bought dynamite. A poisonous gas exhales from dynamite. The con-

clusion follows that he put dynamite in the bombs that he was seen to make.

In Lingg's room, after the murder, were found various articles, among them the following: a cold chisel, a file, shells, loaded cartridges, sheets of lead, bolts, two empty gas-pipe bombs and two loaded with dynamite, a rifle, a round bomb loaded with dynamite, a piece of block tin, a piece of candlestick composed of tin, lead, antimony, and zinc, fuse of various lengths, and fulminating caps. He had every ingredient necessary for the making of bombs like the one that killed Degan. Differences in the exact amounts of these ingredients in the different bombs would be accounted for by the fact that he made each semiglobe separately with a small ladle over the kitchen stove, casting each in a small clay mold made by himself.

Lingg's purpose in making the bombs is to be found from the purposes for which the International Arbeiter Association existed. These have been before stated, and were made apparent from the publications and speeches of the other defendants. There was evidence of a distinct plan on the part of the defendants to attack the police of

the whole city on the night in question. Members of the Association helped themselves to bombs brought by Lingg to the rendezvous, and were to make separate attacks upon the police stations, gradually concentrating to fight in the center of the city. This plan had to be changed because the police were concentrated near the neighborhood of the Haymarket.

There was a vast array of evidence of the foregoing sorts, and the defendants were convicted under a statute of Illinois making accessories punishable as principals. The Court found that Degan's death was directly brought about by the conspiracies and plans of the defendants and other "Internationals." The bombs were made and obtained in pursuance of the plan. The meeting was called at the Haymarket on the appointed evening. That day the signal "Ruhe" was printed, to begin the revolution. In pursuance of the plan, and varying from it only as was made necessary by the location of the police, a bomb was first hurled at them and then the "Internationals" opened fire with guns. The jury were justified in believing that the bomb was thrown either by a member of the conspiracy or by an agent employed to throw it.

**43. MADAME LAFARGE'S CASE.** (ARTHUR GRIFFITHS. *Mysteries of Police and Crime*. 1898. Vol. I, p. 193.)

One of the greatest poisoning trials on record in any country is that of Madame Lafarge, and its interest is undying, for to this day the case is surrounded in mystery. Although the guilt of the accused was proved to the satisfaction of the jury at the time of the trial, strong doubts were then entertained, and still possess acute legal minds, as to the justice of her conviction. . . .

In the month of January, 1840, an iron-master, Lafarge, residing at Glandier, in the Limousin, died suddenly of an unknown malady. His family, friends, and immediate

neighbors at once accused his wife of having poisoned him. This wife differed greatly in breeding and disposition from the deceased. Marie Fortunée Capelle was the daughter of a French artillery colonel, who had served in Napoleon's Guard. She was well connected, her grandmother having been a fellow pupil of the Duchess of Orléans under Madame de Genlis; her aunts were well married, one to a Prussian diplomat, the other to M. Garat, the well-known general secretary of the Bank of France. She had been delicately nurtured; her father

held good military commands, and was intimate with the best people about, many of them nobles of the First Empire, and the child was petted by the Duchess of Dalmatia (Madame Soult), the Princess of Echmuhl (Madame Ney), Madame de Cambacères, and so forth. Colonel Capelle died early, and Marie's mother, having married again, also died. Marie was left to the care of distant relations; she had a small fortune of her own, which was applied to her education, and she was sent to one of the best schools in Paris. . . . Marie grew up distinguished looking, if not absolutely pretty; tall, slim, with dead-white complexion, jet-black hair worn in straight shining plaits, fine dark eyes, and a sweet but somewhat sad smile. These are the chief features of contemporary portraits.

To marry her was now the wish of her people, and she was willing enough to become independent. Some say that a suitor was sought through the matrimonial agents, others deny it positively. In any case, a proposal came from a certain Charles Pouch Lafarge of Glandier, a man of decent family but inferior to the Capelles, not much to look at, about thirty, and supposed to be prosperous in his business. The marriage was hastily arranged, and as quickly solemnized — in no more than five days.

Lafarge drew a rosy picture of his house: a large mansion in a wide park, with beautiful views, where all were eager to welcome the bride and make her happy. As they traveled thither the scales fell quickly from Marie's eyes. Her new husband changed in tone; from beseeching he became rudely dictatorial, and he seems to have soon wounded the delicate susceptibilities of his wife. The climax was reached on arrival at Glandier, a dirty, squalid place. Threading its dark, narrow streets, they reached the mansion — only a poor place, after all, surrounded with smoking

chimneys: a cold, damp, dark house, dull without, bare within. The shock was terrible, and Madame Lafarge declared she had been cruelly deceived. Life in such surroundings, tied to such a man, seemed utterly impossible. She fled to her own room, and there indicted a strange letter to her husband, a letter that was the starting point of suspicion against her, and which she afterwards explained away as merely a first mad outburst of disappointment and despair. Her object was to get free at all costs from this hateful and unbearable marriage.

This letter, dated August 25, 1839, began thus: "Charles, — I am about to implore pardon on my knees. I have betrayed you culpably. I love not you, but another. . . ." And it continued in the same tone for several sheets. Then she implored her husband to release her and let her go that very evening. "Get two horses ready, I will ride to Bordeaux and then take ship to Smyrna. I will leave you all my possessions. May God turn them to your advantage, you deserve it. As for me, I will live by my own exertions. Let no one know that I ever existed. . . . If this does not satisfy you, I will take arsenic, *I have some* . . . spare me, be the guardian angel of a poor orphan girl, or, if you choose, slay me, and say I have killed myself. Marie."

This strange effusion was read with consternation not only by Lafarge, but by his mother, his sister, and her husband. A stormy scene followed between Lafarge and his wife, but he won her over at length. She withdrew her letter, declaring that she did not mean what she wrote, and that she would do her best to make him happy.

"I have accepted my position," she wrote to M. Garat, "although it is difficult. But with a little strength of mind, with patience, and my husband's love, I may grow



contented. Charles adores me and I cannot but be touched by the caresses lavished upon me." To another she wrote that she struggled hard to be satisfied with her life. Her husband under a rough shell possessed a noble heart; her mother-in-law and sister-in-law overwhelmed her with attentions.

Now she gradually settled down into domesticity, and busied herself with household affairs. M. Lafarge made no secret of his wish to employ part of his wife's fortune in developing his works. He had come upon an important discovery in iron smelting, and only needed capital to make it highly profitable. His wife was so persuaded of the value of this invention that she lent him money, and used her influence with her relatives to secure a loan for him in addition. Husband and wife now made wills whereby they bequeathed their separate estates to each other. Lafarge, however, made a second will, almost immediately, in favor of his mother and sister, an underhand proceeding, of which his wife was not told. Then he started for Paris, to secure a patent for his new invention, taking with him a general power of attorney to raise money on his wife's property. During their separation many affectionate letters passed between them.

The first attempt to poison, according to the prosecution, was made at the time of this visit to Paris. Madame Lafarge conceived the tender idea of her having her portrait painted, and sending it to console her absent spouse. At the same time she asked her mother-in-law to make some small cakes to accompany the picture. They were made and sent, with a letter, written by the mother, at Marie Lafarge's request, begging Lafarge to eat *one* of the cakes at a particular hour on a particular day. She would eat one also at Glandier at the same moment, and thus a mysterious affinity might be set

up between them. A great deal turned on this incident. The case containing the picture and the rest was dispatched on December 16th, by diligence, and reached Paris on the 18th. But on opening the box, one large cake was found, not several small ones. How and when had the change been effected? The prosecution declared it was Marie's doing. The box had undoubtedly been tampered with; it left Glandier, or was supposed to leave, fastened down with small screws. On reaching Paris it was secured with long nails, and the articles inside were not placed as they had been on departure. But the object of the change was evidently evil. For now Lafarge tore off a corner of the large cake, ate it, and the same night was seized with violent convulsions. It was presumably a poisoned cake, although the fact was never verified, but Marie Lafarge was held responsible for it, and eventually charged with an attempt to murder her husband.

In support of this grave charge it was found that on the 12th of December, two days before the box left, she had purchased a quantity of arsenic from a chemist in the neighboring town. Her letter asking for it was produced at the trial, and it is worth reproducing. "Sir," she wrote, "I am overrun with rats. I have tried *nux vomica* quite without effect. Will you, and can you, trust me with a little arsenic? You may count upon my being most careful, and I shall only use it in a linen closet." At the same time she asked for other harmless drugs. Further suspicious circumstances were adduced against her. It was urged that after the case had been dispatched to Paris she was strangely agitated, her excitement increasing on the arrival of news that her husband was taken ill, that she expressed the gravest fears of a bad ending, and took it almost for granted that he must die.

Yet, as the defense presently

showed, there were points also in her favor. Would Marie have made her mother-in-law write referring to the small cakes, one of which the son was to eat, if she knew that no small cakes but one large one would be found within? How could she have substituted the large for the small? There was as much evidence to show that she could not have effected the exchange as that she had done so. Might not some one else have made the change? (Here was the first importation of another possible agency in the murder, which never seems to have been investigated at the time, but to which I shall return presently, to explain how Marie Lafarge may have borne the brunt of another person's crime.) Again, if she wanted thus to poison her husband, it would have been at the risk of injuring her favorite sister also. For this sister lived in Paris, and Lafarge had written that she often called to see him. She might then have been present when the case was opened, and might have been poisoned too.

Lafarge so far recovered that he was able to return to Glandier, which he reached on the 5th of January, 1840. That same day Madame Lafarge wrote to the same chemist's for more arsenic. It was a curious letter, and certainly calculated to prejudice people against her. She told the chemist that her servants had made the first lot into a clever paste which her doctor had seen, and had given her a prescription for it; she said this "so as to quiet the chemist's conscience, and lest he should think she meant to poison the whole province of Limoges." She also informed the chemist that her husband was indisposed, but that this same doctor attributed it to the shaking of the journey, and that with rest he would soon be better. But he got worse, rapidly worse. His symptoms were alarming, and pointed undoubtedly to arsenical

poisoning, judged by our modern knowledge.

Madame Lafarge, senior, now became strongly suspicious of her daughter-in-law, and she insisted on remaining always by her son's bedside. Marie opposed this, and wished to be her husband's sole nurse, and, according to the prosecution, would have kept every one else from him. She does not seem to have succeeded, for the relatives and servants were constantly in the sick room. Some of the latter were very much on the mother's side, and one, a lady companion, Anna Brun, afterwards deposed that she had seen Marie go to a cupboard and take a white powder from it, which she mixed with the medicine and food given to Lafarge. Madame Lafarge, senior, again, and her daughter, showed the medical attendant a cup of chicken broth on the surface of which white powder was floating. The doctor said it was probably lime from the white-washed wall. The ladies tried the experiment of mixing lime with broth, and did not obtain the same appearance. Yet more, Anna Brun, having seen Marie Lafarge mix powder as before in her husband's drink, heard him cry out, "What have you given me? It burns like fire." "I am not surprised," replied Marie, quietly. "They let you have wine, although you are suffering from inflammation of the stomach."

Yet Marie Lafarge made no mystery of having arsenic. Not only did she speak of it in the early days, but during the illness she received a quantity openly before them all. It was brought her to Lafarge's bedside by one of his clerks, Denis Barbier (of whom more directly), and she put it into her pocket. She told her husband she had it. He had been complaining of the rats that disturbed him overhead, and the arsenic was to kill them. Lafarge took the poison from his wife, handed it over to a maid-

servant, and desired her to use it in a paste as a vermin killer. Here the facts were scarcely against Marie Lafarge.

Matters did not improve, however, and on the 13th Madame Lafarge, senior, sent a special messenger to fetch a new doctor from a more distant town. On their way back to Glandier, this messenger, the above-mentioned Denis Barbier confided to the doctor that he had often bought arsenic for Marie Lafarge, but that she had begged him to say nothing about it. The doctor, Lespinasse, by name, saw the patient, immediately ordered antidotes, while some of the white powder was sent for examination to the chemist who had originally supplied the arsenic. He does not seem to have detected poison, but he (the chemist) replied that nothing more should be given Lafarge unless it had been prepared by a sure hand. On this the mother denounced Marie to the now dying Lafarge as his murderess. The wife, who stood there with white face and streaming eyes, heard the terrible accusation, but made no protest.

From that till his last moments he could not bear the sight of his wife. Once, when she offered him a drink, he motioned, horror stricken, for her to leave him, and she was not present at his death on the 14th of January. A painful scene followed between the mother and Marie by the side of the still warm corpse. High words, upbraidings, threats on the one side, indignant denials on the other. Then Marie's private letters were seized, the lock of her strong box having been forced, and next day, the whole matter having been reported to the officers of the law, a post mortem was ordered, on suspicion of poisoning. "Impossible," cried the doctor, who had regularly attended the deceased. "You must all be wrong. It would be abominable to suspect a crime without more to go upon."

The post mortem was, however,

made, yet with such strange carelessness that the result was valueless. It may be stated at once that the presence of arsenic was never satisfactorily proved. There were several early examinations of the remains, but the experts never fully agreed. Orfila, the most eminent French toxicologist of his day, was called in to correct the first autopsy, and his opinion was accepted as final. He was convinced that there were traces of arsenic in the body. They were, however, infinitesimal; Orfila put it at half a milligram. Raspail, another distinguished French doctor, called it the hundredth part of a milligram, and for that reason declared against Orfila. His conclusion, arrived at long after her conviction, was in favor of the accused. The jury, he maintained, ought not to have found her guilty, because no definite proof was shown of the presence of arsenic in the corpse.

This point was not the only one in the poor woman's favor. Even supposing that Lafarge had been poisoned — which, in truth, is highly probable — the evidence against her was never conclusive, and there were many suspicious circumstances to incriminate another person. This was Denis Barbier, Lafarge's clerk, who lived in the house under a false name, and whose character was decidedly bad. Lafarge was not a man above suspicion himself, and he long used this Barbier to assist him in shady financial transactions — the manufacture of forged bills of exchange which were negotiated for advances. Barbier had conceived a strong dislike to Marie Lafarge from the first; it was he who originated the adverse reports. At the trial he frequently contradicted himself, as when he said at one time he had volunteered the information that he had been buying arsenic for Marie, and at another, a few minutes later, that he only confessed this when pressed. Barbier then was Lafarge's confederate in

forgery; had these frauds been discovered he would have shared Lafarge's fate. It came out that he had been in Paris when Lafarge was there, but secretly. Why? When the illness of the iron-master proved mortal, Barbier was heard to say, "Now I shall be master here!" All through that illness he had access to the sick-room, and he could easily have added the poison to the various drinks and nutriment given to Lafarge. Again, when the possibilities of murder were first discussed, he was suspiciously ready to declare that it was not *he* who gave the poison. Finally, the German jurists, already quoted, wound up their argument against him by saying, "We do not actually accuse Barbier, but had we been the public prosecutors we would rather have formulated charges against him than against Madame Lafarge."

Summing up the whole question, they were of opinion that the case was full of mystery. There were

suspicious that Lafarge had been poisoned, but so vague and uncertain that no conviction was justified. The proofs against the person accused were altogether insufficient. On the other hand, there were many conjectures favorable to her. Moreover, there was the very gravest circumstantial evidence against another person. The verdict should decidedly have been "not proven." . . .

Marie Lafarge was sentenced to hard labor for life, after exposure in the public pillory. The latter was remitted, but she went into the Montpelier prison and remained there many years. Not long after her conviction there was a strong revulsion of feeling, and during her seclusion she received some six thousand letters from outside. . . . At last, having suffered seriously in health, she appealed to Napoleon III, the head of the Second Empire, and obtained a full pardon in 1852.

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*Boston Transcript*, Paris Dispatch of Dec. 10, 1912. An effort to obtain the revision of the trial of Mme. LaFarge, a young and beautiful society woman, who was sentenced to imprisonment for life in 1840 for the murder of her husband by poisoning him with arsenic, is to be made by a powerful committee of scientific men, writers, and politicians which has just been formed. The case of Mme. LaFarge was very similar to that of Mrs. Maybrick. It caused a great sensation at the time. The conviction was due principally to the evidence of the great chemist Matthieu Orfila, who swore to the presence of arsenic in the dead man's body. Another leading scien-

tist of the period, François Raspail, hastened to Tulle, where the trial took place, in order to declare to the jury that Orfila's evidence was insufficient as arsenic was present in all bodies, but he arrived too late.

Raspail's contention is supported to some extent by later experiments carried out by Armand Gautier, and Professor Gabriel Bertrand has just concluded a series of studies in every living organism, and further that the methods hitherto employed to test the presence of arsenic in bodies had had the effect of introducing arsenic into those bodies. Mme. LaFarge died in 1855, two years after she had been pardoned by Napoleon III.

## SUBTITLE B: EVIDENCE TO PROVE INTENT

46. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> The state of mind accompanying a forbidden act is frequently an element material to make the act a crime. The notion of Intent, in crimes, may be also, in a broad sense, that of ultimate purpose or object, but it is regarded simply as a state of mind coexisting with the act, and is of a conglomerate nature peculiar to itself. Thus, when A shoots a pistol whose ball strikes X, A's state of mind as he shot may have been that he was pulling the trigger of a pistol whose ball would (a) strike a tree, (b) strike Z, (c) strike a person, X, who was about to assault A himself. The criminal law tells us whether either of these states of mind is criminal; but it does not need to generalize in one phrase or term the exact nature of all possible criminal states of mind; it merely defines the criminal state of mind essential for each respective crime.

The idea of criminal Intent, then, usually partakes of Knowledge, Plan, Hostility, and the like; its absence is often indicated by the ideas of ignorance, reasonable belief, and the like. So far as evidence of it is concerned, Intent as a separate proposition for proof does not commonly exist. Knowledge, Emotion, and Design, are distinct from each other, and have more or less distinct modes of proof. But so far as Intent is constituted of one or more of these as ingredients, it forms no separate title of proof; for each of the ingredients is to be proved in the way proper to itself.

There is, however, one element in Intent which is distinct from any of those above, and may thus have to be shown by different evidence. This is the element of *deliberateness* or *willfulness*, — the negative of inadvertence, accident. Thus one who incorrectly writes the addition of a column of figures may do so either inadvertently or intentionally; one who knocks over a lamp and sets fire to a house may do so either inadvertently or deliberately. This element is distinct from that of ignorance, or mistake through ignorance (*i.e.* the absence of knowledge). For instance, one who utters a counterfeit bill may have known it to be counterfeit, but may pay it out by inadvertence, having drawn from the wrong part of his pocketbook. So, on the other hand, one who sells tainted milk does not do it by accident, though he is ignorant of its bad quality. In other words, one may lack knowledge and yet act deliberately, or one may have knowledge and yet act inadvertently. Thus, this distinct element in criminal Intent consists not alone in the voluntary movement of the muscles (*i.e.* in action), nor yet in a knowledge of the nature of an act, but in the combination of the two, — *the specific will to act, i.e.* the volition exercised with conscious reference to

<sup>1</sup> Adapted from the same author's *Treatise on Evidence* (1905, Vol. I, §§ 242, 301).

*whatever knowledge the actor has* on the subject of the act. We do not necessarily show this in showing Knowledge; and, conversely, we may find Knowledge conceded and still have to show criminal knowledge. For instance, on the one hand, a person might know arsenic to be poisonous, and yet might administer it inadvertently to another; so that independently of showing his past knowledge of its nature, it might also be necessary to negative his inadvertence. On the other hand, a person might deliberately pull the trigger of a firearm though ignorant that it was loaded; and thus the deliberateness of the act — *i.e.* the combination of voluntary action with all the knowledge which the person had — would be unquestioned, and the further proof required would be that peculiar to showing knowledge of the particular firearm's contents. There may always thus be a residuum, apart from Knowledge, which remains to be proved.

This residuum, or Intent, the element of deliberateness, the negative of inadvertence or accident, may of course be evidenced by the surrounding circumstances and the conduct, as other mental states are. It may also be evidenced by Design; for, *e.g.*, one who has planned to kill another is very unlikely to have acted inadvertently in shooting at him. It may also be evidenced by Knowledge, for one who knows, *e.g.*, that arsenic is poisonous is less likely than otherwise to administer it inadvertently. It may also be evidenced by Emotion; for one who is angry with another is less likely than otherwise to strike him inadvertently. All these elements, independently useful and provable as bearing on the doing of the act, help also to throw light on the intent accompanying the act.

*Other Similar Acts.* But there is one peculiar mode of evidencing this deliberateness which stands by itself in the sense that it may have no bearing distinctively on a previous Design or on a previous Knowledge, and yet may help to throw light on Intent; namely, *other similar acts*. Such acts may be used as evidencing either of those three mental states. Hence it is necessary to discriminate, and to examine here the probative value of similar offenses or acts (*i.e.* similar to the one charged) offered for the purpose of showing such a Knowledge, Intent, or Design. The conditions may differ under which the same conduct will evidence one or another of these probanda.

(a) *Theory of evidencing Knowledge.* In resorting to former offenses or other similar acts to show Knowledge, it is sufficient to invoke the general principles of proving Knowledge. It has been seen (*ante*, No. 30) that this mode of proof rests on the following process of thought. When fact X is used to show a person's knowledge of fact A, it is assumed (a) that through fact X there probably was received an impression by the person; and (b) that this impression would probably result in notice or warning of fact A. Thus, (a) a prior injury to an employee by a machine would probably have come to the employer's notice in some way, and (b) the notice of the accident would probably reveal to him the defect in the machine. These two elements may not both be doubtful in a given case, but they are always impliedly present if the inference is to have any validity. Apply this to the class of cases we are now concerned with. Suppose A's knowledge of the poisonous nature of a substance X is to be shown; suppose the fact offered that he once gave it to a sick dog and that the dog died; if we are to base an inference of probable knowledge upon this, it is because we believe it prob-

able (a) that the dog's death came to his notice, and (b) that the fact of the death would suggest to him that it was the substance X and not the illness that caused the dog's death. Again, suppose A's knowledge of the counterfeit nature of a certain silver dollar is to be shown; suppose the fact offered that he twice passed counterfeit ten-dollar bank notes; if we are to base on this an inference of probable knowledge, it is because we believe it probable (a) that in the course of using the bank notes, at one time or another up to their final disposal, some one probably doubted to him their genuineness and (b) that a doubt as to the genuineness of the bank notes would probably suggest a doubt as to the genuineness of the silver dollar. Again, if A's knowledge of the stolen character of a bar of iron is to be shown, and the fact is offered that he has also received and possessed a stolen bicycle, then our inference must assume (a) that A's receipt of the bicycle was under such circumstances as to suggest its vendor or pledgor to be a thief, or as to result in a reclamation by the owner and a warning to the defendant; so that (b) when the bar of iron was offered to A, by the same or another vendor or pledgor, the circumstances were such that the former transaction would naturally suggest that this bar of iron also was stolen.

Such, then, is the strict and legitimate scope of evidence of other similar acts to show Knowledge. The process of thought is: The other act must probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question.

(b) *Theory of evidencing Intent.* To prove Intent, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances, — the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning. Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (*i.e.* discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, *i.e.* a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, *i.e.* criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given

circumstances, with an innocent intent. The general canon of logical inference already examined (*ante*, No. 2, § 3) is here applied and illustrated.

Yet, in order to satisfy this principle, it is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the similarity of the instance. Suppose the blowing up of an American warship in Havana Harbor to be in question; the blowing up of various ships of various other nations in the preceding fifty years would have no significance as to the accidental nature of the occurrence (except to show that such an accident is possible); the blowing up of an American warship in the preceding year in Algiers would have scarcely more significance; but the blowing up of an American warship in the same year in Cadiz or in the same harbor of Havana would have striking significance. So, where the intent of an erroneous addition in a bookkeeper's accounts is in issue, the erroneous addition of a bill rendered to a former employer ten years before would have no significance, because it is still within the limits of ordinary casual error that such things should occur at intervals; but several other erroneous additions in the bookkeeper's own favor in the same year and the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation.

(c) *Theory of evidencing Design or System.* The object here is not merely to negative an innocent Intent at the time of the act charged, but to prove a preëxisting Design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of Intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior Design or system which included the doing of the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a positive design which in its turn is to evidence (by probability) the doing of the act designed. The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.* Thus, where the act of passing counterfeit money is conceded, and the intent alone is in issue, the fact of two previous utterings in the same month might well tend to negative innocent intent; but where the very act of uttering is disputed — as, where the defendant claims that his identity has been mistaken — and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance. So, on a charge of assault with intent to rape, where the intent alone is disputed, a prior assault on the previous day upon the same woman, or even upon another member of her family, might have probative value; but if the assault itself is disputed, and the defendant attempts, for example, to show an *alibi*, the same facts might be of little or no value, and it might be necessary to go further and to show (for example) that the defendant on the same day, with a confederate guarding the house, assaulted other women in the same family, who escaped, leaving the complainant as the only woman accessible to him for his purpose.

It will be seen that the difference between requiring *similarity*, for acts



negating innocent Intent, and requiring *common features indicating common design*, for acts showing Design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity. Nevertheless the distinction is a real one. The clew to the difference is best gained by remembering that in the one class of cases the act charged is assumed as done, and the mind asks only for something that will negative innocent intent; while in the other the very act is the object of proof, and is desired to be inferred from a plan or system.

47. HODGES' AND PROBIN'S CASE. (CAMDEN PELHAM. *The Chronicles of Crime*. ed. 1891. Vol. I, p. 351.)

The trick of cross-dropping has become so notorious of late years, that any description of the mode in which it was practiced is almost unnecessary. As, however, this is the first case of the kind with which we have met in the course of our search in the records of crime, we shall give it a place in our calendar.

The dupe, in this instance, was William Headley, an ironmonger at Cambridge, who, on the trial of these robbers, deposed that on the 7th of July, 1796, he was in town, going from Shoelane to the Angel Inn, St. Clement's, to take a place on the outside of the coach to go into Wiltshire: when he met Hodges, who was a stranger in Butcher row, and left him to take his place. He went on to Clare Market, where Hodges overtook him, and they walked together through Portugal street. While in that street Hodges suddenly stopped, and clapping his cane on a parcel which was lying on the ground, said that he had a "finding." He picked up the parcel, and opened the outer covering, and the witness saw in it something like a red pocketbook. He inquired what it was? but the prisoner refused to show him in the street, and they, in consequence, went into a public house in order to open it. Having called for some liquor, the prisoner opened the parcel, and produced from it what looked like a diamond cross, and a receipt in the following terms: "London, 20th June, 1796. Received of John

King, Esq., the sum of three hundred and twenty pounds, for one brilliant diamond cross, by me, William Smith." The prisoner seemed much alarmed and confused on seeing this, but the witness having read the receipt, suggested that the parcel should be taken to Mr. Smith. This, however, was opposed by Hodges, who asked whether they had not better inquire of the gentleman sitting by (the prisoner Probin) what his opinion was? This was assented to, and upon his being addressed, he suggested that Hodges ought to give the witness a present, as having been by when the cross was found, and that he should keep it. The cross was then taken out and examined, and Hodges said that he did not mind giving the witness something, but he must go to his banker's first, and get some drafts changed. He then went out, leaving the cross with the witness and Probin, but returned, saying that his banker was out, and could not be seen until four o'clock, and a meeting at that hour was eventually appointed to take place at the Angel Inn, St. Clement's. Each party then gave his name. Hodges said that he came from Worcester, and was a hop merchant; and Probin said that his name was William Jones, and that he lived at No. 7, Charing Cross. A discussion now took place, to whom the care of the cross should be intrusted; and Probin suggested, that the witness perhaps would be better satis-

fied if it were left in his hands, and that if he deposited something, he might carry it away until four o'clock. He asked what would be required, and they said that he ought to leave one hundred pounds at least. He then produced a Bank bill, payable on demand, for that amount from his stocking, where he had concealed it, and handing it to Hodges, he said that that would do. The witness then went away, but subsequently showing the cross to a friend, he found that it was quite valueless. Information was, in consequence, given at Bow

street of the robbery, and both prisoners were apprehended in the course of the ensuing day, money to the amount of nearly fifty pounds being found on each. It afterwards turned out that the prisoner Hodges changed Mr. Headley's Bank bill almost immediately after he had received it. In his possession was found a second cross, precisely similar to that palmed off upon the prosecutor.

The prisoners being found guilty, were sentenced to be transported for seven years.

**48. CAPTAIN KIDD'S CASE.** (*Military Trials*. 1866. p. 21.)

Captain William Kidd the hero of, as it may be called, this political and nautical romance, was born in the town of Greenock, in Scotland, and bred up for a seaman's life. Having quitted his native country, he resided at New York, where he became owner of a small vessel, with which he traded among the pirates, and thus obtained a thorough knowledge of their haunts, and could give a better account of them than any other person whatever. He was a man not particularly remarkable for courage, but very avaricious. He could never resist the tempting influence of the rapid profits made by pirates, and to this was owing his connection with them. While in their company, he used to converse and act as they did; yet at other times he would make singular professions of honesty, and intimate how easy a matter it would be to extirpate sea robbers, and prevent their future depredations. His frequent remarks on this subject engaged the notice of several considerable planters in the state of New York, who, forming a more favorable opinion of him than his true character would warrant, procured him the patronage with which he was afterwards honored.

(P. BURKE. *Celebrated Naval and*

For a series of years complaints had been made of the piracies committed in the West Indies, which had been greatly encouraged by some of the inhabitants of North America, on account of the advantage from purchasing effects thus fraudulently obtained. This coming to the knowledge of King William III, he, in the year 1695, bestowed the government of New England and New York on his devoted follower, Richard Coote, Earl of Bellamont. . . . A royal commission in the usual form was granted to Captain Kidd, to take and seize pirates, and bring them to justice; but though a second commission was added, there was, beyond the general direction not to molest the king's friends, and to bring ships taken to legal trial, no special clause or proviso to restrain his conduct, or regulate the mode of his proceeding. . . . A ship was purchased and equipped in the port of London; it received the name, which this affair made so known, of the *Adventure Galley*. In this vessel Captain Kidd crossed the Atlantic, and then towards the close of the year 1695 sailed from New York and made prize of a French ship. . . . At the expiration of five weeks fell upon and seized

the *Quedagh Merchant*, a ship of four hundred tons burthen, the master of which was an Englishman, named Wright, who had two Dutch mates on board, and a French gunner; but the crew consisted of Moors, natives of Africa, and were about ninety in number. . . . Kidd, therefore, on his arrival, was seized by order of his lordship, when all he had to urge in his defense was, that he thought the *Quedagh Merchant* a lawful prize, as she was manned with Moors, though there was no kind of proof that this vessel had committed any act of piracy. . . .

The trials of Kidd and his companions came on at the Old Bailey in May, 1701. The proceedings were very lengthy, and consisted of several distinct trials; the first was for murder against Kidd alone, the other trials were for various acts of piracy committed by him and different members of his crew. . .

On Kidd's urging that he acted under a royal commission, Mr. Justice POWELL properly observed to the jury, "I understand that he had a commission; therefore if any one has a commission, and he acts according to it, he is not a pirate; but if he takes a commission for a color, that he may be a pirate, it will be bad indeed: and therefore, if the crown can prove that he was a pirate all along, this will be a great evidence against him." . . .

Lord Chief Baron WARD: "Gentlemen of the jury, — The prisoners at the bar, William Kidd, Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loff, Hugh Parrot, Richard Barlicorn, Abel Owens, and Darby Mullins, in number ten, stand all here indicted for the crime of piracy, charged to be committed by them. And the instance of the crime is for feloniously and piratically seizing and taking the ship called the *Quedagh Merchant*, with the apparel and tackling thereof, to the value of 400 (pounds), and divers goods

mentioned in the indictment to the value of 4500 (pounds), the goods of several persons unknown, from the mariners of the said ship, and this at high sea within the jurisdiction of the Court of Admiralty, about ten leagues from Cutsheen in the East Indies, the 30th of January, 1697, and in the eighth year of his Majesty's reign. . . . To make good this accusation, the king's counsel have produced their evidence, and two witnesses have been examined in this case; each of them were in the ship which took the *Quedagh Merchant*, and very well acquainted with all the proceedings; that is, Robert Brandinham and Joseph Palmer. The first has given you an historical account of the whole proceedings of Captain Kidd, from his first going out of England in the *Adventure Galley*, to the time of this fact charged on them. They tell you that about May, 1696, the king intrusted this Captain Kidd with two commissions, and they were both read to you. By one of them under the Admiralty seal, he was authorized to set out as a privateer the *Adventure Galley*, and therewith to take and seize the ships and goods belonging to the French king, or his subjects, and such other as were liable to confiscation. And by the other commission, under the broad seal of England, authority was given for the taking of some pirates by name, and all pirates in the several places therein mentioned; but in no sort to offend or molest any of the king's friends or allies, their ships or subjects, by color thereof. And by both commissions command was given to bring all such ships and goods, as should be taken, to legal trials and condemnations. They tell us that this ship set out for Plymouth about May, 1696, and that in their passage they did take a French ship, and they did condemn that ship. Now, gentlemen, you must bear this in your minds, that to make it piracy it

must be the taking piratically and feloniously upon the high sea, within the jurisdiction of the Admiralty of England, the goods of a friend — that is, such as are in amity with the king. Now, you see what way they went to work, and what measures they took. Captain Kidd goes out, and goes to New York; and when he was there he has a project in his head, of setting up articles between himself and the people that were willing to be concerned with him: for now, whether it seems more probable from what followed, that Captain Kidd designed to manage himself according to the measures given him, and the powers of his commissions, or any other way, you must consider: for it is told you, that between one hundred and fifty and one hundred and sixty men came in under these articles, whereof the other prisoners were part, and concerned in them. And as to those articles, the import of them was, that whatever should be taken by these people in their expeditions should be divided into one hundred and sixty parts, whereof Captain Kidd was to have forty shares for his part, and the rest were to have according to the merits of each party, some whole shares, and some half shares.

“Now, after these articles, you perceive what progress they made, and what course they took; they went from one place to another, and used a great deal of severity wherever they came. A design they had to go into the Red Sea, and they had expectations of the Mocca fleet that lay at Mocca, and they sent their spies three times to get intelligence: the two first times they could make no discovery, but the third time they made an effectual discovery that the fleet was ready to sail; and in the meantime Captain Kidd lay there in expectation of this fleet; and as the first witness tells you, Captain Kidd said, he intended to make a voyage out of this fleet.

Well, he had a discovery of this fleet, and they came accordingly; and they tell you, that he and his men did attack one of the ships; but these ships being guarded by two men-of-war, he could make nothing of them; however, he showed what his intention and design was. Could he have proved that what he did was in pursuance of his commissions, it had been something; but what had he to do to make any attack on these ships, the owners and freighters whereof were in amity with the king? This does not appear to be an action suitable to his commissions. After he had done this, he came to land, and there, and afterwards at sea, pursued strange methods, as you have heard. The seeming justification he depends on is his commissions. Now it must be observed how he acted with relation to them, and what irregularities he went by. He came to a place in the Indies, and sent his cooper ashore, and that cooper was killed by the natives; and he uses barbarity, and ties an Indian to a tree, and shoots him to death. Now he went from place to place, and committed hostilities upon several ships, dealing very severely with the people.

“But this being something foreign to the indictment, and not the facts for which the prisoners at the bar are indicted, we are confined to the *Quedagh Merchant*. But what he did before shows his mind and intention not to act by his commissions, which warrant no such things. Gentlemen, you have an account, that he met with this ship, the *Quedagh Merchant*, at sea, and took her; that this ship belonged to people in amity with the king of England; that he seized this ship and divers goods were taken out of her and sold, and the money divided pursuant to the heads contained in those articles set up in New York. The witnesses that speak to that come home to every one of the prisoners; they tell you that the

dividend was made; that Captain Kidd had forty shares of the money, and the rest of the prisoners had their proportions according to the articles, some a whole share, and some a half share of that money. After they had seized the ship, you hear of a certain sort of project, that a Frenchman should come and pretend himself the master, and procure, or pretend to procure a French pass, under a color that these people's ship and goods, who were Moors, should be Frenchmen's ship and goods, or sailed under a French pass, and so justify what he did under the color of his commission from the king. Now, no man knows the mind and intentions of another, but as it may be discovered by his actions. If he would have this to be understood to be his intention, or that it was in reality, that he took this as a French ship, or under a French pass, then

he ought to have had the ship and goods inventoried, and condemned according to law, that he might have had what portion belonged to him, and that the king might have had what belonged to him, as his commissions directed; but here was nothing of that done, but the money and goods which were taken were shared, and you have an account likewise how some of the goods were sold, and the money disposed of; and one witness speaks positively of the distribution of the goods that remained unsold, that they were divided according to the same proportions as the articles mentioned, and every one of the prisoners had his share; there belonged forty shares to Captain Kidd, and shares and half shares to the rest.

"Now, this is the great case that is before you, on which the indictment turns." . . .

**49. BRADFORD v. BOYLSTON FIRE AND MARINE INSURANCE COMPANY.** (1831. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 11 Pick. 162.)

Assumpsit on a policy of insurance underwritten by the defendants, upon property of the plaintiffs shipped on board a vessel, from a port in England to a port of discharge in the United States; "partial loss to be computed upon each package as if separately insured." The plaintiffs allege in their declaration, that on May 5, 1828, they shipped on board the *Aspasia*, at Liverpool, certain goods, to be conveyed to New York, and that owing to tempests on the voyage the salt water found access to the goods and injured them; and the plaintiffs claimed a partial loss amounting to 33 per cent upon the value of the goods.

At the trial before WILDE, J., it appeared, that the goods alleged to have been damaged consisted of thirty-two bales of point and duffil blankets and that the blankets were manufactured for the plaintiffs

by one Wood, in the kingdom of Great Britain. The plaintiffs offered evidence tending to prove that the blankets were damaged on board, by the perils alleged in their declaration. The defendants contended that the damage arose from some defect in the manufacture of the blankets, or from their having been fraudulently packed by Wood in a wet state, for the purpose of increasing their weight, the blankets having been purchased by the plaintiffs by weight. The defendants offered in evidence two depositions of one Russell, to prove that during the year 1828 he imported into New York certain bales of point and duffil blankets manufactured by Wood, which proved to be damaged, and, in the opinion of Russell, by being packed in a wet state for the purpose of increasing their weight. The defendants also offered the testimony of one Lee, who stated that

in 1828, the firm of which he was a partner, received a consignment of point and duffil blankets from Wood, and also some which they purchased of Wood; that the blankets came in three different vessels, and were all damaged; that the blankets in the inside of the bales were slightly damp and very much spotted, and the outside blankets were perfectly dry; that the damage to the blankets exhibited as part of the *Aspasia's* cargo, was of a similar character, and he would have supposed they were a part of his own; that the damage was of a peculiar kind and not like that produced by salt water. There was evidence in the case tending to show that the damage was caused by sulphuric acid. To the admission of the depositions of Russell and of the testimony of Lee, the plaintiffs objected, on the ground that it was an attempt to prove that Wood had fraudulently damaged the blankets in question, by proving that he had in other cases damaged blankets by packing them in a wet state to increase their weight; which the plaintiffs contended it was not competent for the defendants to do. But the Judge overruled the objection and permitted the evidence to go to the jury. . . .

The jury found a verdict for the defendants, and no inquiry was made or moved for by the plaintiffs' counsel at the time, as to the principles upon which the verdict was founded. The plaintiffs moved for a new trial: 1. Because the depositions of Russell and the testimony of Lee were admitted in evidence. . . . *S. D. Ward*, in support of the motion. . . . *S. Hubbard* and *Cook*, contra. . . .

PUTNAM, J., delivered the opinion of the Court.—The main objection which has been made to the proceedings at the trial, is, that the testimony of Lee and the depositions of Russell ought not to have been received for the defendants. It is contended that the evidence proves that Wood made bad blank-

ets for other persons and that this circumstance has no tendency to prove that he made bad blankets for the plaintiffs; that it is no better than to offer evidence of general bad reputation, when a party should be held to prove the particular fraud. And the case of *Holcombe v. Hewson*, 2 Campb. 391, has been much relied upon, and is the strongest which we have seen for the plaintiffs. In that case *Holcombe* was bound to prove that he had supplied *Hewson* with good beer, and he offered to prove that several other persons who dealt with him while he supplied the defendant, were satisfied with his beer, as being of excellent quality; but Lord ELLENBOROUGH held the evidence to be inadmissible, because he might have dealt well with some, but not well with other customers. This case was properly decided; the evidence offered by the plaintiff was of his own doings and conduct in regard to strangers, from which it was intended to be inferred that his conduct towards the defendant had been similar; that would be clearly a non sequitur.

But in the case at bar the evidence objected to does not arise between the party who furnished the damaged goods and the purchaser, but between strangers to the manufacturer. The evidence comes in collaterally, and is greatly, if not unavoidably, connected with other testimony which is admitted to be material and competent. The point to be proved by the defendants was, that the blankets were injured by some other cause than the perils of the sea. They had a peculiar appearance; they were so singularly spotted and marked, that Lee, who had imported blankets from England, of similar appearance, would have supposed they were the same. This happened in 1828, the same year that the plaintiffs imported those now in question. It happened also, that a great many bales of blankets exactly resembling the

plaintiffs' were imported that year from England into New York. Now it is conceded that it would be perfectly competent to compare the plaintiffs' blankets with the other damaged blankets, in order to satisfy the jury that it was not the damage of the sea which operated so peculiarly and injuriously. It is not contended but that it would be proper to prove that they all came from England; but that evidence would be much less satisfactory than to trace them to one manufactory in England. If you may properly go to the manufactory, why not to the name of the manufacturer? It is not easy to draw the line. They are marked and injured as no other blankets were, which have been imported. They may have been injured by persons at Wood's manufactory, without his knowledge, and so without any intention of fraud on his part; it may have been done by some enemy, with a view to prejudice Wood in his business. In the case of *Holcombe v.*

*Hewson*, before cited, Lord ELLENBOROUGH said, "let the plaintiff call those who frequented the defendant's house and drank the beer which he sent in." Why not, in the case at bar, call those who bought of Wood, blankets marked in this extraordinary manner at the same time? The object is not to impute a fraud to the manufacturer (for we do not see any motive he could have to destroy the blankets), but to prove in a suit between other parties, that the injury did not arise from sea damage. And the evidence that the great number of bales of blankets which came that year, in six ships, from Wood's manufactory, had these distinguishing marks upon them, which are ascertained to have been such as would be occasioned by sulphuric acid, is we think admissible as tending to disprove the allegation of the plaintiffs, that the injury arose from the perils of the sea. . . . We are all of opinion that the judgment should be rendered upon the verdict.

**50. LIST PUBLISHING CO. v. KELLER.** (1887. FEDERAL DISTRICT COURT. NEW YORK. 30 Fed. 772.) . . .

In Equity. Bill for injunction to restrain infringement of complainant's copyright.

*Wallace MacFarland*, for complainant. *Edmund Wetmore*, for defendant.

WALLACE, J.—The parties are the proprietors and publishers of rival "society" directories, which purport to give the names and addresses of those persons in New York City who are supposed to be people of fashion. The complainant asserts that its copyrighted directory, "The List," is infringed by the defendant's directory, the "Social Register," and has made a motion for a preliminary injunction. The question in the case is whether the defendant, in compiling his directory, has done so by his own original labor, or whether, in order to spare himself time and expense, he has copied the

names and addresses given in the "Social Register" from the "List." If he has copied any part of the complainant's book, he has infringed the copyright. He has no right to take, for the purposes of a rival publication, the results of the labor and expense incurred by the complainant, and thereby save himself the labor and expense of working out and arriving at these results by some independent road. . . . The compiler of a general directory is not at liberty to copy any part, however small, of a previous directory, to save himself the trouble of collecting the materials from original sources. . . . Either of the present parties could lawfully use the general city directory to obtain the correct addresses of the selected persons; nor is it doubted that the defendant had the right to use the

complainant's book for the purpose of verifying the orthography of the names, or the correctness of the addresses, of the persons selected. But if the defendant has used the "List" to save himself the trouble of making an independent selection or classification of the persons whose names appear in the "Social Register," although he may have done so only to a very limited extent, he has infringed the complainant's copyright.

In a case like this, when a close resemblance is the necessary consequence of the use of common materials, the existence of the same errors in the two publications affords one of the surest tests of copying. The improbability that both compilers would have made the same mistakes, if both had derived their information from independent sources, suggests such a cogent presumption of copying by the later compiler from the first that it can be overcome only by clear evidence to the contrary. *Mawman v. Tegg*, 2 Russ. 393; *Spiers v. Brown*, 31 Law T. 16; *Lawrence v. Dana*, 2 Amer. Law T. (N. S.) 402. The complainant relies upon this criterion here. The "List" contains a selection of about 6000 names and addresses of persons residing in New York City out of the 313,000 names which appear in the general city directory. The "Social Register" contains about 3500 names and addresses of persons residing in New York City, and of this number over 2800 appear in the "List." The fact that 2800 of the names and addresses in the defendant's book originally appeared in the complainant's book would, standing alone, be quite inconclusive. But when it is shown that 39 errors

in complainant's book, consisting of misprints, erroneous addresses, insertion of names of persons who never existed, and insertions of names of deceased persons, are reproduced in the defendant's book, although it was not published until more than a year after the complainant's book was published, a strong presumptive case of piracy is made out. The depositions on the part of the defendant are addressed in part to an explanation of his reproduction of these errors consistently with the theory that they were not copied from the complainant's book. These depositions have been carefully read and considered, and the conclusion has been reluctantly reached that the explanation is inadequate. It will not be profitable to analyze the depositions. It suffices to state that the case for the complainant is such as to call for a full and explicit vindication on the part of the defendant. If it is true that his directory was prepared from several private visiting lists furnished to Ashmore for the purpose, these lists should have been produced or their non-production accounted for; and, if they could not be produced, corroborative testimony of their existence, the sources from which they were obtained, and their contents should have been adduced. It may be that the presumption which at present must prevail will be overthrown by the proofs at the final hearing of the cause, but, as the case now appears, the complainant is entitled to an injunction. The injunction will be limited to the extent to which the defendant's book is identical with the complainant's book.



#### **TITLE IV: EVIDENCE TO PROVE THE DOING OF A HUMAN ACT**

53. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)

The general classification of Circumstantial Evidence (*ante*, No. 3) is into three groups: Concomitant, Prospectant, and Retrospectant. When the doing of a Human Act is the probandum, this classification is to be understood thus: Place yourself at a time before the Act, if any, was done; note any circumstance (*e.g.* a plan) that points forward to the act probably being about to be done or not done or done by a specific person; such circumstances are Prospectant. Then place yourself at the time and place of the Act, if any; note the circumstances (*e.g.* a knife with initials) which point to the doing or not doing of the act then and there, or its doing by a specific person; these form the Concomitant evidence. Then place yourself at a time subsequent to the Act, if any, and note the circumstances (*e.g.* stolen goods found on the accused) which point back in time to the doing or not doing of the act, if any, or its doing by a specific person.

No exact line can be or need be drawn between the three groups; they are merely useful for grouping typical cases.

54. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. p. 586.)

Taking for the subject of investigation, a case of murder, the following may be supposed to present the *corpus delicti*, as fully proved. A woman has been found at night, dead in her bed, with several wounds on the head, apparently inflicted with a hatchet or similar implement, and the bed itself partially consumed by fire. In the effort to discover the perpetrator of this offense, the following series of facts may be supposed to appear.

A. On examining the premises, during the night, and soon after the discovery of the crime, a man's hat or cloak is found on the ground in the rear yard of the house. . . . The questions which immediately and naturally suggest themselves, in reference to the article found, are: "How came it to be there?" and "What does it mean?" Viewed with reference to its *ordinary* uses, it indicates, as the reasonable cause of its existence, the presence of a *man* at the spot where it was found. But the fact has a more important aspect than this. The *extraordinary* position of the article gives to it an extraordinary character, indicating, as its immediate cause, the existence of some *unusual* occasion, and a correspondingly unusual condition on the part of the supposed wearer. . . . The principal fact of the crime affords the only means, yet known, of accounting for the minor fact just shown, and aids in giving to it the interpretation sought, which is this: that the wearer of the hat or

cloak was present at the scene of the crime, on the night of its commission; and that he escaped from it in haste, and by an unusual way, in order to avoid observation. So far as the finding of the article in question is regarded as a purely physical fact, it implies, indeed, two successive presumptions or inferences: first, that the article actually belonged to, or was habitually worn by the individual supposed to be designated; and next, that such individual was the person who wore it on the night of the murder. Each of these is liable to be met by what has already been explained as an infirmative supposition. . . . The article may not be satisfactorily and fully *identified*; or, if identified, it does not necessarily follow that it was worn by the individual on the occasion; *another* person, really connected with the crime, may, accidentally or intentionally, have obtained possession of it and worn it. . . .

Another fact of the same physical class comes to light. A hatchet, with which a blow competent to have inflicted the wounds observed on the body might have been given, and itself apparently stained with blood, is found (with indications of having been recently thrown there) in a corner of the yard of the premises, and not far from the spot where the other article was discovered: and this hatchet, also, is believed, or indeed proved to have belonged to the same individual. This is a still more important fact than the one already noticed. It indicates what is always necessary to be shown against any accused party, — the general fact of the *possession of the means* of crime.

Viewed by itself, the supposed bearing and meaning of this last circumstance might be met and explained or avoided by the same species of suppositions as were applied to the first one; going to show that the appearance observed might not, or, indeed, did not proceed from the cause assigned. The implement may have been mistaken for another; it may have been accidentally thrown where it was found; what has been taken for blood upon it may be nothing more than rust; or, if actually the party's hatchet, possession of it may have been acquired by another person. But the fact of *convergent* and *united bearing*, which now, for the first time, presents itself as an element of proof, begins to show that this common determinate tendency from two distinct points upon another, is not accidental, but must be due to the operation of some real, inducing cause, common to both. . . .

A third fact is brought to light. The *individual* supposed to have been the owner or wearer of the article or instrument found, or, at least, a person strongly resembling him, and by some sworn to have been the same person, is ascertained to have been actually *on the premises* where the crime was committed, on the night of its commission. This is a more important fact than either of those yet discovered. . . . It presents the *particular human agent* sought for, not presumptively and inferentially, as the other facts did, but directly and absolutely. It presents him as *possessing opportunity* to commit the crime; a fact always necessary to be made out against every accused party. . . .

The facts, thus apparently *united* as discovered, are reasonably supposed to have actually *occurred* in the *same* connection; and the interpretation which the discoverer and observer naturally give to them is this: that the individual indicated was concerned in the commission of the crime; and that, seeking to escape by a back way, in order to avoid observation, he

accidentally dropped his hat or cloak, in his haste, or purposely threw it off as an encumbrance to motion; and that the implement was disposed of in a similar way. This interpretation gives to each fact a natural meaning. . . .

The probability on which it rests may still be met and qualified by the following infirmative suppositions. First, it may be a case of mistaken identity. . . . Next, conceding the point of identity, and that the individual supposed to have been seen was actually present, so long as an *exclusive* presence is not shown, it is possible that the crime might have been committed by another also present. But, here, again, the associated facts of the articles found present difficulties in the way of such an infirmative supposition. Still, there is room left for the following infirmative supposition, or rather hypothesis of the case, as it may, with stricter propriety, be termed, from its involving the assumption of *several* connected facts. The real criminal may have fabricated all the physical evidence hitherto discovered; and having possessed himself of the criminative articles, and finding the accused present on the premises, took advantage of that as a circumstance to aid his plans against him; and having waited until the accused had left the house, committed the crime and then threw the articles where they might seem to indicate the presence of the owner in the act of secretly making his escape.

But this whole hypothesis is subject to be overturned by a single additional fact. For, supposing it proved that the accused, towards whom all the previously discovered facts uniformly pointed, was seen, on the night of the crime, leaving the premises, or their immediate vicinity, by an unusual way, as over a fence; or in an unusual manner, as in great secrecy or in great haste; or in an unusual personal condition, as without a hat, — the case would be restored to the original criminative supposition that he did escape by the way indicated by the position of the articles, and that he dropped or threw them where they were found; the coincidence in regard to the hat, if such were the article, materially increasing its probability. . . .

Additional facts are brought to light. The accused, when seen on the premises, was observed to wear a cloak similar to the one found, and appeared to have something concealed under it. This favors the idea that he may have thus concealed the hatchet which was found, and evidently used. In the course of further inquiry, a piece of string is found to have been attached to the handle of the hatchet. A piece of string is now found attached to the cloak, and these two pieces, on being brought together, are ascertained to be of precisely the same kind, showing that they were once *united*. This close physical coincidence converts the conjecture just mentioned into a reasonable presumption, amounting almost, if not quite, to a certainty. And the bearing of these last circumstances, taken together, reveals a new and most material fact; showing that the accused went to the premises, *prepared* for the commission of the crime, and having adequate *means* of its commission, which means were actually used.

*B.* The circumstances which have thus far been supposed to be developed by a course of investigation are, almost exclusively, those of the *concomitant* class. . . . There is generally a disposition to carry this process a step further, by ascending to the ultimate *origin* of the whole transaction, and inquiring what could have induced or instigated the individual to whom the facts

point, as the cause of the crime, to have committed it; or, in other words, what motive he could have had for it. It is found that the individual in question had recently been on ill terms with the deceased, and had been heard to utter threats against her. Facts like these, showing not only a disposition and aptitude, but the elements of an actual intention to injure the deceased, have a peculiarly important influence in singling out one individual from among several others who might be supposed to have had equal *opportunity* and equal *means* of committing the same crime.

C. In order to render the case, as thus hypothetically constructed, the more entirely convincing, let it next be supposed that the following *subsequent* circumstances are discovered. Upon search being made after the suspected individual, he is found to have fled. He is pursued, and with some difficulty apprehended. On being questioned, he denies his name and all knowledge of the deceased, or of the crime; but on being searched, his name is found on various articles of his clothing, partially erased. A letter is also found from the deceased, requesting a meeting at the very time and place of the murder. On being interrogated where he was, on the night of the crime, he makes a statement which is found to be palpably false. On being committed to custody, he is detected in attempting to procure the destruction of the important physical evidence first discovered, and in endeavoring to prevail on a friend to have a false *alibi* sworn to, in his behalf.

Such are the various groups of facts available to indicate an act of crime.

**TITLE IV (continued): EVIDENCE TO PROVE THE  
DOING OF A HUMAN ACT**

**SUBTITLE A: CONCOMITANT CIRCUMSTANCES TO PROVE THE  
DOING OF A HUMAN ACT**

55. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> A fact having a Concomitant indication is one which is thought of as being in existence at the time of and in connection with the act to be proved; the logical indication or inference is that the person bearing that fact as a mark is thereby to be associated more or less closely with the act. There is a *negative* as well as an *affirmative* form of inference; in the affirmative form, *e.g.* X was at the place of the murder, therefore he may have committed it; and the negative form, *e.g.* X was at a different place at the time of the murder, therefore he did not commit it.

The various subvarieties of this class of Evidence may be grouped into two:

1. Time and Place (Opportunity);
2. Physical and Mental Capacity, Tools, Clothes, etc.

1. *Time and Place.* (a) *Opportunity.* When an act is done, and a particular person is alleged to have done it (not through an agent, but personally), it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it. It is true that another person may have done it, but the former is at least within the limited number of persons who could have done it, and thus is fit to become a subject for further investigation.

*Explanation.* On the principle of Explanation (*ante*, No. 2, § 5), if A is shown to have been in a building when a murder was committed, he may admit this fact, and seek to diminish its probative significance by showing that there were in the same building, at the same time, two or ten or five hundred other persons. In so doing, he has pointed out the possibility of two or ten or five hundred other hypotheses, equally possible with that charged against him. The strength of these other hypotheses takes away the significance of the fact of his opportunity, just in proportion to the number and degree of naturalness of the other hypotheses — *i.e.* the hypotheses that each of the other persons had an equal opportunity. Such is the principle of explaining away Opportunity.

Since the showing of Opportunity leaves open all the hypotheses of other persons' equal opportunity, it is proper for the proponent of the evidence to strengthen it by cutting off in advance, so far as possible, these other hypotheses, *i.e.* by showing that the person charged was one of a few only, or the sole person, having the opportunity. In other words, while the proponent need not, he *may* always show exclusive opportunity.

<sup>1</sup> Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, §§ 130-144, 83-89.)

(b) *Essential Inconsistency (Alibi)*. The negative form of the Concomitant inference, is, if not the more common, at least the more effective one. It may be termed the argument from Essential Inconsistency. Its usual theory is that a certain fact cannot coexist with the doing of the act in question, and, therefore, that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The form sometimes varies from this statement; but its nature is the same in all forms. The inconsistency, to be conclusive in proof, must be *essential*, *i.e.* absolute and universal; and its evidentiary strength will increase with its approach to absolute or essential inconsistency. There are five common cases of this form of the argument (though more are conceivable): 1. The absence of the person charged in another place (*Alibi*); 2. The absence of a husband (non-access), — a variety of the preceding; 3. The survival of an alleged deceased person after the supposed time of death; 4. The doing of a crime by a third person; and, 5. The self-infliction of the harm alleged.

2. *Capacity, Tools, Clothes, etc.* (a) For the doing of an act, certain traits or features physical or corporal may have been essential; the act shows that it was done by a person possessing them. Thus, physical strength (to wield a weapon), mental power (to execute a will), technical skill (to give poison, imitate handwriting, etc.), may be found to have been requisite; specific clothes or corporal marks may be found to have been an essential circumstance in the person who did the act; hence, the possession of such strength, power, skill, tools, clothes, or other marks is a circumstance pointing to a given person's share in the act.

*Explanation* here follows the usual lines of that principle.

(b) *Essential Inconsistency*. The negative argument of the present species is that since a particular mark is essentially concomitant to the act, a person lacking that mark could not have done it. *E.g.* a person lacking poison could not have given it to the deceased; a person lacking money could not have loaned it to the alleged debtor.

The following passages illustrate Concomitant evidence in various aspects.

#### Topic 1. Time and Place

56. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. pp. 368, 549.) This division may, without impropriety, be extended so far as to include not only those circumstances which are strictly contemporaneous with the criminal act, but those also which *immediately* precede and follow it.

The great leading circumstance of this class, the one which first occurs for consideration, and the one of which evidence is always specially sought, is that of *presence*, on the part of the accused, at the scene of crime, or company or juxtaposition with the subject of it, at the time of its commission; or, at least, of *proximity* or *vicinity* of the accused to the scene or subject of the crime, about such time. The force of the evidence, in these cases, consists in the concurrence or coincidence of the three leading circumstances of person, time, and place. The closer these are brought to the subject of the crime, the stronger their effect to demonstrate the presence of the accused, and to show such presence to have been exclusive.

1. *Proximity*, on the part of the accused, as thus presented for consideration, may be, in itself, of various degrees, from mere vicinity, up to actual juxtaposition or contact. It may also be of various kinds, such as proximity to the person of the deceased, or to the scene of the crime, or to both; and it may exist at different stages; as before the commission of the crime, or afterwards, or both before and after.

The strongest form in which this circumstance can be presented, and the one which requires the least reasoning to give it effect, is undoubtedly that of the juxtaposition of the persons of the accused and deceased, proved, by actual observation, to have existed both immediately *before* and immediately *after* the crime is perpetrated. These show presence *at the moment* of actual perpetration, with the greatest effect possible, short of direct evidence. . . . The circumstance of *time* is here of the utmost importance; for if the room were not entered immediately, but only after an interval sufficient to allow the escape of another person, the *exclusive* character and effect of the circumstances would be destroyed. This may be illustrated by the well-known case of Jonathan Bradford, in which the person who committed the murder found means to escape from the chamber of the deceased, only the instant before Bradford entered it.

The character of the *place*, also, is essential to the exclusive effect just mentioned. . . . Lord Coke's example of a violent presumption is of a *house* in which a man is run through with a sword and dies, and another is seen coming out of it with a bloody sword; and *no other person was at the time in the house*. This last fact undoubtedly constitutes the foundation of the presumption spoken of. Where this fact is clearly *proved*, it is not, indeed, necessary that the persons of the accused and deceased should be actually seen *together*, either before or after the commission of the crime. If they were in different parts of the same house, it would be sufficient; or even if the accused were only seen entering the house just before, and coming out of it immediately after; or only in the act of coming out, as in Lord Coke's example.

It is seldom, however, that cases occur, presenting merely these leading circumstances of personal proximity, time, and place. On the contrary, they are almost uniformly associated with other minor circumstances, immediately precedent or subsequent, or both, which have the double effect of proving a *corpus delicti*, and fixing the guilt of it upon the particular party whose exclusive presence is shown. As where a person is seen going into the apartment of another, with a loaded pistol; and, soon after, a shot is heard from within; and the apartment is immediately entered, and the occupant is found dead or dying from a mortal wound; and the other person is seen standing near, with a discharged pistol; and the wound is conclusively shown to have been inflicted with a pistol in the hands of some other person than the deceased; and no third person is found in the apartment.

The next form of personal juxtaposition, from which a presumption of guilt may be deduced against an accused party, is where it is observed to exist only *after*, and not before the commission of the crime. As where a man is found in a house, or in the open air, recently dead or dying from a mortal wound; and another is seen standing by him, or stooping

over him, or busied about him, or even just leaving him. If the circumstances of time and place concur (as they may) in excluding the presence of any other person, the result would be the same as in the preceding description of cases; a previous juxtaposition being necessarily inferred. Lord Coke's example is of a person *escaping from* a house in which another is found dead by violence; and yet it assumes an exclusive presence. Bradford's case was one of subsequent actual juxtaposition of persons, belonging strictly to the division now under consideration.

The next form of actual juxtaposition of the persons of an accused and deceased individual, from which a presumption of guilt may be deduced, is that which has been observed to exist only *previous* to the commission of the crime; as where the body of a murdered person is found in a building, or in the open air, and no one is or has been seen near it; but, some time before the body is found, or the crime ascertained to have been committed, the deceased was seen in company with the accused, and not far from the spot. The criminative effect of these circumstances is dependent, as in the cases before considered, upon those of time and place. . . . Hence, where a person has been found dead by violence, and no one near the body, or has suddenly and unaccountably disappeared, the first inquiry which naturally suggests itself, and the one which, in fact, is always made, is: "In *whose company* was he *last seen* alive?" In Corder's case, the deceased was last seen walking with the accused towards a barn, under the floor of which the dead body of the former was afterwards found buried. In the celebrated case of Spencer Cowper, much stress was laid on this circumstance to criminate the accused. In Thornton's case, the prisoner and the deceased were seen walking together, at a very late hour of the night on which the latter came to her death; and they were proved, by the physical evidence of footprints, to have been in the same field with the pit in which the dead body was found, and in the immediate vicinity of such pit. But the evidence as to the important circumstance of *time* failed to give to the facts their full criminative effect; and upon this ground, together with a doubt as to the *corpus delicti*, the accused was acquitted.

We come next to that description of cases in which no actual juxtaposition of persons has been observed, either before or after the commission of the crime, but only *proximity* to the scene of crime, of various degrees of closeness; this may be of very various degrees. In Barbot's case, the prisoner was not observed on his way to the scene of the crime, — the time being a late hour of the night; but he was seen, the next morning, returning from the spot in a canoe; and was satisfactorily traced all the way to his home. In Stewart's case, the accused was seen in the neighborhood of a ferry over which the deceased was expected to pass, inquiring of the ferryman, if he had passed. Soon after the deceased had come across the ferry, he was shot and killed by some person concealed in a wood through which the road lay; and, a few hours afterwards, at nightfall, the accused was seen and spoken with, on a hill just above the spot. . . . In Wood's case, the deceased was seen on the road, resting against a fence, and the prisoner about forty yards off, approaching him.

The next and last description of cases remaining to be considered under the present general head embraces those in which such care has been taken



by the criminal to avoid observation, that he has not been seen, either at or near the scene of the crime, or going towards it, or going from it, but his proximity, and indeed his presence are *inferred* from his movements at other points, before and after the crime was committed. . . . In Rush's case, the prisoner left his house in the evening, not long before the deceased, who lived in the neighborhood, was shot, and returned at about nine o'clock.

The weight and force of facts like these, when considered by themselves, consist merely in the coincidences and correspondences of *time* which they present; rendering the fact of presence *probable* in various degrees, but possessing no *exclusive* efficacy. . . .

2. The principal *infirmative* supposition applicable to the circumstance of opportunity to commit a crime, is that, admitting it proved to have existed, it does not necessarily follow that it was actually taken advantage of by the party shown to have possessed it; or that it was not taken advantage of by another person. In order to give it this effect, where it is solely or chiefly relied on, the circumstances tending to show its existence must be *exclusive* in their operation, by demonstrating that no other person had, or could have had the opportunity possessed by the accused, and that, therefore, by a necessary consequence, none but he could have committed the crime.

Its whole tendency is merely to show a *possibility* that the act might have been committed by the person supposed to be indicated; without any of that quality of positive *probability* in which the essence of the force of presumptive evidence resides. . . . *Another* person may have been present. The real murderer may have left the dead body, and escaped from the room or the house in which it is found, only the moment before the accused entered it. The real incendiary may have fled from the building fired, only the moment before the accused approached it. The presence of the accused himself, on such an occasion, may be accounted for upon grounds of humane and laudable intention to render assistance, or mere innocent curiosity, or even mere accident. The *exclusive* character of the accompanying circumstances, in regard to *means and modes of entrance* upon and exit from the scene of the crime, however apparently satisfactory, *may not be real*. The murderer may have escaped from the room or house, by a door, or even a window, the existence or capacity of which has been entirely overlooked. Supposing the exclusive presence of one particular person to be satisfactorily established, such person may not have been the accused, but *another person* more or less closely resembling him. In a case of supposed murder the circumstance that the accused was the *last person seen* in company with the deceased, previous to his death or disappearance; or, in other words, that the deceased when last seen alive was seen in his company, does not, of itself, necessarily exclude the possibility that *another* and *unseen* person may have joined the deceased, after the accused left him, perpetrated the crime, and effectually escaped. The circumstances of the accused leaving his residence *just before*, and returning to it *just after* the perpetration of a crime in the vicinity, merely show a coincidence of action, without any necessary *criminative* effect.

*Hastiness* of movement *towards* the scene of the supposed crime may have been prompted by a desire to render assistance, on hearing alarming sounds or cries from the spot. And *hastiness* of movement *from* the spot may have

been dictated by a similar desire to call for more adequate aid, or by a fear of impending danger to the party himself.

*Secrecy* of movement near the scene of the crime, even including the disguise of the person, may be explained on other suppositions than that of guilty intent. The lovers of servants are apt to be stealthy in their visits, and in this way are sometimes taken for thieves. And secrecy and disguise have sometimes been assumed and practiced out of mere sport.

**57. JONATHAN BRADFORD'S CASE.** (JAMES RAM. *On Facts as Subjects of Inquiry by a Jury.* 3d Amer. ed., 1863. p. 449.)

Jonathan Bradford, in 1736, kept an inn, in Oxfordshire, on the London road to Oxford. He bore a very unexceptionable character. Mr. Hayes, a gentleman of fortune, being on his way to Oxford, on a visit to a relation, put up at Bradford's. He there joined company with two gentlemen, with whom he supped, and, in conversation unguardedly mentioned that he had then about him a sum of money. In due time they retired to their respective chambers; the gentlemen to a two-bedded room, leaving, as is customary with many, a candle burning in the chimney corner. Some hours after they were in bed, one of the gentlemen, being awake, thought he heard a deep groan in an adjoining chamber; and this being repeated, he softly awaked his friend. They listened together, and the groans increasing, as of one dying and in pain, they both instantly arose and proceeded silently to the door of the next chamber, whence they had heard the groans, and, the door being ajar, saw a light in the room. They entered, and perceived a person weltering in his blood in the bed, and a man standing over him with a dark lantern in one hand and a knife in the other! The man seemed as petrified as themselves but his terror carried with it all the terror of guilt. The gentlemen soon discovered that the murdered person was the stranger with whom they had that night supped, and that the man standing over him was their host. They seized Bradford directly, disarmed him of his knife, and

charged him with being the murderer. He assumed, by this time, the air of innocence, positively denied the crime, and asserted that he came there with the same humane intentions as themselves; for that, hearing a noise, which was succeeded by a groaning, he got out of bed, struck a light, armed himself with a knife for his defense, and was but that minute entered the room before them. These assertions were of little avail; he was kept in close custody till the morning, and then taken before a neighboring justice of the peace. Bradford still denied the murder, but, nevertheless, with such apparent indications of guilt, that the justice hesitated not to make use of this most extraordinary expression, on writing out his mittimus, "Mr. Bradford, either you or myself committed this murder."

This extraordinary affair was the conversation of the whole country. Bradford was tried and condemned, over and over again, in every company. In the midst of all this pre-determination, came on the assizes at Oxford. Bradford was brought to trial; he pleaded — not guilty. Nothing could be stronger than the evidence of the two gentlemen. They testified to the finding Mr. Hayes murdered in his bed; Bradford at the side of the body with a light and a knife; that knife, and the hand which held it, bloody; that, on their entering the room, he betrayed all the signs of a guilty man; and that, but a few moments preceding, they had heard the groans of the deceased.

Bradford's defense on his trial was the same as before the gentlemen: he had heard a noise; he suspected some villainy was transacting; he struck a light; he snatched the knife, the only weapon near him, to defend himself; and the terrors he discovered, were merely the terrors of humanity, the natural effects of innocence as well as guilt, on beholding such a horrid scene.

This defense, however, could be considered but as weak, contrasted with the several powerful circumstances against him. Never was circumstantial evidence more strong! There was little need of the prejudice of the county against the murderer to strengthen it; there was little need left of comment from the judge, in summing up of the evidence; no room appeared for extenuation; and the jury brought in the prisoner guilty, even without going out of their box.

Bradford was executed shortly after, still declaring that he was not the murderer, nor privy to the murder of Mr. Hayes; but he died disbelieved by all.

Yet were these assertions not untrue! The murder was actually committed by Mr. Hayes' footman: who, immediately on stabbing his master, rifled his breeches of his

money, gold watch, and snuffbox, and escaped back to his own room; which could have been, from the after circumstances, scarcely two seconds before Bradford's entering the unfortunate gentleman's chamber. The world owes this knowledge to a remorse of conscience in the footman (eighteen months after the execution of Bradford) on a bed of sickness. It was a death-bed repentance, and by that death the law lost its victim.

It is much to be wished that this account could close here, but it cannot! Bradford, though innocent, and not privy to the murder, was, nevertheless, the murderer in design: he had heard, as well as the footman, what Mr. Hayes declared at supper, as to the having a sum of money about him; and he went to the chamber of the deceased, with the same diabolical intentions as the servant. He was struck with amazement! he could not believe his senses! and, in turning back the bedclothes, to assure himself of the fact, he, in his agitation, dropped his knife on the bleeding body, by which both his hands and the knife became bloody. These circumstances Bradford acknowledged to the clergyman who attended him after his sentence.

#### 58. WILLIAM SHAW'S CASE.

*Remarkable Trials of All Countries.*

William Shaw was an upholsterer at Edinburgh, in the year 1721. He had a daughter Catherine Shaw, who lived with him. She encouraged the addresses of John Lawson, a jeweler, to whom William Shaw declared the most insuperable objections, alleging him to be a profligate young man, addicted to every kind of dissipation. He was forbidden the house; but the daughter continuing to see him clandestinely, the father on the discovery, kept her strictly confined. William Shaw had, for some time, pressed his daughter to receive the addresses

(T. DUNPHY AND T. J. CUMMINS. 1873. p. 457.)

of a son of Alexander Robertson, a friend and neighbor; and one evening, being very urgent with her thereon, she peremptorily refused, declaring that she preferred death to being young Robertson's wife. The father grew enraged, and the daughter more positive; so that the most passionate expressions arose on both sides, and the words "barbarity," "cruelty," and "death," were frequently pronounced by the daughter! At length he left her, locking the door after him.

The greater part of the buildings in Edinburgh are formed on the

plan of chambers in English inns of court, so that many families inhabit rooms on the same floor, having all one common staircase. William Shaw dwelt in one of these, and a single partition only divided his room from that of James Morrison, a watch-case maker. This man had indistinctly overheard the conversation and quarrel between Catherine Shaw and her father, but was particularly struck with the repetition of the above words, she having pronounced them loudly and emphatically! For some little time after the father had gone out, all was silent, but presently Morrison heard several groans from the daughter. Alarmed, he ran to some of his neighbors under the same roof. These, entering Morrison's room, and listening attentively, not only heard the groans, but distinctly heard Catherine Shaw faintly exclaim: "Cruel father, thou art the cause of my death!" Struck with this, they flew to the door of Shaw's apartment; they knocked — no answer was given. The knocking was still repeated — still no answer. Suspicions had before risen against the father; they were now confirmed: a constable was procured, an entrance forced; Catherine was found weltering in her blood, and the fatal knife by her side. . . . Just at the critical moment, William Shaw returns and enters the room. All eyes are on him! He sees his neighbors and a constable in his apartment, and seems much disordered thereat; but at the sight of his daughter, he turns pale, trembles, and is ready to sink. The first surprise and the succeeding horror leave little doubt of his guilt in the breasts of the beholders; and even that little is done away on the constable discovering that the shirt of William Shaw is bloody.

He was instantly hurried before a magistrate, and upon the depositions of all the parties, committed to prison on suspicion. He was shortly after brought to trial, when, in his

defense, he acknowledged the having confined his daughter to prevent her intercourse with Lawson; that he had frequently insisted on her marrying Robertson; and that he quarreled with her on the subject the evening she was found murdered, as the witness, Morrison, had deposed: but he averred, that he left his daughter unharmed and untouched; and that blood found upon his shirt was there in consequence of his having bled himself some days before, and the bandage becoming untied. These assertions did not weigh a feather with the jury, when opposed to the strong circumstantial evidence of the daughter's expressions, of "barbarity," "cruelty," "death," and of "cruel father, thou art the cause of my death," — together with that apparently affirmative motion with her head, and of the blood so seemingly providentially discovered on the father's shirt. On these several concurring circumstances, was William Shaw found guilty, was executed, and was hanged in chains, at Leith Walk, in November, 1721.

There was not a person in Edinburgh who believed the father guiltless, notwithstanding his latest words were, "I am innocent of my daughter's murder." But in August, 1722, as a man, who had become possessor of the late William Shaw's apartments, was rummaging by chance in the chamber where Catherine Shaw died, he accidentally perceived a paper fallen into a cavity on one side of the chimney. It was folded as a letter, which, on opening, contained the following: "Barbarous father, your cruelty in having put it out of my power ever to join my fate to that of the only man I could love, and tyrannically insisting upon my marrying one whom I always hated, has made me form a resolution to put an end to an existence which is become a burthen to me. . . . My death I lay to your charge: when you read this, consider yourself as the inhuman wretch that plunged the murderous knife into the bosom of

the unhappy — Catherine Shaw." This letter being shown, the handwriting was recognized and avowed to be Catherine Shaw's by many of her relations and friends. It became the public talk; and the magistracy of Edinburgh, on a scrutiny, being convinced of its authenticity, or-

dered the body of William Shaw to be taken from the gibbet, and given to his family for interment; and as the only reparation to his memory and the honor of his surviving relations, they caused a pair of colors to be waved over his grave, in token of his innocence.

59. DOWNING'S CASE. (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 240.)

Two brothers-in-law, Joseph Downing and Samuel Whitehouse, in the year 1822, met by appointment to shoot, and afterwards to look at an estate, which on the death of Whitehouse's wife without issue would devolve on Downing. They arrived at the place of meeting on horseback, Downing carrying a gun barrel and leading a colt. After the business of the day, and after drinking together some hours, they set out to return home, Downing leading his colt as in the morning. Their way led through a gate opening from the turnpike road, and thence by a narrow track through a wood. On arriving at the gate, Downing discovered that he had forgotten his gun barrel; and a man who accompanied them to open the gate went back for it, returning in about three minutes. In the meantime Whitehouse had gone on in advance; and the prisoner, having received his gun barrel, followed in the same direction. Shortly afterwards Whitehouse was found lying on the ground in the wood, at a part where the track widened, about 600 yards from the gate, with his hat off, and insensible from several wounds in the head, one of which had fractured his skull. While the person by whom he was discovered went for assistance, the deceased had been turned over and robbed of his watch and money. About the same time Downing was seen in advance of the spot where the deceased lay, proceeding homeward and leading his colt; and a few minutes afterwards two men were seen following in the

same direction. Suspicion attached to Downing, partly from his interest in the estate enjoyed by the deceased, and he was put upon his trial for this supposed murder; but it was clear that he had no motive on that account to kill the deceased, as the estate was not to come to him until after failure of issue of the deceased's wife, to whom he had been married several years, without having had children; so that it was his interest that the way should not be opened to a second marriage. That the deceased had been murdered at all, was a highly improbable conjecture, and it was far more probable that he had fallen from his horse and received a kick, especially as his hat bore no marks of injury, so that it had probably fallen off before the infliction of the wounds. That the deceased, if murdered at all, had been murdered by the prisoner was in the highest degree improbable, considering how both his hands must have been employed, nor was there any evidence that the deceased had been robbed by the prisoner. It thus appeared, that these accumulated circumstances, of supposed inculpatory presumption, were really irrelevant and unconnected with any *corpus delicti*. The prisoner was acquitted; and it is instructive that about twelve months afterwards, the mystery of the robbery, the only real circumstance of suspicion, was cleared up. A man was apprehended upon offering the deceased's watch for sale, and brought to trial for the theft of it, and acquitted, the judge thinking that he ought not

to be called upon, at so distant a period, to account for the possession of the deceased's property, which he might have purchased, or otherwise fairly acquired, without being able to prove it by evidence. The accused, when no longer in danger, acknowl-

edged that he had robbed the deceased, whom he found lying drunk on the road, as he believed; but that he had concealed the watch, on learning that it was supposed that he had been murdered, in order to prevent suspicion from attaching to himself.

**60. LOOKER'S CASE.** (W. Amer. ed. 1905. p. 242.)

A farmer was tried under the special commission for Wiltshire, in January, 1831, upon an indictment which charged him with having feloniously sent a threatening letter, which was alleged to have been written by him. That the letter was in the prisoner's handwriting was positively sworn by witnesses who had had ample means of becoming acquainted with it, while the contrary was as positively asserted on the part of the prisoner by numerous witnesses equally competent to speak to the fact. But the scale appears to have been turned by the circumstance that the letter in question, and two others of the same kind sent to other persons, together with a scrap of paper found in the prisoner's bureau, had formed one sheet of paper; the ragged edges of the different portions exactly fitting each other, and the water-mark name of the maker, which was divided into three parts, being perfect when the portions of paper were united. The jury found the prisoner guilty, and he was sentenced to be transported for life. The judge and jury having retired for a few minutes, during their absence the prisoner's son, a youth about eighteen years of age, was brought to the table by the prisoner's attorney, and confessed that he had been the writer of the letter in question, and not his father. He then wrote on a piece of paper from memory a copy of the

**WILLS.** *Circumstantial Evidence.*

contents of the anonymous letter, which on comparison left no doubt of the truth of his statement. The writing was not a verbatim copy, although it differed but little; and the bad spelling of the original was repeated in the copy. The original was then handed to him, and on being desired to do so, he copied it, and the writing was exactly alike. Upon the return of the learned judge the circumstances were mentioned to him, and he had the prisoner tried upon a second indictment for sending a similar letter, when the son admitted in the witness box writing and sending all the three letters in question, and the father was at once acquitted. The son was subsequently indicted for the identical offense which had been imputed to the father: he pleaded guilty, and was sentenced to transportation for seven years. It appeared that he had had access to the bureau, which was commonly left open. . . . The correspondence of the fragment of paper found in the prisoner's bureau with the letter in question, and with the two others of the same nature sent to other persons, was simply a circumstance of suspicion, but foreign, as it turned out, to the *factum* in question; and considering that other persons had access to the bureau, its weight as a circumstance of suspicion seems to have been overrated.

**61. REGINA v. CLEARY.** (*Nisi Prius*. 1862. 2 F. & F. 850.)

The prisoner, a soldier, was indicted for the murder of one Houghton, at Chichester.

*Roupell* and *A. Smith*, for the prosecution. *Barrow*, for the defense.

The case for the prosecution was, that the prisoner had shot the deceased by mistake for one of his officers. The deceased, a student in the college at Chichester, had been shot in a lane leading thereto, and also leading to the barracks, a few minutes before twelve, on the night of the 16th of October. He uttered a loud shriek, which was heard at some distance, and he was immediately after found by a policeman and another man, named Bedford. He was shot just under the breast-bone, and was writhing in pain, and said to Bedford something which showed he was in dread of imminent death; but this the policeman did not hear him say. He said to the policeman, "Remove me, or I shall die of cold." He then said something else as to who shot him. He was removed into the college, where the principal spoke to him, and he seemed sensible, but did not speak. He died soon afterwards. . . . The prisoner, on the night of the 15th, the day before the murder, had been told that he was ordered for drill next day, and had uttered some angry words, saying he would not go, and would know who ordered it, and would go to the battalion order room to find out, and that he would "drill some one." That night, after going to bed, he left the barracks, and there was strong evidence that he had taken a rifle and ammunition with him. In about half an hour a shot was heard near the college, and some one, by the light of the flash, saw a man dressed in what seemed a soldier's greatcoat and cap running away. There was no other evidence as to who fired the shot, but the theory of the prosecution was, that it was an attempt by the prisoner to shoot one of his officers. There was no evidence, however, of any of them having been walking near the spot at the time. He had not returned to barracks, and a man, described as dressed like him, in a soldier's coat and cap, with a musket, had been

seen by more than one witness next night, near the place where the deceased was shot, standing under the hedge. And this man was so seen there just before the shot was fired. Not far off from the spot the prisoner's rifle was found, loaded, laid down half covered up under a hedge. The prisoner was seen next day, the 17th, three or four miles off, without his rifle. And when arrested on that day he was at some distance from Chichester, going towards Petworth. He ran away when he saw the officer, and said he was a deserter, and had left Chichester two days ago. When told of the murder, he said, "I had nothing to do it with." When told that there had been a rifle found, he said, "How do they know it was taken out of the barracks? Have they found one?" When told that it had been found, he said, "It is not mine." After his arrest, he said he had applied in August to Major Bush, the commanding officer of his company, for a "pass" to see his brother, and had been refused; and on another occasion said he doubted not the major would hang him if he could, and that he hoped the major would have him drummed out. He also said that the major had been shot at twice before in China, and that he knew who did it. It came out that several soldiers were out of barracks the night before the murder, but on the night of the murder it did not appear that any other soldier than the prisoner was out, or that more than one rifle was missing. There was, however, no evidence that the major or any other officer would be likely to be in the lane about the time of the shot, or that any of them had been there.

At the close of the case, ERLE, C. J. (to the jury).—There are two questions for you: First, was the deceased murdered? Secondly, was he murdered by the prisoner?

On the first question there can be little doubt, for if the shot was

fired by accident, and with no intent to kill any one, the person who fired it, and who must have heard the shriek uttered by the deceased, would have gone to his assistance. It is plain that whoever fired the shot meant to kill some one, and to leave his victim to die.

Then the second question arises, was the prisoner the person who fired the shot? Now there is no express evidence that he was, and it is only to be inferred from circumstances, — partly from the evidence of identity; partly from the suggested motive or intent of the prisoner to kill some other person. As to the evidence of identity, it is doubtful and slight, and no one speaks clearly to having seen the prisoner near the spot at the time, but only to a person dressed like him, *i.e.* in the common dress of a soldier. It is true that one or two speak to having seen a man dressed like a soldier, and with a gun. And if you are satisfied that the prisoner took a gun with him, then that would bear strongly against him, not only as to the identity, but as to the falsity of the statement he made that he had not a gun with him, and also as to the finding of a gun near the spot in the way he took. But even assuming that he had a gun, that would not be conclusive that he was the man who fired the fatal shot. It is suggested that it is to be inferred that he was so from the fact that he had uttered angry words or threats against any one who had to do with his being ordered to drill next day. But there is no evidence that he had found out who had had to do with it, or that he had conceived enmity against any particular person, or that any person against whom he might be supposed to have an enmity was or would be likely to be at the spot at or about the time of the fatal shot. . . . The question comes to this: on the whole of the evidence, are you satisfied that he fired that shot? That is, fired it intentionally, for the the-

ory of accidental firing seems (for the reason I have given) untenable.

Verdict, not guilty.

[Reporter's Note.] A verdict which met the approval of all lawyers, although great doubt and dissatisfaction was expressed among laymen. It was said that there was no moral doubt of the man's guilt. Nor was there, if all the facts were taken as clearly proved on which the theory of the prosecution was based. But then the great fact it required, that the prisoner had fired the shot, was not clearly proved; even assuming that it was proved that he took a gun with him. For whether that was the gun fired, and he was the man who fired (which no doubt may be taken as facts in substance the same), must depend, as the Lord Chief Justice pointed out, partly on evidence of identity, which was doubtful, and partly on the assumed or suggested theory of motive and intent, as to which, not only was there doubt, but there was an utter blank and defect in the evidence; for it was not proved that any officer who had had to do with the order to drill, or who might be supposed to have had to do with it (Major Bush, for instance), was or would be likely to be on the spot at the time the shot was fired. The case for the prosecution went upon the theory that one man had been shot by mistake for another, and the evidence of identity was so doubtful, that though, if it had been clearly proved that the prisoner had fired the shot willfully at any one, it would not have mattered whether he fired at the deceased; yet, as the evidence of identity was so doubtful, and it was sought to eke it out by a presumption that the prisoner was the man who fired the shot, because he had a design to shoot some one, it was essential to prove that the man whom he meant to shoot was or might be supposed to have been on the spot, otherwise, it is obvious



there could be no greater reason to presume that the prisoner had fired *this* shot than any *other* shot, or that the prisoner had fired it rather than any other person.

The verdict was supposed to have gone on the notion, that if one man is shot by mistake for another, it is not murder! A notion quite contrary to the clear meaning of the charge, and probably to the common knowledge of all men. But the verdict went upon *this*, that if the main proof or main part of the proof, that the prisoner fired the shot, is, that he meant to kill *some one else* (which, per se, rather negatives the idea that he did so) it must at least be clearly proved, that the person whom he meant to shoot was on the spot, or might

have been *supposed* to be. This was not only not proved, but there was no evidence of it, so that the case broke down on what turned out to be its vital point. For, striking that out, the case for the prosecution, even assuming an intent to kill an officer, and even assuming an attempt to do so, on the part of the prisoner, was quite consistent with the theory that he had abandoned the attempt, laid aside the gun, and gone away, and that some other person had fired the shot, either against the deceased or some one else. The only person who spoke to the *personal* identity of the prisoner, as distinguished from the mere common likeness of a soldier's dress, saw him three or four miles off and *without* a gun.

62. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. p. 511.) If the accused can make it appear, that, at the very time when the crime charged is alleged to have been committed (it being of a nature to require his personal presence) he was *in another place*, a result of the same kind will be established; founded on the obvious impossibility that the same person could have been in two different places at the same time. This species of defense is familiarly known as an *alibi*. . . .

A leading rule in the application of this description of evidence is, that the time relied on, and in which the value of the evidence essentially consists, must *correspond closely* with the time at or during which the offense is proved to have been committed.

Sometimes, all that can be proved is that the crime was committed, or must have been committed, during a space of time embracing several hours: as, during a night or part of a night, or during a forenoon. In such cases, the *alibi* evidence relied on, in order to be effectual, must be applied to and cover the *whole* of such period. A good illustration of this position is presented in Richardson's case. It was satisfactorily proved, in that case, that the crime had been committed during the forenoon of the day specified. To meet this, the prisoner adduced evidence to show that, during that same forenoon, he was engaged at work, with his fellow servants, at some distance from the cottage which was the scene of the crime. Here was a seemingly entire correspondence between the two facts, in the important particular of time; bringing the facts themselves in direct opposition to each other. But, on a closer scrutiny of all the circumstances, it was found that the accused had not been in company with his fellow workmen, during *the whole* of the forenoon in question; but that there was an *interval* of about *half an hour*, during which he had *absented* himself from them. This apparently short interval served to destroy the effect of the whole evidence. For it was satisfactorily shown that it was long enough to have admitted of his going to the cottage, committing the crime and returning to his companions;

and this was subsequently proved to have been the actual fact, by the prisoner's own confession. . . .

Where the time proved as that of the commission of the crime, and that shown by the *alibi* evidence, are not identical, but only proximate to each other, the inference deducible from a view of both periods in connection, is not always one of necessity and certainty, rendering the fact of the party's presence at the scene of crime incredible under any circumstances, or incredible *in toto*; but often one of improbability, more or less strong, rendering the fact of presence incredible in degree only, and according to circumstances. . . .

The two circumstances, the aid of which is indispensable in determining this question, — whether it were actually and physically impossible, and therefore at once incredible, that the party was, or could have been, at both places, consecutively, — are, the *distance* between the two places, and the *rapidity* with which the party could have moved from one to the other.

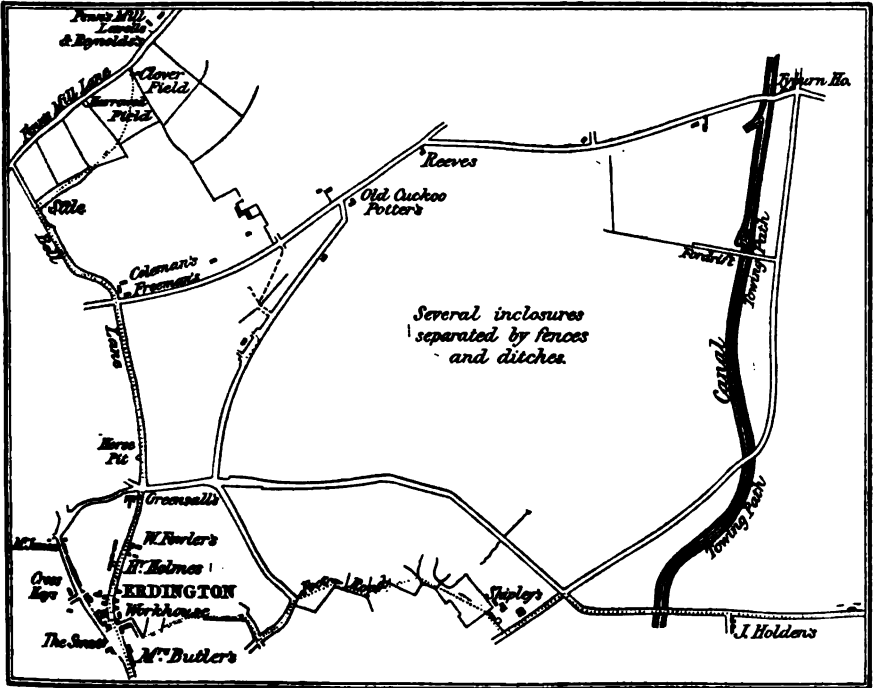
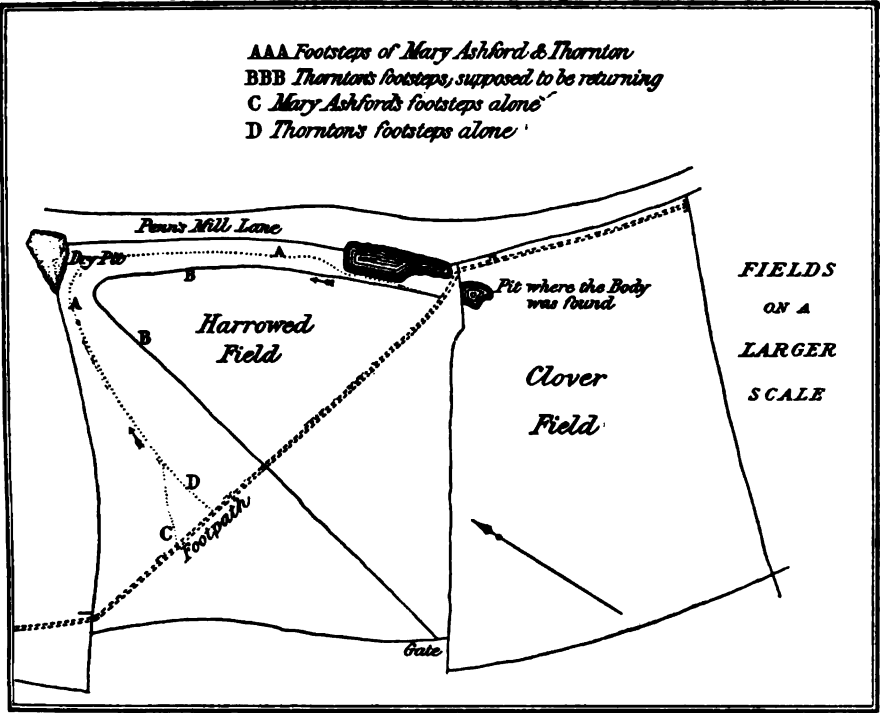
**63. ABRAHAM THORNTON'S CASE.** (W. O. WOODALL. *Reports of Celebrated Trials*. 1873. Vol. I, p. 23.)

[The general features of this case are stated in No. 162, *post*. The accused's whereabouts at the precise hour of 4.30 A.M. on the night of the death were evidenced by his own testimony to the committing magistrate and by other witnesses. A diagram to illustrate this testimony is given facing page 160.]

*Abraham Thornton.* — "Saith that he is a bricklayer; that he came to the 'Three Tuns' at Tyburn about six o'clock last night, where there was a dance. . . . Examinant stayed until about twelve o'clock. He then went with Mary Ashford. . . . They then turned to the right and went along a lane until they came to a gate and stile on the right-hand side of the road; they went over the stile and into the next piece, along the fore drove; they continued along the foot road four or five fields, but cannot tell exactly how many. Examinant and Mary Ashford then returned the same road . . . and whilst they stood there a man came by. . . . That examinant and Mary Ashford stayed at the stile a quarter of an hour afterwards; they then went straight up to Mr. Freeman's again, crossed the road and went on towards Erdington till he came to a

grass field on the right-hand side of the road, within about 100 yards of Mr. Greensall's, in Erdington. Mary Ashford walked on, and examinant never saw her after she was nearly opposite Mr. Greensall's. . . . It was then four o'clock, or ten minutes past four o'clock. Examinant went by Shilley's in his road home, and afterwards by John Holden's where he saw a man and woman with some milk cans, and a young man driving some cows out of a field who he thought to be Holden's son. He then went towards Mr. Twamley's mill where he saw Mr. Rotton's keeper taking the rubbish out of the nets at the floodgates. He asked the man what o'clock it was; he answered near five o'clock or five. He knew the keeper. Twamley's mill is about a mile and a quarter from his father's house with whom he lives. The first person he saw was Edward Teck, a servant of his father, and a boy."

*W. Jennings.* — "I am a milkman and live at Birmingham. I buy milk of Mr. Holden, of Erdington; myself and wife were at his house on the morning of the 27th of May. I remember seeing the prisoner coming down the lane which leads



NO. 63. THORNTON'S CASE



from Erdington to Mr. Holden's. He was going towards the house. It was as near as I can judge, then about half past four. I had no watch with me. We milked a cow a piece in the yard after we saw him, which might occupy us ten minutes. My wife then asked Jane Heaton what o'clock it was. The prisoner was walking very leisurely. My wife saw him as well as I." Cross examined by Mr. *Clarke*. "I was standing in the lane within about thirty yards of Mr. Holden's house on the great road when I first saw Thornton. I had been standing there about ten minutes. When I first saw the prisoner, he was within twenty yards of us, coming down the lane between Mr. Holden's house and the canal lane. . . ."

*Martha Jennings*.—"I saw the prisoner on the 27th of May walking gently along the lane leading to Mr. Holden's house. I then went to milk the cows, and inquired of Jane Heaton the time of day a little while afterwards. Between the time of milking the cows and seeing the prisoner might be a quarter of an hour. I was standing near Holden's house when he passed me. . . . The prisoner was walking leisurely, and did not seem in a hurry, or the least confused."

*Jane Heaton*.—"I live servant with Mr. Holden. I was getting up at half past four on the morning of the 27th of May. My bedroom window looks into the lane which leads from Erdington to Castle Bromwich. I saw a man, whom I supposed to be the prisoner, walking towards Castle Bromwich. He was walking quite slow. About a quarter of an hour after, Jennings's wife came and asked me what time of the day it was. I looked at the clock, and observed that it wanted seventeen minutes of five. The clock was not altered for several days after that."

*John Holden*.—"I was at home on the 28th of May last,

when Mr. Twamley came to examine my clock. I believe it to be a very good one. . . ."

*Mr. William Twamley*.—"I live at Newhall Mills, near Sutton Coldfield, and within three miles of Castle Bromwich. I caused the prisoner to be apprehended. I compared my watch and Holden's clock on the 28th of May; they were exactly alike as to time. From Mr. Holden's I immediately went to Birmingham, and my watch agreed exactly with St. Martin's Church clock there."

*John Haydon*.—"I am gamekeeper to Mr. Rotton, of Castle Bromwich. I left my own house about ten minutes before five of the morning of the 27th of May. As I passed by Mr. Z. Twamley's, I heard Mr. Rotton's stable clock strike five. About five minutes after I saw the prisoner. He was then coming towards Mr. Twamley's mill, as if from Erdington to Castle Bromwich. I knew him very well. I asked him where he had been. He said, 'To take a wench home. . . .'"

*W. Crompton*.—"I saw Mr. Webster on the morning of the 27th of May in the field in which were the footsteps. We rode to Castle Bromwich together. Mr. Webster compared his watch with mine; we perfectly agreed. Our watches were according to Birmingham time. We found our watches were fifteen minutes slower than Mr. Rotton's stable clock. The Birmingham clocks and those at Castle Bromwich differed fifteen minutes. . . ."

[On a later argument of law, involving the proof of alibi] Mr. *Tindal* contended that even admitting all the defective part of the allegations in the counterplea to be struck out, still there did remain sufficient *prima facie* evidence against the defendant. . . . There was abundance of other proof to show the impossibility of the defendant's having committed the crime charged against him. It appeared

from the replication that about quarter past four Mary Ashford left the house of Mary Butler. She had then a mile and a half to go to the pit; and he thought he should not be allowing too much time for a woman to go such a distance in saying twenty minutes. Then she reached the pit at twenty-five minutes before five. He would now ask according to the replication, where was Thornton at that time? The answer would be, taking the latest moment, that at twenty-five minutes before five he came up with another person a mile and a half from the pit. When Mary Ashford arrived at the pit, the circumstances of rape and murder,

according to the counterplea, were yet to happen; events which, according to the experience of courts of justice, must have occupied at the smallest computation a quarter of an hour. This brought them to ten minutes before five, at which precise moment they had Thornton meeting another person, namely, John Haydon, a mile further from Holden's farm, and two miles and a half from the pit. From thence he was traced still departing from the pit until he reached Castle Bromwich; so that in point of fact, it was utterly impossible for Thornton to have committed the acts imputed to him. . . .

**64. FRANK ROBINSON'S CASE.** (T. DUNPHY and T. J. CUMMINS. *Remarkable Trials of all Countries.* 1873.)

[On Saturday night, April 9, 1836, Helen Jewett, an inmate of a house of ill fame, was murdered in her room; the body was discovered about 4 A.M.; a man who had been with her that night had disappeared; the accused was said to be the man].

*Rosina Townsend*, after being sworn, deposed as follows: "I was acquainted with Helen Jewett. The last time that I saw Helen Jewett alive was on Saturday night, the 9th of April last [in my house]. The prisoner at the bar was known to me by the name of 'Frank Rivers' and by no other name. . . . I saw the prisoner at the bar on the night that Helen Jewett was murdered. A person knocked at my hall door; I went to the door and asked who was there? This was about nine o'clock, or it might have been as late as half past nine. When I asked who was there — the door was still locked — I asked a second time the same question. . . . The reason that I wished to ascertain this was that Miss Jewett had requested me in the course of the evening not to admit a certain young man by the

name of Bill Easy to see her if he should happen to come there. . . . The reason that Helen Jewett assigned to me for not wishing to see Bill Easy on that night was that she then expected Frank Rivers to visit her. . . . I mean by Frank Rivers Mr. Robinson — the prisoner at the bar. When I opened the door, I discovered that it was Frank Rivers (or Mr. Robinson) who was there. . . . When I called Helen I told her that Frank had come. When I told her this he had turned the entry to go upstairs. . . . Immediately on Frank's going upstairs, Helen Jewett came out of the parlor and followed him up. When she came out of the parlor she took hold of Robinson's cloak, and said: 'My dear Frank, I am glad you have come. . . .' That was the last that I saw of the prisoner at the bar on that night. . . ." Cross-examined by Mr. *Maxwell*. "I am 39 years of age. . . . There were two visitors at my house who called themselves Frank Rivers, the prisoner at the bar being one of them. . . . Shortly after I admitted Mr. Rivers (Robinson) and he had gone upstairs, I retired to

my sleeping room. That was about nine or half past nine o'clock. . . ."

The defense was opened by Mr. *Ogden Hoffman* in one of those brilliant effusions, which in the course of his long and extensive practice justly acquired for him an imperishable celebrity. . . . In conclusion the learned gentleman stated, that he and his associate counsel should rely greatly for the complete exculpation of their client by proving by the testimony of a highly respectable tradesman a positive alibi, showing that the prisoner up to past ten o'clock, on the night of the 9th of April last (the night of the murder), was smoking cigars in a grocery store in this city situated full a mile and a half from the house of Rosina Townsend, in Thomas Street. . . .

*Robert Furlong*, on being sworn, was examined by Mr. *Hoffman*, and deposed as follows: "Keep a grocery store at the corner of Nassau and Liberty streets. . . . Know the prisoner at the bar by sight. He has often been in my store to buy cigars. . . . The prisoner was in my store the Saturday night previous to the murder. He came there, as near as I can remember, about half past nine o'clock. He bought at the store a bundle of cigars, containing twenty-five. After he bought the cigars, he lighted one, and took a seat on the barrel and smoked there until ten o'clock. When the clock struck ten, that gentleman (the prisoner) took out his watch and looked at it. He said that his watch, which was a small silver lepine, was one minute past ten o'clock. I also took out

my watch, which I had regulated on that day by Mr. Harold of Nassau Street, and compared my watch with his. When the clock struck, my partner said, 'There's ten o'clock, and it is time to shut up.' That was our usual time and the porter went out to put up the shutters. . . . When we got completely shut up, Mr. Robinson remarked to me that he was encroaching on my time. I replied, 'Oh, no, not at all; I shall remain at the store until the boy returns.' . . . Before he went away, he stood a short time on the stoop, and afterwards said, 'I believe I'll go home; I'm tired,' and then bade me good-night. It must have been full ten or fifteen minutes after ten when he left my store. . . . I am now positive that the prisoner here is the person who was in my store on the ninth of April. I cannot be mistaken in this. Am not related to the prisoner, nor to any of his connections, in any way, even in the most distant manner. . . ."

*Henry Burnham*, examined by Mr. *Phenix* for the prosecution.—"I am deputy keeper for Bellevue. I know Mr. Furlong. . . ." By a Juror.—"I have the utmost confidence in Mr. Furlong's integrity and oath. I have known him for eight years, and I never knew anything of him but good." At the close of this witness's examination, the juror who proposed the last material question stated that the object of his asking it was merely to satisfy some of the jurors who did not know Mr. Furlong as well as some of the others. . . .

[The accused was acquitted.]

- 65. THE POPIISH PLOT. [Printed *post*, as No. 349.]
- 66. KARL FRANZ' CASE. [Printed *post*, as No. 388.]
- 67. JOHN HAWKINS' CASE. [Printed *post*, as No. 342.]
- 68. ROBERT HAWKINS' CASE. [Printed *post*, as No. 335.]
- 69. DURRANT'S CASE. [Printed *post*, as No. 386.]

70. **HILLMON v. INSURANCE CO.** [Printed *post*, as No. 389.]

71. **TOURTELOTTE v. BROWN.** [Printed *post*, as No. 384.]

72. **ANON.** (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 199.) . . .

A striking example of the way in which the scientific evidence may succeed in establishing the innocence of a person accused of murder is seen in the following case, which was tried in 1835: A woman, who had a violent disposition and was subject to attacks of hysteria, accused her husband of having attempted to poison her, and in proof of her charge produced a white powder, which, as she alleged, he had put into her food. The powder was found to be white arsenic, and the food on examination was found to contain a fatal quantity of that poison. The husband was therefore immediately arrested and kept in prison pending the investigation. The woman was perfectly well for eight days, but on the ninth day became very violent, and did many eccentric things, and on the next

day she died. Examination of the body showed that arsenic had been the cause of death. Her husband denied that he had ever put any arsenic into her food. But had it not been for the scientific evidence he would probably have been unable to prove that he was innocent. Undoubtedly he owed his escape to his having been in prison for the eight days between the accusation brought by his wife and her death, for the medical witnesses proved that it was not possible for him to have given the dose of arsenic which caused the death of the woman, since the effects of arsenic could not have remained latent in the system for that length of time. Circumstances, therefore, indicated that the woman had committed suicide, and on the strength of this evidence the prisoner was immediately set at liberty.

#### Topic 2. Physical and Mental Capacity, Tools, Clothing, etc.

73. **ALEXANDER M. BURRILL.** *A Treatise on Circumstantial Evidence*. (Amer. ed., 1868. p. 263.) The participation of the accused in the crime proved to have been committed is shown by those physical facts or appearances which connect him with it; affording so many natural coincidences, harmonizing with the supposition of his guilt. They are, in other words, the traces, marks, or indications, more or less distinct and impressive, of the presence of a particular criminal agent; . . . and may be enumerated in the following order.

1. Impressions *directly* from the person; such as prints in earth or snow of the feet or shoes, and impressions of other parts of the body. Of these (especially in cases of crime committed in rural districts) *footprints* are the most common. They may be considered as of two kinds: *ordinary* footprints, exhibiting no peculiar characteristics; and impressions of a *peculiar* character. The former are important, first as showing the general fact that one or more persons have been present; secondly, as indicating the direction from which they approached, or in which they left the scene of crime, and their movements about it; and, thirdly, as more immediately indicating the particular perpetrator by inferences which they tend to establish. Im-



pressions from *other parts* of the body than the feet sometimes answer a similarly useful purpose, in detecting and identifying an offender. In the case of *Rex v. Brindley*, impressions were found in the soil, near the scene of crime, which was stiff and retentive, of the knee of a man who had worn breeches made of stripped corduroy, and patched with the same material, but the patch was not set on straight; the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the dress of the prisoner. Impressions made even by the *teeth* have sometimes furnished important criminative evidence. Mascardus has related an instance, where an enclosed ground, set with fruits, was broken into by night, and several of them eaten; the rinds and fragments of some of which were found lying about. On examining these, it appeared that the person who ate them had lost *two front teeth*, which caused suspicion to fall on a man in the neighborhood, who had lost a corresponding number; and he, on being taxed with the theft, confessed his guilt.

2. Impressions made by *instruments* used by the person come next to be considered. These operate, in the detection of the criminal, in two ways, as just observed respecting footprints, that is to say: first, generally, as indicating the quarter from which the offender came; and they may have this effect, though the instruments themselves are not found; secondly, specially, as identifying the guilty person; and this is effected, where the instruments themselves are found, by comparing them with the impressions. As an instance of the former, marks of violence, such as impressions of a chisel, on the outside of the doors or windows of a building, indicate the general fact that the robber or murderer came from without. . . . As instances of impressions of instruments specially indicating the offender may be mentioned marks of an iron instrument upon the windows of a house, corresponding with a chisel found in the prisoner's possession, or proved to have been used by him.

3. Marks made by instruments held or used by the offender in a *peculiar* manner. These often contribute material aid in fixing the charge of guilt on a particular individual. Thus, where, on examination of the body of a murdered person, the fatal wound appears to have been inflicted by one who held the instrument in his left hand.

4. *Objects left* at the scene of crime, by the supposed offender, being identified as belonging to him or previously seen in his possession. Of this description of traces of the person are the instruments of crime themselves; such as the pistol, razor, knife, or hatchet used in committing a murder; articles of dress; such as a hat, a glove, a neckcloth, a cloak, and the like. These furnish obvious means of identifying the criminal.

5. *Objects left* at the scene of crime, corresponding with other objects in the possession of the supposed offender. Such as a bullet, extracted from the body of the deceased, accurately fitting the barrel of a pistol, or a bullet mold, found on the accused; shot taken from the wound, and ascertained to be of the same quality with other shot found in his possession; patches and tow wadding, found near the body of the deceased, corresponding with similar patches found in the prisoner's rifle box; and the like.

6. *Fragments* or portions of objects found at the scene of the crime, corresponding with other portions of objects, found on the accused, or known to have been in his possession. Of this description are: a piece of the

blade of a knife, found sticking in the window frame of a house which had been broken into, corresponding with a broken-bladed knife found in the prisoner's pocket; . . . a fragment of a printed paper, or of a letter, used as wadding for the charge of the firearm with which the crime was committed, corresponding with another piece found on the prisoner's person or premises; a portion of a sheet of paper on which a letter has been written, corresponding with another portion found in the prisoner's desk; and the like.

**74. THE SHEFFIELD CASE.** (H. L. ADAM. *The Story of Crime*. 19 —, p. 294.)

One of the most remarkable instances of how evidence, circumstantial evidence, can miscarry, so to speak, and point in a direction diametrically opposed to the truth, was that in connection with the Sheffield industrial riots. During this period of strife a good deal of violence was used towards the "blacklegs," which included the throwing of explosive bombs. On a certain night a bomb was thrown into the house of a man who was regarded by the strikers as an "undesirable," which resulted in the man's death. At the moment of the explosion a woman in a neighboring house happened to look out of her window, when she saw a man running hastily from the scene of the outrage. She was able to get a good view of his face, and also saw the sleeve of his coat catch on a protruding hook outside a butcher's shop. Tearing himself free from this, he disappeared. But with the assistance of this woman the police were able to arrest the man,

who was immediately identified by the witness. On the meat hook outside the butcher's shop the police found a piece of cloth which had been torn from the fleeing man's coat; the coat sleeve of the man arrested was torn and a piece of cloth missing, which was found to be that on the hook outside the butcher's shop. There could be no doubt about it, the cloth was precisely the same and the piece fitted exactly. This seemed conclusive evidence, in all conscience.

Yet it was entirely misleading as subsequent events proved. It was quite true that the man in question was running from the scene of the outrage as the woman declared, it was also perfectly correct that his coat caught on the hook outside the butcher's shop, that he tore it away and disappeared. But he did not throw the bomb; he, however, saw the man who did, and he was simply running away for *his own protection!*

**75. THE OBSTINATE JURYMAN'S CASE.** (S. M. PHILLIPPS. *Famous Cases of Circumstantial Evidence*. No. XXI.)

Two men were seen fighting together in a field. One of them was found, soon after, lying dead in that field. Near him lay a pitchfork which had apparently been the instrument of his death. This pitchfork was known to have belonged to the person who had been seen fighting with the deceased; and he was known to have taken it out with him that morning. Being

apprehended and brought to trial, and these circumstances appearing in evidence, and also that there had been, for some time, an enmity between the parties, there was little doubt of the prisoner's being convicted, although he strongly persisted in his innocence. But, to the great surprise of the court, the jury, instead of bringing in an immediate verdict of guilty, withdrew

and, after staying out a considerable time, returned and informed the court, that eleven, out of the twelve, had been, from the first, for finding the prisoner guilty; but that one man would not concur in the verdict. Upon this, the judge observed to the dissentient person, the great strength of the circumstances, and asked him how it was possible, all circumstances considered, for him to have any doubts of the guilt of the accused? But no arguments that could be urged, either by the court or the rest of the jury, could persuade him to find the prisoner guilty; so that the rest of the jury were at last obliged to agree to the verdict of acquittal.

This affair remained, for some time, mysterious; but it at length came out, either by the private acknowledgement of the obstinate juryman to the judge who tried the cause (who is said to have had the curiosity to inquire into the motives

of his extraordinary pertinacity), or by his confession at the point of death (for the case is related both ways), that he himself had been the murderer! The accused had, indeed, had a scuffle with the deceased, as sworn on the trial, in which he had dropped his pitchfork, which had been, soon after, found by the juryman, between whom and the deceased an accidental quarrel had arisen in the same field; the deceased having continued there at work after the departure of the person with whom he had been seen to have the affray; in the heat of which quarrel, the juryman had unfortunately stabbed him with that very pitchfork, and had then got away totally unsuspected; but finding, soon after, that the other person had been apprehended, he had contrived to get upon the jury, as the only way of saving the innocent without endangering himself.

**76. THE YARMOUTH MURDER.** (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 34.)

No more extraordinary instance of a single circumstance leading to the detection of a criminal can be offered than in what was known as the "Yarmouth Murder."

On September 23, 1900, a woman was found lying dead upon the beach at Yarmouth, and from the appearance of the body she had evidently been strangled. On her fingers were some rings, but with the exception of the laundry mark upon her clothes, there was no clew by which she could possibly be identified. She had been staying for some days in lodgings in the town, and was known to her landlady as Mrs. Hood. While she was there letters bearing a Woolwich postmark had come addressed to her by that name. Only a day or two before her death she had had her photograph taken upon the beach. All investigation to discover who the woman really was

or to trace her murderer proved unavailing, and at the coroner's inquest a verdict was brought in of willful murder against some person unknown. Subsequently it was discovered that the laundry mark upon the dead woman's clothes, 599, was that put by a laundry upon the clothes sent to them from a particular house in Bexley Heath. Further inquiry showed that a woman named Bennett had formerly lived there, and she was identified as the original of the photograph that had been taken at Yarmouth. This led, early in November, to the arrest of the dead woman's husband, Bennett, who was a workman in Woolwich Arsenal, and he was committed for trial on the charge of murder. He denied all knowledge of the crime, and asserted that he had never been to Yarmouth. This was disproved, however, by collateral evidence, and many facts

were brought forward connecting the prisoner with the murder. The motive alleged for the crime was that Bennett might be free to marry another woman. The date of the wedding had been fixed, and it was shown that his behavior

after the night of the murder pointed to his having a knowledge of his wife's death. So convincing was the whole of the circumstantial evidence, that after a short deliberation the jury brought in a verdict of "Guilty," and Bennett was executed.

**77. THE CASE OF THE PAIR OF GLOVES.** (CHARLES DICKENS. *Three Detective Anecdotes*. Works, Nelson ed., 1901. Vol. XVII, p. 546.)

It's a singular story, sir (said Inspector Wield, of the Detective Police, who, in company with Sergeants Dornton and Mith, paid us another twilight visit, one July evening); and I've been thinking you might like to know it. It's concerning the murder of the young woman, Eliza Grimwood, some years ago, over in the Waterloo Road. She was commonly called The Countess, because of her handsome appearance and her proud way of carrying herself; and when I saw the poor Countess (I had known her well to speak to), lying dead, with her throat cut, on the floor of her bedroom, you'll believe me that a variety of reflections calculated to make a man rather low in his spirits, came into my head. That's neither here nor there. I went to the house the morning after the murder, and examined the body, and made a general observation of the bedroom where it was. Turning down the pillow of the bed with my hand, I found, underneath it, a pair of gloves. A pair of gentleman's dress gloves, very dirty; and inside of the lining, the letters Tr, and a cross. Well, sir, I took them gloves away, and I showed 'em to the magistrate, over at Union Hall, before whom the case was. He says, "Wield," he says, "there's no doubt this is a discovery that may lead to something very important; and what you have got to do, Wield, is, to find out the owner of these gloves." I was of the same opinion, of course, and I went at it immediately.

I looked at the gloves pretty narrowly, and it was my opinion that they had been cleaned. There was a smell of sulphur and rosin about 'em, you know, which cleaned gloves usually have, more or less. I took 'em over to a friend of mine at Kennington, who was in that line, and I put it to him. "What do you say now? Have these gloves been cleaned?" "These gloves have been cleaned," says he. "Have you any idea who cleaned them?" says I. "Not at all," says he; "I've a very distinct idea who *didn't* clean 'em, and that's myself. But I'll tell you what, Wield, there ain't above eight or nine regular glove cleaners in London," — there were not at that time, it seems — "and I think I can give you their addresses, and you may find out, by that means, who did clean 'em." Accordingly, he gave me the directions, and I went here, and I went there, and I looked up this man, and I looked up that man; but, though they all agreed that the gloves had been cleaned, I couldn't find the man, woman, or child that had cleaned that aforesaid pair of gloves. . . .

One evening, I thought I'd have a shilling's worth of entertainment at the Lyceum Theatre to freshen myself up. So I went into the pit, at half price, and I sat myself down next to a very quiet, modest sort of young man. Seeing I was a stranger (which I thought it just as well to appear to be) he told me the names of the actors on the stage, and we got into conversation. When the play was over, we came

out together, and I said, "We've been very companionable and agreeable, and perhaps you wouldn't object to a dram?" "Well, you're very good," says he; "I *shouldn't* object to a dram." Accordingly, we went to a public house, near the theater, sat ourselves down in a quiet room upstairs on the first floor, and called for a pint of half-and-half apiece, and a pipe. Well, sir, we put our pipes aboard, and we drank our half-and-half, and sat a-talking, very sociably, when the young man says, "You must excuse me stopping very long," he says, "because I'm forced to go home in good time. I must be at work all night." "At work all night?" says I. "You ain't a baker?" "No," says he, laughing, "I ain't a baker." "I thought not," says I, "you haven't the looks of a baker." "No," says he, "I'm a glove cleaner." I never was more astonished in my life, than when I heard them words come out of his lips. "You're a glove cleaner, are you?" says I. "Yes," he says, "I am." "Then, perhaps," says I, taking the gloves out of my pocket, "you can tell me who cleaned this pair of gloves? It's a rum story," I says. "I was dining over at Lambeth, the other day, at a free-and-easy — quite promiscuous — with a public company — when some gentleman, he left these gloves behind him. Another gentleman and me, you see, we laid a wager of a sovereign, that I wouldn't find out who they belonged to. I've spent as much as seven shillings already, in trying to discover; but, if you could help me, I'd stand another seven and welcome. You see there's Tr and a cross, inside." "I see," he says. "Bless you, I know these gloves very well! I've seen dozens of pairs belonging to the same party." "No?" says I. "Yes," says he. "Then you know who cleaned 'em?" says I. "Rather so," says he. "My father cleaned 'em." "Where does your father

live?" says I. "Just round the corner," says the young man, "near Exeter Street, here. He'll tell you who they belong to, directly." "Would you come round with me now?" says I. "Certainly," says he. . . . "Good evening, sir," says I to the old gentleman. "Here's the gloves your son speaks of. Letters Tr, you see, and a cross." "Oh, yes," he says, "I know these gloves very well; I've cleaned dozens of pairs of 'em. They belong to Mr. Trinkle, the great upholsterer in Cheapside." "Did you get 'em from Mr. Trinkle, direct," says I, "if you'll excuse my asking the question?" "No," says he; "Mr. Trinkle always sends 'em to Mr. Phibbs, the haberdasher's, opposite his shop, and the haberdasher sends 'em to me." "Perhaps *you* wouldn't object to a dram?" says I. "Not in the least!" says he. So I took the old gentleman out, and had a little more talk with him and his son, over a glass, and we parted excellent friends.

This was late on a Saturday night. First thing on the Monday morning, I went to the haberdasher's shop, opposite Mr. Trinkle's, the great upholsterer's in Cheapside. "Mr. Phibbs in the way?" "My name is Phibbs." "Oh! I believe you sent this pair of gloves to be cleaned?" "Yes, I did, for young Mr. Trinkle over the way. There he is in the shop!" "Oh! that's him in the shop, is it? Him in the green coat?" "The same individual." "Well, Mr. Phibbs, this is an unpleasant affair; but the fact is, I am Inspector Wield of the Detective Police, and I found these gloves under the pillow of the young woman that was murdered the other day, over in the Waterloo Road." "Good Heaven!" says he. "He's a most respectable young man, and if his father was to hear of it, it would be the ruin of him!" "I'm very sorry for it," says I, "but I must take him into custody."

"Good Heaven!" says Mr. Phibbs, again; "can nothing be done!" "Nothing," says I. "Will you allow me to call him over here," says he, "that his father may not see it done?" . . . Mr. Phibbs went to the door and beckoned, and the young fellow came across the street directly; a smart, brisk young fellow. "Good morning, sir," says I. "Good morning, sir," says he. "Would you allow me to inquire, sir," says I, "if you ever had any acquaintance with a party of the name of Grimwood?" "Grimwood! Grimwood!" says he. "No!" "You know the Waterloo Road?" "Oh! of course I know the Waterloo Road!" "Happen to hear of a young woman being murdered there?" "Yes, I read it in the paper, and very sorry I was to read it." "Here's a pair of gloves belonging to you, that I found under her pillow the morning afterwards!" He was in a dreadful state, sir; a dreadful state! "Mr. Wiold," he says, "upon my solemn oath I never was there. I never so much as saw her, to my knowledge, in my life!" "I am very sorry," says I. "To tell you the truth, I

don't think you *are* the murderer, but I must take you to Union Hall in a cab. However, I think it's a case of that sort, that, at present at all events, the magistrate will hear in private."

A private examination took place, and then it came out that this young man was acquainted with a cousin of the unfortunate Eliza Grimwood, and that, calling to see this cousin a day or two before the murder, he left these gloves upon the table. Who should come in, shortly afterwards, but Eliza Grimwood! "Whose gloves are these?" she says, taking 'em up. "Those are Mr. Trinkle's gloves," says her cousin. "Oh!" says she, "they are very dirty, and of no use to him, I am sure. I shall take 'em away for my girl to clean the stoves with." And she put 'em in her pocket. The girl had used 'em to clean the stoves, and, I have no doubt, had left 'em lying on the bedroom mantelpiece, or on the drawers, or somewhere; and her mistress, looking round to see that the room was tidy, had caught 'em up and put 'em under the pillow where I found 'em. That's the story, sir.

**78. WILLIAM JONES' CASE.** (CAMDEN PELHAM. *The Chronicles of Crime*. ed. 1891. Vol. II, p. 139.)

A murder, equal in atrocity, and somewhat similar in its circumstances to those of Mr. Bird and his housekeeper at Greenwich, was committed on the night of Monday, 1st January, 1828, upon the body of a woman seventy-five years old, named Elizabeth Jeffe, who had the care of an unoccupied house belonging to a respectable gentleman named Lett, and situated at No. 11, Montague-place, Russell-square.

It appears that Mr. Lett resided at Dulwich, and the house in Montague-place, which he had formerly occupied, being to let, he had placed the unfortunate Mrs. Jeffe in it to take care of it, and to exhibit its rooms to any person who might be

desirous of renting it. On the evening of Monday, the 1st January, she was last seen alive by Gardner, the potboy of the Gower Arms public house, Gower-street, who delivered a pint of beer to her, and then she was in conversation at the door with a young man, dressed in a blue coat, and wearing a white apron. On the following day the house remained closed contrary to custom, and some suspicion being entertained that something serious had occurred to cause this unusual circumstance, information was conveyed to Mr. Justice Holroyd, who resided in the same street, whose butler, with the porter of Mr. Robinson, an upholsterer, pro-

ceeded to the house. Some difficulty was at first experienced in obtaining admittance; but the back area door having been forced, the unfortunate woman was found lying in a front room on the basement story, with her throat dreadfully cut and quite dead. Mr. Plum, a surgeon of Great Russell-street, was immediately sent for, and on his arrival, he proceeded to an examination of the person of the deceased. He found that she had been dead during several hours, and that her death had obviously been caused by the loss of blood occasioned by the wound in her throat, which extended through the windpipe and gullet, and the large vessels on the right side of the neck. The handkerchief of the deceased had been thrust into the wound, but from the appearances which presented themselves, it became obvious that the foot and not the hand had been employed to place it in the position in which it was found. On the left collar bone there were some bruises, as if produced by some person's knuckles, and upon the thighs there were similar marks, as well as some drops of blood, but no wound was discovered besides that in the throat, to which death could be attributable. Upon a further inspection of the deceased's clothes, it was discovered that her pockets had been rifled; but although the kitchen drawers were open, and bore the bloody impress of fingers, and a workbasket was similarly stained, there was nothing further to show that the object of the murderer, which was evidently plunder, had been attained. The neck handkerchief and cap ribbon of the wretched woman were cut through, apparently in the effort to inflict the wound, and independently of the opinion of Mr. Plum, that the deceased could not have cut herself to such an extent, the fact of her death being caused by the hand of another was clearly shown, by the absence of any instrument with which the wound could

have been inflicted, although part of a razor case was found lying on the floor. Upon an examination of the house being made, it was found that the hall door was merely on the latch, and the furniture in the parlor presented an appearance which showed that the murderer had gone into that apartment after the death of his victim. A publication headed "The State of the Nation" was found there smeared with blood, and a doeskin glove for the right hand, on which marks of blood were also visible, was discovered lying on the floor.

From circumstances which came to light, the officers who were employed to endeavor to trace out the perpetrators of this atrocious murder, were induced to suspect that Charles Knight, the son of the deceased, was in some measure implicated in its commission. By direction of Mr. Halls, the magistrate of Bow-street, who throughout the whole case exhibited the most unremitting desire to secure the ends of justice, therefore, he was apprehended at his lodgings in Cursitor-street; but upon his being questioned, he gave a clear and unembarrassed statement of the manner in which he had been engaged during the night of the murder; an inquiry having proved this to be true, he was ordered to be discharged.

The police were now completely at a loss to fix upon any person as being open to suspicion. The man who had been seen in conversation with the deceased at the door of her house, however, appeared to be pointed at by common consent, and an accident soon pointed out a person named William Jones as the individual suspected. It was learned that he had been in the habit of calling upon the deceased at her master's residence, and that he was a seafaring man; but beyond these circumstances, and that he had been living in Mitre-street, Lambeth, nothing could be learned of him or his pursuits. On inquiry

being made at his lodgings, it was discovered that he had absconded, and the suspicion of his guilt, which was already entertained, was greatly strengthened by this circumstance. A reward of 10*l.* was offered for his apprehension, and by a remarkable accident on Monday the 13th January, he was taken into custody by a city officer, on a charge of stealing a coat. He was then taken to Guild-hall office, but Salmon, the Bow-street officer, having claimed him on this charge, he was delivered over to his custody, and by him conveyed to Bow-street. He there most strenuously denied that he was at all implicated in the murder, although he admitted that "he had done other things," but he was remanded for the production of further evidence. From subsequent inquiries, it was learned that he was the son of Mr. Stephen Jones, a gentleman well known in the literary world as the author of a dictionary called "Jones' Sheridan Improved," and as the editor of a journal published in London. This gentleman, who died only a short time before the Christmas preceding the murder, left two sons, who possessed considerable talents, but who were too much inclined to habits of dissipation. William Jones had gone to sea, but latterly, on his return, being so much straitened in his circumstances as to be sometimes in actual want, he had occasionally visited Mrs. Jeffe, who was a kind-hearted woman, and who, from the respect which she bore his family, had often relieved his necessities. At the time of his apprehension he was twenty-five years of age, and was dressed in a blue coat, as described by Gardner, the potboy, by whom he was seen talking to the deceased. Upon his subsequent examinations, the material facts which were proved against him were, that he had been living with a young woman, named Mary Parker, who generally went by the name of Edwards, in Woot-

ton-street, Lambeth; but that on the 27th of December, he suddenly removed with her to Mitre-street. During the latter part of his residence in Wootton-street, he was in extremely bad circumstances, and on the 31st of December, he and his paramour were entirely without food or money. On that night he quitted Parker in Fleet-street, and appointed to meet her at the same place at half past twelve o'clock, and at that hour he came to her, as she was standing near Serjeants' Inn, in a direction from Shoe-lane. He then had money and treated her to something to drink; and on the following morning he went out for an hour, but returned, and now produced a considerable quantity of silver money, with which they were enabled to redeem some clothes, which had been pawned, and afterwards to go to the Olympic Theatre. In the course of the ensuing week, the prisoner was observed to be anxiously endeavoring to prevent the discovery of his new residence, by going home by circuitous routes, and other means, and was heard to declare his apprehension that some officers were in search of him. But the most important circumstances proved were, first, that of the prisoner having a severe cut on his left thumb, when he was taken into custody, which appeared to have been recently inflicted; and secondly, that the razor case, which was found lying near the body of the deceased woman, had been lent to the prisoner, on the Sunday before the murder, with a razor, by Mrs. Williams, with whom he had formerly lodged. Upon proof of these facts, the prisoner was fully committed for trial; but strong as the suspicion was against him, it proved to be insufficient in the minds of the jury, before whom the case was tried, to warrant them in returning a verdict of guilty.

The case came on at the Old Bailey sessions, on Friday the 22d of February, when considerable



curiosity was exhibited by the public. The court was crowded to excess at an early hour, and its avenues were thronged until the conclusion of the proceedings. The prisoner was put to the bar at ten o'clock, and pleaded Not guilty, to the two indictments preferred against him; the first for the murder, and the second for stealing a coat, the property of George Holding. Having been given in charge

to the jury in the first case, . . . the trial terminated at twelve o'clock at night, when the jury returned a verdict of Not guilty.

The prisoner was arraigned on the next day upon the second indictment, when he withdrew the plea which he had put on the record, and confessed himself guilty. At the following sessions, held in the month of April, he was sentenced to be transported for seven years.

79. **KARL FRANZ'S CASE.** [Printed *post*, as No. 388.]

80. **CHICAGO & ALTON R. CO. v. CROWDER.** (1892. APPELLATE COURT OF ILLINOIS. 49 Ill. App. 156.)

Opinion of the Court, BOGGS, J. James Crowder, husband of the appellee, administratrix, lost his life on the 19th day of December, 1891. At the time, he was engaged in the service of the appellant company as rear brakeman on a freight train, bound south on its road. The hindmost car of the train was a caboose, having on its top, near its north, or rear end, as the train was moving, a cupola. Within the caboose a ladder extended from the floor to the cupola. Sliding windows on each side of the cupola were so arranged that persons within could pass through them, out upon the roof of the car. When, on the day named, the train was approaching, and within something less than a mile of Petersburg, the conductor, Mr. Drake, and Crowder, the deceased, were in this cupola. The conductor informed the deceased that four cars were to be set out of the train at Petersburg, and directed him to attend to the rear end of the train, while he (the conductor) went forward and got out the cars. The conductor then opened one of the windows of the cupola, stepped out upon the top of the caboose, and turning about, told the deceased to go down into the caboose and fasten the latch upon the inside of the door. Crowder immediately descended, and from the floor of the

caboose, looked up at the conductor, and said "all right." He was not heard to speak again, nor seen alive afterward.

The conductor went forward over the top of the cars to the front, or head end of the train, and remained there until the station of Petersburg was reached. When the work of setting out the cars began, he noticed that Crowder was not at his post, and soon after discovered that he was not upon the train. He walked rapidly back in search of him, and came upon his lifeless body lying upon the ground upon the east side, and within five or six feet of the railroad track. The feet of the dead man extended nearly to the track, his body at right angles with it. His head lay partly against the stump of an old piling, which projected ten or twelve inches above the surface of the ground. The skull was crushed, the stump of the old piling besmeared with blood, and brains and blood were spattered here and there upon the ground about the body, and upon the ballast of the railroad track. It was evident that the deceased had fallen or been thrown from the train; his head crushed and body mangled by striking the stump of the piling. It is estimated to be six hundred and twenty feet from the point where the caboose was, when the conductor

parted with the deceased, to the place where the body lay. One hundred and twenty-one feet north of the body, at the side of the railroad track, stood a water tank. Attached to this tank by a hinge, by the use of which it might be raised or lowered, was a hollow tube, or spout, made of heavy sheet iron, used to conduct water from the tank to the tenders of engines on the road. The appellee in an action on the case recovered in the Circuit Court a judgment against the appellant company for causing the death of Crowder, upon the theory that this spout had been negligently allowed to hang or swing so low upon its hinge that it would reach and strike a brakeman if he, when passing the tank, should be upon the top of a freight car near the edge of the roof and that the deceased came out of the cupola window upon the edge of the roof of the caboose, to discharge his duties as rear brakeman, and was struck by the spout, rendered unconscious, and caused to fall to the ground and be killed. This is an appeal from the judgment so rendered.

The duty of the deceased as rear brakeman required him to be upon the top of the car before the train reached the whistling post for the station at Petersburg. The information and directions given him by the conductor amounted to an order to discharge his duty. Hence, it may be conceded that the jury were warranted in believing he made his way from the floor of the caboose, where he was when last seen, through a window of the cupola to the roof of the car, and that he fell or was thrown from the train to the ground. It is further to be conceded that it sufficiently appears from the evidence, that the spout might have reached and struck a man of his height, had he been standing by the side of the cupola on the roof at the moment the car was passing the tank. Nothing was found upon the roof of the car or

upon the cupola indicating that he had been injured there, or even that he had been there. Nor was there mark of blood, indentation, or other indication upon or about the spout from which it could be supposed that it had come in contact with his person. A close-fitting, knit woolen cap, worn by the deceased, was found upon the ground about halfway between the tank and the body, and on the opposite side of the track. It had neither rim nor visor, fitted the head closely, and was a kind much worn by brakemen, because it could not be blown off by the wind easily, if at all. The cap was without mark, abrasion, or stain of blood, or anything to induce the belief that it had been removed from the head of the deceased by a blow or stroke of the spout. On the side of the caboose below and perhaps extending back a little beyond the cupola, several spots, supposed to be blood, were found on the morning following the unfortunate occurrence. These spots were dry and so near the color of the painted side of the car that it was difficult for the witnesses to determine whether they were spots of blood or not. One of the spots was described as being "greasy," and some of the witnesses thought it was composed of brains or flesh and blood. Spots or stains of blood were found upon the rear lower steps of the caboose. Aside from the circumstances recited and the deductions logically arising therefrom, nothing is known of the manner or the cause of the death of Crowder.

Perhaps the deductions of counsel for appellee, from these facts and circumstances, may best be made known by a quotation from their brief, viz.: "Crowder was then on the floor of the caboose and, looking at Drake, answered 'all right.' That was the last seen of him alive, and those were the last words he was heard to utter. He followed Drake out of the window to be on top when the whistle board was

reached, as is required by the rules of the company. Crowder was just in the act of getting out of the window of the cupola or had just got out, and was straightening up, when the cupola came even with the tank. The window is small, about twelve by twenty inches, or fourteen by twenty at most. He was a large man, weighing 180 pounds, and standing five feet nine inches high. His body necessarily extended considerably over the edge of the car. The spout struck him violently upon the head and knocked off his cap, which jostled to the other side of the car and fell about halfway between the tank and the place where Crowder's body was found. Crowder evidently had hold of the hand-rail on top of the cupola, as this was necessary to enable him to get out and raise himself up on the narrow margin of the roof at the side of the cupola. When the spout hit him he clutched for an instant to the rail until he lost consciousness, or was knocked over on the edge of the roof, and his body resting there an instant rolled off and struck the stump of an old piling, 121 feet from the tank, being about the reasonable and natural distance at which you would expect to find the body, taking into consideration the momentum of the body when it left the car. As he fell, or while hanging to the car, the blood which flowed in consequence of the injury from the spout, dropped down and was drawn in by the action of air to the side of the car."

Such may have been the manner of his death, but there is force in the argument of opposing counsel that many of the conclusions arrived at by counsel for appellee rest upon conjecture and speculation as to mere possibilities and probabilities. The spout *may* have come in contact with the head of the deceased and have removed his cap and inflicted a wound from which his blood flowed and dropped upon the side of the car. But, as counsel

for the appellant say, doubts of this nevertheless arise when it is remembered that no mark or stain of blood was upon the roof of the car, the cupola, the cap, or the spout of the tank; and impartial minds might accept and adopt as equally probable, the suggestion that the blood (if it was blood) upon the side and steps of the caboose, was thrown there from the body when it was dashed against the piling. That one of these spots was composed of his flesh or brains is as well shown as that any were of his blood. Is it not as reasonable to believe that this came from the body after it struck the piling where the flesh was mangled, the skull crushed, and the blood and brains of the unfortunate man scattered upon the stump, the ground and the ballast of the track, as to suppose that it came from a wound by a blow of the spout which crushed the skull so that the brain exuded and the blood flowed, and yet left no mark or stain upon the spout, the cap, the roof of the car, or cupola?

The theory advanced by counsel of the appellee as to the manner of the displacement of the cap and the injury to and fall of the deceased in the view of counsel for the appellant, is a plausible suggestion that his death might have been so caused, and yet it has no established fact in its support to inspire belief of its truth or give it weight above the other suggestions advanced by them, that the cap might have been displaced as the deceased drew his head out of the small window of the cupola, and in endeavoring to catch and retain it, he lost his balance and hold upon the handrail, the cap escaped and was carried by the wind across the top of the car to the opposite side of the track and to the place where it was found, and the unfortunate man, though struggling to keep his place upon the roof of the car, was unable to do so, and was finally thrown therefrom to the ground and killed. Or he might, though not

wounded or in any way injured, have lost his balance while out upon the roof of the car, and, in an ineffectual struggle to recover it and avert a fall, displaced the cap from his head.

The argument of counsel for the appellee, that it is entirely unreasonable to say that Crowder, an experienced brakeman, in the habit of running on the tops of cars day after day, should, in broad daylight, when the train was running at a steady gait, on a level track, with no snow or ice on the cars, lose his footing or stumble and fall from a car, seems to be answered by the argument that such an explanation of his death is the very first to arise in an impartial mind. Either one of various suppositions not inconsistent with the facts known would

account for his death, but it seems difficult to say that any one of them, more than another, finds lodgment in the mind as a belief created by the process of ascertaining unknown facts from the existence of facts that are known.

However this may be, the evidence is in another respect so clearly insufficient that we are impelled to award a reversal of the judgment. There is no proof as to the exercise of due care upon the part of the deceased. . . . There being no proof as to his acts and conduct at the time of the accident, that he was acting with due care cannot be regarded as proven. For this reason a new trial should have been granted. The judgment must be, and is, reversed, and the cause remanded.

**81. TOLEDO, ST. LOUIS & KANSAS CITY R. CO. v. CLARK.**  
(1892. APPELLATE COURT OF ILLINOIS. 49 Ill. App. 17.) . . .

Opinion of the Court, PLEASANTS, P. J. Appellee recovered judgment below on a verdict for \$1000 damages for the loss of his right foot, charged to have been caused by the negligence of appellee. He was a single man, thirty-one years of age, residing six miles west of the city of Charleston. He went to the city on the morning of December 10, 1890, and spent the day there. About nine o'clock in the evening, on his way to take the train for home, while passing over the track of appellant on the sidewalk of Railroad street, an engine, coming from the shops, in charge of an assistant hostler as engineer and a man who worked about the shops as fireman, ran upon him and crushed his foot, which had to be amputated. He was going by the usual route from the public square to the depot. The street runs east and west, parallel with the track of the I. & St. L. Ry. and nearly parallel with that of appellant, which runs northeast and southwest, crossing the former at a point east of the place of the accident, variously stated by

the witness at eighty to a hundred and thirty feet, and the south sidewalk, diagonally, at a small angle. Appellee was walking west, carrying two bundles. His statement is, that when a few steps from the crossing, he looked north and saw the engine, then about at the crossing of the I. & St. L. track, and supposing it was moving on that track, did not look to see it again until, walking on, his foot was caught and held, beyond his power to extricate it, in a hole between appellant's south rail and the planking on its north side. The engine was moving without any headlight, at a rate of four to five miles an hour. Appellee says he heard no bell, or other warning of it. He thinks his foot went into the hole six inches. He stated that he had passed over that crossing a hundred times, probably, but never noticed it particularly, or that there was anything wrong about it; that if he had seen the hole, he could easily have stepped over it, and that if he had not stepped into it, he would have passed the crossing in ample time to avoid

the collision. On behalf of the defense it was claimed and evidence offered tending to prove that the bell was ringing; that the engine was moving, for some distance before it reached the sidewalk, so nearly alongside of him that if he had turned his eyes north, he must have seen the situation; that he was intoxicated at the time, and stupidly stepped on the crossing immediately before the collision; that the flangeway, into which he said he put his foot, was only three inches or less in width; that his shoe, on the trial, measured four; and that when the accident occurred he was wearing overshoes.

As to each of these claims, except the last two — the measurement of his shoe, and the fact that he also wore overshoes — there was evidence to the contrary. Elijah Sewell, a resident of Charleston, familiar with the crossing, and in the employ of the company as brakeman and switchman, speaking of the space between the rail and the plank, says: "The plank lays kind o' wedge fashioned with the rail, which made it five or six inches at the south end and about three at the north;" and that he made the experiment and found that his foot would slip in there. Madigan, the roadmaster, says the rail on the south side was two and a half or three inches from the plank, but varied a little where the plank was worn from the flange of the wheel. It appears, also, that there was a switch stand a few feet from the south end, and movable rails laid in the walk. Madigan says: "The two rails, I think, extend into the walk, probably a foot or so from the north side, and the movable rail from the south comes across the walk

to meet that. The switch stand is at the south side of the walk. These rails are moved by the switch stand, back and forth across the sidewalk, and when the rails are moved to the south, so as to connect with the Y, it would leave a space on the north side of the south rail of six or seven inches."

Two undisputed facts, which may have turned the scale in the mind of the jury, were that the plaintiff was on the track and only his foot was injured. The wheel that crushed it was running on the south rail — the one he would have passed first — and it is not easy to account for his injury, except upon his own statement, that finding his foot fast, he threw his body backward and outward from the track. A man stupefied by liquor to the extent it is claimed he was, usually leans and lunges forward; and had he got so far as the south rail when the engine struck him, it seems most probable that his body would have fallen between the rails, and, if his foot had not, in fact, been fast, that the falling of his body outward, before the collision, would have cleared it also. A further and fair inference would be that his injury was caused by the catching of his foot, and not by his attempt to cross the track, which would have been accomplished in a moment. The jury might well consider this frog-like arrangement of a movable rail, on a city sidewalk, faulty construction, and the leaving a space between the fixed rail and the planking, sufficient to catch and hold a foot, culpable negligence. . . . We see no material error in any ruling of the court. The judgment must therefore be affirmed.

**TITLE IV (continued): EVIDENCE TO PROVE THE  
DOING OF A HUMAN ACT**

**SUBTITLE B: PROSPECTANT CIRCUMSTANCES TO PROVE THE  
DOING OF A HUMAN ACT**

83. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.) It is convenient (as pointed out *ante*, No. 53) to arrange the order of evidentiary facts, when offered to prove the Doing of a Human Act, according as the indication of the evidence is Prospectant, Concomitant, or Retrospectant.

Evidentiary facts having Prospectant indications are of several sorts; the principal ones may be roughly grouped as follows: Moral Character or Disposition; Emotion or Motive; Design or Plan; Habit or Custom. The nature of the argument or inference in each instance is this: Because A had a Disposition, Habit, Emotion, Design, or Capacity to do (or not to do), an act *x*, therefore he probably did (or did not do) the act *x* alleged. Observe that the party alleging the act argues that the disposition indicates a doing of the act, while the party denying the act argues that the (opposite) disposition indicates a not doing; the nature of the argument or inference being precisely the same in both cases, the difference being in the proposition to be proved.

**Topic 1. Moral Character<sup>1</sup>**

84. JAMES SULLY. *The Human Mind*. (1892. Chap. XVIII, sec. 22, p. 281.) *Moral Habitudes*. The principle of habit produces other effects in this region of conduct. The final decision after deliberation, if a rational and good one, does not need to be arrived at again and again in all similar cases. A particular exercise of self-control, say the quelling of a feeling of annoyance, or the determining to do some unpleasant duty, which, in the first instance, was the outcome of a process of reflection, will, in succeeding cases, be shortened or compressed into control without such preliminary reflection.

Here we may see that the process of self-control is becoming habitual in a new sense. Certain motives are acquiring a fixed place in the mind as ruling forces, organically connected with appropriate actions, while other and lower forces are losing ground. Every repetition of the situation calling out this particular variety of action (that is, of action having this particular motive or reason) tends to fix conduct in this direction, that is, to establish a habit of doing. The prevailing motive, for example, consideration for others, now passes into the form of a fixed inclination or active disposition. Or, to express the result another way, we may say that conduct is brought more fully under the sway of a general rule or maxim, so as to be immediately determined by the recognition of this. . . .

<sup>1</sup>[Compare the analysis of Character and Conduct in No. 28, *ante*. — Ed.]

It is obvious from this brief account of moral habitudes that they illustrate the psychophysical process which underlies all habit. Thus veracity, with its confirmed disposition to speak the truth, implies that this particular motive or tendency is instantly called up by the appropriate circumstances, viz. the situation of being called on to state something to another. That is to say, there is an organized connection between a group of presentation complexes and an impulse to follow out a particular line of action. The perfection of the moral habitude depends on this instant excitation of the higher motive before the lower impulse, which would impede its realization, has time to assert. . . .

*Volition and Character.* The word "character" (from the Greek, "mark" or "stamp") is used in everyday language to mark off any sort of difference in mental or moral qualities. Thus we are wont to speak of a person's intellectual peculiarities, special tastes, and so forth, as constituents of his character. In a narrower and stricter sense the term involves a special reference to qualities belonging to the active side of the mind. Volition, in its rationalized form, conduct, being the final and most important outcome of mind as a whole, the word character has naturally come to connote in a peculiar manner those qualities, as active energy and deliberation, which go to constitute the higher type of will.

According to the more popular use of the term, every individual has his own stamp of character. This individual character is fixed partly by the peculiarities of the person's psychophysical "nature," or what we call temperament and idiosyncrasy. Thus the contrast of the volatile and fickle, and the pertinacious and obstinate temper of mind, is, as we may see from its early manifestation, a congenital difference based on certain organic peculiarities. At the same time it is evident that even individual character is a growth and as such illustrates the interaction of organism and environment. Each man's character may thus be said to be a product of particular environmental influences acting upon a particular set of congenital properties or tendencies. Such action, it is to be noted, while presupposing the existence of particular congenital tendencies, in its turn serves to select from among a whole group of such tendencies particular constituents for special developmental expansion or realization.

In addition to this everyday meaning, the word character has acquired an ethical significance. As employed in the science of ethics, it refers not to variable individual peculiarities, but to certain moral qualities which it is supposed to be the special business of social discipline and education to cultivate in all alike. In this ethical sense "character" has come to stand for "good character." This may be defined as a morally disciplined will, including a virtuous condition of the whole mind, that is, the disposition to think and feel (as well as to act) in ways conducive to the ends of morality.

We thus see that every good or moral man possesses a character in a double sense. In the first place, he has a particular group of intellectual, affective, and conative peculiarities which constitute his individual character. In the second place, he possesses certain virtuous principles and dispositions which make up the typical moral character and which assimilate him to other moral men. This moral character, though it presupposes the connate organic base of normal human development, may be spoken of as an ac-

quired product, the result of the action of that set of external influences which constitutes the educative action of a civilized and moral community upon a normal human mind.

(a) *Character as Organized Habit.* Confining ourselves now to moral character, we see at once that this consists in the possession of certain acquired tendencies or habitudes which we call virtues, — both what moralists distinguish as private ones, for example, temperance and prudence, and as public ones, such as veracity, justice, and benevolence. The excellence of the character can be estimated by the fixity and the preponderance of these virtuous dispositions. As we have seen, in all comparatively simple and recurring situations where a lower impulse is opposed to a higher motive, the degree of perfection of the moral habitude is indicated in the completeness of the control and the promptness of the right or good action. The less the disturbing force of the instinctive factor (passion, appetite), the more highly developed the character. . . . (b) *Character as Conscious Reflexion.* While, however, moral character is thus woven out of fixed habitual dispositions (Aristotle's "egeis"), it would be an error to conceive of it as merely a cluster or group of such habitudes. According to the biological view of mind, the habitual, that is, the relatively unconscious, organic process comes in only so far as environmental features and situations recur in like form, and so require similar modes of reaction. Now while it is true that the external conditions of human life, physical and social, are so far recurrent that our actions may be organized into a certain number of persistent norms or types of conduct, as thrift, temperance, fulfillment of promise, and the like, they are not so uniform in their actual, concrete combinations as to allow of our particular actions becoming in the complete sense habitual. . . . To act honestly only tends to become automatic in familiar, oft-recurring situations, as in exchanging coin for commodities over the counter of a shop: it may grow into a problem for the most patient reflexion as soon as the situation becomes exceptional, as when we discover a coin in some public place. . . .

*Causes of Individual Variation.* If mental development in its common typical form is a product of two factors, congenital power, and exercise of function or what we commonly call experience, we may infer that all variations depend on differences in these two factors. That is to say, every degree of general superiority or inferiority of mind, and every special modification of mental configuration, arise from certain differences in the original psychophysical constitution or in the life experience of the individual. . . . Whatever the nature and the extent of these congenital organic foundations of individuality, they have to be supplemented by our second factor, viz. functional exercise. The biologist's conception of development is that of a process of interaction between organism and environment. In order to the formation of any organic product, there must be first the requisite germ of organ, and also the appropriate stimulus to excite this to its proper functional activity. In like manner, as we have seen, mental growth is determined by environmental agencies, by the presence of certain stimuli or excitants, fitted to call forth the several psychical reactions. These external conditions vary considerably from individual to individual. In addition to the common physical environment, as determined by such circumstances as climate, locality, and so forth, there is the individual environment con-



stituted by the peculiar group of forces acting on his organism. Thus, no two children, not even members of the same family, come under precisely similar conditions of temperature, nutrition, excitation of movements, etc. The succession of sense stimuli, with their correspondent motor reactions, making up the external life experience of an infant, is a different one in every case. Still more evidently is the human environment a variable one. Even twin members of a family have an unlike social milieu in so far as the parents and others feel and behave differently towards them.

We may say, then, that individual development is the selective action of what Mr. Galton has happily called "nurture" upon "nature."

85. HANS GROSS. *Criminal Psychology*. (1911. transl. Kallen. § 13, p. 61; § 84, p. 384.) *Particular Character-Signs*. It is a mistake to suppose that it is enough in most cases to study that side of a man which is at the moment important — his dishonesty only, his laziness, etc. That will naturally lead to merely one-sided judgment and anyway be much harder than keeping the whole man in eye and studying him as an entirety. Every individual quality is merely a symptom of a whole nature, can be explained only by the whole complex, and the good properties depend as much on the bad ones as the bad on the good ones. At the very least the quality and quantity of a good or bad characteristic shows the influence of all the other good and bad characteristics. Kindliness is influenced and partly created through weakness, indetermination, too great susceptibility, a minimum acuteness, false constructiveness, untrained capacity for inference; in the same way, again, the most cruel hardness depends on properties which, taken in themselves, are good: determination, energy, purposeful action, clear conception of one's fellows, healthy egotism, etc. Every man is the result of his nature and nurture, *i.e.* of countless individual conditions, and every one of his expressions, again, is the result of all of these conditions. If, therefore, he is to be judged, he must be judged in the light of them all.

For this reason, all those indications that show us the man as a whole are for us the most important, but also those others are valuable which show him up on one side only. . . .

*Nature and Nurture*. Schopenhauer was the first to classify people according to nature and nurture. Just where he first used the categories I do not know, but I know that he is responsible for them. "Nature" is physical and mental character and disposition, taken most broadly; "nurture" is bringing up, environment, studies, scholarship, and experience, also in the broadest sense of those words. Both together present what a man is, what he is able to do, what he wants to do. . . .

Criminologically the influence of nurture on mankind is important if it can explain the development of morality, honorableness, and love of truth. The criminalist has to study relations, actions, and assertions, to value and to compare them when they are differentiable only in terms of the nurture of those who are responsible for them. . . . We who have had, during the growth of popular education, the opportunity to make observations from the criminalistic standpoint, know nothing favorable to its influence. If the general assertion is true that increased national education has reduced brawling, damages to property, etc., and has increased swindling, misappropriations, etc., we have made a great mistake. For the psychologi-

cal estimation of a criminal, the crime itself is not definitive; there is always the question as to the damage this individual has done his own nature with his deed. If, then, a peasant lad hits his neighbor with the leg of a chair or destroys fences, or perhaps a whole village, he may still be the most honorable of youths, and later grow up into a universally respected man. Many of the best and most useful village mayors have been guilty in their youth of brawls, damages to property, resistance to authority, and similar things. But if a man has once swindled or killed anybody, he has lost his honor, and, as a rule, remains a scoundrel for the rest of his life. If for criminals of the first kind we substitute the latter type, we get a very bad outlook.

In many countries the law of such cases considers extenuating circumstances and defective bringing up, but it has never yet occurred to a single criminalist that people might be likely to commit crime because they could not read or write. Nevertheless, we are frequently in touch with an old peasant as witness who gives the impression of absolute integrity, reliability, and wisdom, so much so that it is gain for anybody to talk to him. But though the black art of reading and writing has been foreign to him through the whole of his life, nobody will have any accusation to make against him about defective bringing up. . . . We must, of course, assume that deficiency in education is not in itself a reason for doubting the witness, or for holding an individual inclined to crime. The mistakes in bringing up like spoiling, rigor, neglect, and their consequences, laziness, deceit, and larceny, have a sufficiently evil outcome. And how far these are at fault, and how far the nature of the individual himself, can be determined only in each concrete case by itself.

*Religion.* The sole training on which the criminalist may rely is that of real religion. A really religious person is a reliable witness, and when he is behind the bar he permits at least the assumption that he is innocent. Of course it is difficult to determine whether he is genuinely religious or not, but if genuine religion can be established we have a safe starting point. . . . The religious statistics are altogether worthless. . . . One part is worthless because it deals only with the criminality of baptized Protestants or Catholics, and the final section, which might be of great interest, *i.e.* the criminality of believers and unbelievers, is indeterminable. Statistics say that in the country *A* in the year *n* there were punished *x* per cent Protestants, *y* per cent Catholics, etc. Of what use is the statement? Both among the *x* and the *y* percentages there were many absolute unbelievers, and it is indifferent whether they were Protestant or Catholic unbelievers. It would be interesting to know what percentage of the Catholics and of the Protestants are really faithful, for if we rightly assume that a true believer rarely commits a crime, we should be able to say which religion from the viewpoint of the criminalist should be encouraged. The one which counts the greater percentage of believers, of course, but we shall never know which one that is.

86. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. p. 277.) . . . [Certain legal] authors say: "The character and habit of a person is presumed to continue as proved to be at a time past. So, in an American case (*Sleeper v. Van Middlesworth*, 4 Denio 431) it was attempted to impeach the character of P, a witness. A and B who knew P four years

before when he resided at another place testify that his character was then bad. It was held that the presumption was that P's character remained the same." What we desire to point out is that the mental law is one of change and not of continuance and that it is a mistake therefore to attempt to apply such a presumption here. We are compelled to attribute continuity, to a certain limited extent, to the physical sequences of nature, because they have no purpose in view that we can understand, and in order to render our world intelligible to us, but not because there is anything in their existence per se that warrants the presumption. In the sphere of men's opinions and character there is no such necessity, for they are equally intelligible on the assumption that they change from time to time; indeed, there is nothing that a man changes more easily than his opinions. If there is any validity in the presumption that, because a man held certain opinions or was of a certain character four years ago, he does so now or is now of the same character, it is due not to continuance, but to repetition, that is, habit. It is because the opinions have been reinforced by frequently thinking in the same way and a mental disposition has thus been formed that we find them now, not of the same, but of the same kind only stronger and more fixed, for that is the legitimate conclusion. When, however, a man's habitual disposition is spoken of, it must, as Mr. Bradley says, be taken to include his environment as well as his internal feelings, etc.; you cannot separate him from his surroundings and assume they have no influence on him, nor can you truly say that if the surroundings change, the individual will remain the same. But how rarely is it that the environment does not alter? Again, a man is influenced consciously or unconsciously by his past, which is not a constant quantity, but ever changes.

It is perhaps truer of morality than of intellectual opinions that persons remain the same, for we know cases of men who, owing to their morality, by force of their habitual conduct act against what are their real opinions. But here, also, as in the sphere of opinion, so much depends on age, surrounding circumstances, change of circumstances, and the like, that the value of the presumption appears to be so slight as hardly to be worth the quoting. That character remains the same would seem to be truer of some races than others: among the Burmans it is notorious that a man may be good one year and bad the next to an extent which one hardly experiences in European countries. This is doubtless only one of the results of different education and surroundings and serves to show how little they can be neglected in estimation of character and its changes. For the character depends on the habituated self and the conditions we meet with, and as neither does this self cover our whole nature nor can we exhaust all the conditions with which we may meet, there is always the possibility of a change in character and some fresh act. It is only part of the facts which is covered by "same character and stimulus, same act." The self no doubt, especially as we grow older, becomes more and more determined and so tends to exclude more possibilities, and external conditions may become more or less permanent: but this is not enough. This fixedness is only relative, because we cannot exhaust all possible external conditions and we can never systematize the whole self.

87. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence.* (1868. pp. 323, 529.) *Moral character, mental endowments, and social position.*

By *moral character* is here meant the possession, habitual practice, and outward exhibition of those principles and that disposition which, united, serve most effectually to guard the mind from crime. Thus, on a charge of *theft*, a known character of unimpeached *honesty*; on a charge of riotous *assault*, a known disposition of uniform *gentleness*, severally serve to raise the suppositions of improbability most appropriate to the defense in each case. . . .

*Mental endowments* and attainments constitute another source of those peculiar motives which are claimed to exercise over the subject of them, an influence more than ordinarily adequate to restrain from the commission of crime. Of these it may be said, that, apart from all reference to moral qualities, they would hardly serve to guard the mind, on all occasions, from evil seductions and impulses, especially as they have been, not infrequently, found to exist in combination with utter destitution of moral principle. But, with this qualification, . . . the outward associations to which mental culture naturally leads, — the society of the wise, the good and the learned, into which it always procures admission for its possessor, and the varied connections growing out of it on every side, — serve to give double force to the restraining influences which have been enumerated.

Lastly, *station* or position in society presents another and very obvious source of restraining motives, growing out of peculiar circumstances. . . . Evidence of station has been considered by Mr. *Bentham* to be peculiarly adapted to render improbable charges of petty theft. "In any of the civilized nations of Europe," he asks, "what evidence would be sufficient to convict a prince of the blood, or a minister of state, of having picked a man's pocket of a dirty handkerchief, in a street, or in going into a play-house?" 3 *Jud. Evid.* 210.

But however strong the argument in this form may, in the abstract, be, it is always subject to the same practical consideration which has been applied to the other forms, already noticed; namely, that restraining motives of the class in question, and of almost the highest supposable degree of power, *have, in point of fact*, proved wholly inadequate to resist the allurements of unlawful desire, or the cogency of malignant passion. The records of the criminal courts of all nations present melancholy examples, of how high social and professional position, great mental attainments, and even apparently pure moral character, have utterly failed as safeguards against the most revolting crimes. How frequently persons of *station* have abandoned themselves to murderous impulses, is shown by such cases as those of the poisoners of Sir Thomas Overbury, Earl Ferrers, Major Strangways, Captain Goodere, and others, in England; and by some appalling examples of recent date, in the United States. That the same circumstance has not availed to deter from the commission of gainful crimes of a high grade, is proved by such cases as that of Dr. Dodd, an English clergyman of high standing, who was convicted of forgery in 1777, and underwent the extreme penalty of the law. The failure of mental attainments to hold successfully in check the murderous propensity, is signally instanced in the celebrated case of Eugene Aram. But the worst is yet to be stated: the insufficiency, namely, of even seem-

ingly high moral and *religious* character, to subdue unlawful inclination, in some of its most odious forms. . . . The assassination of Miss Reay by the Rev. Mr. Hackman, in 1779, and the shocking career of the German priest Riembauer, occur as prominent examples among others. Like the conclusions arrived at by courses of presumptive reasoning in general, the inferences deducible from evidence of character are by no means infallible, but, on the contrary, liable to more or less of error.

The great practical difficulty, subject to be encountered in the application of this species of evidence, consists in the fundamental fact that the reputation for the possession of the particular quality in question, is necessarily drawn from the *exterior* conduct alone. And it is by no means uniformly true that this exterior is the product and result of the internal causes assigned, upon the existence of which its value obviously entirely depends. It is not less true of psychological than of physical facts, that *appearances are often fallacious*. Cases have occurred and continue to occur in this country as well as abroad, in which crimes of the highest grade have, beyond the possibility of doubt, been proved against individuals, who, down to the very moment of their discovery, have borne, even among those best acquainted with them, not only good, but irreproachable characters. Men, whose reputation for uprightness in dealing has been almost proverbial, have suddenly appeared as forgers on the most extensive scale. Men, with characters for mildness and gentleness, and even the habitual observance of religious duties, have appeared as the perpetrators of atrocious murders. These instances of the apparently sudden ruin of the whole moral character, which have sometimes astounded entire communities, and are otherwise so inexplicable, become easy of explanation on the assumption that what *appeared* to be the character, and was so "reputed," was in fact a mere exterior, without any real internal foundation. The ruin has not been sudden, but the reverse. The real character, where it has ever been good, has, for some time, been secretly corrupted, and would have discovered itself sooner, had the proper occasion sooner occurred. . . .

Hence the rule, as practically laid down by the courts, that character evidence is of no force or value except in doubtful cases.

88. **UNITED STATES v. ROUDENBUSH.** (1832. FEDERAL CIRCUIT COURT. Baldw. 524, Fed. Cas. No. 16198.) . . . BALDWIN, J.—The accused is allowed to give evidence of his general good character, and to avail himself of it to rebut the presumption of a corrupt and criminal intention in passing the [counterfeit] paper. It is one of the great safeguards of innocence, and never fails to have a powerful influence with the jury; where there is any doubt, good character will outweigh ordinary presumptions and circumstances merely suspicious. But if the evidence is clear and convincing that the note was passed knowing it to be counterfeit, then, however bright his character may have been previous to the offense, a jury must look only to the facts and law of the case. On the same principle, evidence is permitted to be given of the character of his relatives and connections in society, and of the situation of his family; but these are circumstances which can avail him in a less degree only in cases of doubt; if the positive or circumstantial evidence of guilt leaves no doubt on their minds, a jury could not suffer such considerations to operate without violating a duty which should be

ever held sacred in courts of justice, to judge alike, and by the same rules, the high and low, the rich and poor. A defendant's standing in society gives him a right to demand from you the most favorable construction of the acts proved upon him, which the law permits to be drawn; but every dictate of public justice, the peace, interest, and safety of the community, forbid him to expect, or the jury to grant him a dispensation, if his case comes within the law. . . .

The rule of law is in a few words this: Never convict rich or poor, high or low, the good or the bad, without such proof of guilt as satisfies your minds beyond all reasonable doubt. If the character of the accused is bad, and his habits vicious, if the moral principle is impaired or extinct, and the evidence leaves you in doubt as to the motive with which the act is done, you may, and in most instances will, presume, that the intention with which the particular act is done, is in accordance with the general tenor of his character and conduct. So if the character is good, you will apply the rule in his favor; but when the evidence is clear, either way, character is out of the question; you cannot convict without, or acquit in face of, the evidence.

89. A. C. PLOWDEN. *Grain or Chaff; The Autobiography of a Police Magistrate*. (1903. pp. 224, 228.) If I have carried the reader at all with me in the desultory criticisms I have made on a Magistrate's duties, perhaps he will bear with me a little longer if I touch on certain principles which for my own guidance I have endeavored to follow on the Bench. One of these is to cultivate humility; by which I mean no more than to keep constantly in mind the fact that it is nothing but accident which distinguishes me from the man I have to judge, and which determines our relative positions. . . . Where is the man in the whole world, saint or sinner, who would not steal a loaf of bread if he were starving and if he thought he could steal it without detection?—Opportunity would make him a thief. . . .

There is another principle which I am in constant dread of forgetting, viz. never to allow yourself to be prejudiced against a prisoner by reason of his personal appearance being, in your view, unprepossessing. I am convinced there is nothing more dangerous. It is difficult to see a face for the first time without rapidly drawing from it some inference, favorable or unfavorable; but I am sure in a court of law any such instinct should be jealously watched. Nothing can mislead like the human countenance. Behind the features of a saint may lurk the hypocrisy of a scoundrel, and a face which you feel sure must be that of a confirmed criminal may really be the index of a most innocent mind. . . .

Another consideration is, that however often a prisoner may have been convicted, he may never have done anything very heinous. It is a curious feature of some criminal minds that their imagination never travels beyond the temptation, whatever it may be, that first assailed them and proved too much for their virtue. A man who has been convicted of stealing an umbrella or a watch will go on stealing umbrellas or watches without anything else tempting him in the least. It seems rather terrible to think that a man who has stolen a dozen different umbrellas on a dozen different occasions—the whole value being perhaps £5—must undergo

years of penal servitude merely because every previous conviction has to count. Quite recently I have had such a man before me. His mania — for that seems the right word for it — was to steal something, however worthless, from a public house. A stray article in the bar of a public house had for him a greater temptation than the contents of a jeweler's shop. At all events that was his record. Take the article, whatever it might be, to the window of the "public" and drop it in the street and the temptation would end. Lock in it any room of the house, and the prisoner would break the door to get at it. This is, in fact, what he had done, for he was charged with burglary as well as larceny.

90. A. G. W. CARTER. *The Old Court House [at Cincinnati]*. (1880. p. 257.)

A prosecuting attorney necessarily has a great deal of various, curious, and absolutely funny experience, and sometimes it partakes a little, if not quite, of the romantic. This romantic-serious incident occurred with me: A man was indicted by the grand jury for murder, and I duly prepared the indictment, and it was reported and delivered to the court. The prisoner was brought over from the jail, and stood up for arraignment, and while I was reading the indictment to him I recognized him, to my great surprise and astonishment, as once in bygone times a boy on account of whose bold badness and depravity, I, myself, as a boy had predicted and prophesied of him, to one of my young companions, that he would one day come to the gallows. He was not found guilty of murder in the first degree, however, but he was found guilty of the crime of manslaughter, and sent to the penitentiary for a long term of years. When I recognized him in my arraignment of him, I was at once impressed with the prediction I had made of him a score of years before, and it was with some difficulty that I proceeded in reading the indictment.

On another occasion I was engaged in reading the indictment for counterfeiting to a good-looking prisoner, on his being arraigned in court, when I recognized him as a former schoolmate of mine, and the son of one of the old citizens of this city, who in former days was very much respected, and so departed this life. The prisoner also recognized me, and it was with extreme difficulty that he could keep his erect position in the prisoner's dock, while I was arraigning him. The tears came to his eyes, and the tears came to my eyes; but official duty must be attended to, and it prevailed over feeling, and the indictment was finished and the prisoner pleaded "not guilty," and it was so recorded. But this was not all — my feelings were necessarily further tried. I had to do my duty for the State in the long and tedious trial of my former schoolmate without betraying my feelings, and this I did, and the prisoner was necessarily found guilty, for the evidence was plain and conclusive, and he was sentenced for a term of years to the penitentiary before my eyes, and sent to the penitentiary. This man when a boy was so good, and so good looking, and so amiable and effeminate, that he endeared himself to all his school companions, both boys and girls, indeed, he was loved and treated tenderly by the boys almost as a girl, and he was the last boy in the world that any one would ever have dreamed of being one day a criminal, or a convict in the penitentiary. But so it was. I of course inquired particularly into his history

as a man — having known him so well as a youth — and found out the reason of his downward course. In his young manhood he had become an excellent engraver, and was doing well in his art and trade. He married. His wife proved to be the sister of a notorious counterfeiter, and had helped her brother in his career of crime; but this was not known for a long time afterward by the victim of their wiles and coaxings. Loving his wife, and becoming a pot companion of her brother, he was persuaded to embark in the business of counterfeiting bank notes — and became the steady engraver of a band of counterfeiters extending from Maine to Louisiana. He was at last found out with the unfortunate results above detailed. Whatever became of him I know not.

91. H. L. ADAM. *The Story of Crime*. (19 —. p. 222.) . . . The burglar is a very difficult criminal to deal with, and supplies more to the ranks of the "habituals" than any other class of criminal. He rarely abandons his nefarious form of living, it seems to grow upon him, and immediately he is released from prison he sets to work to arrange another "burst" (burglary). There is a kind of brotherhood among "cracksmen," a sort of burgling fraternity, a free-masonry of mutual support, which is difficult to tackle and destroy. They seem to have banded themselves into a community which is pledged to prey upon society. . . .

Once a coiner always a coiner. That may be taken as an invariable rule. Coining seems to exercise a peculiar fascination over the "smasher," as he is technically termed. A very considerable portion of his life is spent in prison, and when he is not there he is busy making counterfeit coin, living on his own currency. . . . Let us take a more general view of these "mint prosecutions," as they are technically termed. We will take the year 1898 as an example. Of the 116 prosecutions 71 were metropolitan and 45 country. There were 14 acquittals and 102 convictions, 3 of the former and 42 of the latter being country. The convictions were divided into felonies (38) and misdemeanors (64), being the distinction between the two offenses of actual coining and the mere uttering or passing. Nearly all the felony prisoners had previous convictions against them, many of them being old offenders with bad records — living confirmations of the proverb, "once a coiner always a coiner." . . .

It sometimes happens that the police are convinced in their own minds that a certain individual is guilty of a certain crime, yet in the absence of direct evidence they are unable to arrest him. Habitual criminals get to know in time of these difficulties in the way of the prosecution, and endeavor to turn it to good account. I remember a man being charged with suspicious loitering and with having burgling implements in his possession. As each witness for the prosecution gave his evidence the prisoner took him in hand and administered a severe cross-examination. His knowledge of legal procedure was suspicious, and pointed to the fact that he must have made a good many appearances in criminal courts to have acquired it. The judge, of course, had the man's past record before him, and he looked at the jury with a peculiar twinkle in his eye, as much as to say, "Just wait a minute, gentlemen, and you will find he will say just a little too much." Which, verily, he did, for he blurted out the fact that because he was an ex-convict it did not necessarily follow that he was guilty of this



particular crime. Then the judge's smile broadened. In the end the man was convicted, and turned out to be an old jail bird with a very imposing array of previous convictions behind him.

**92. WALTER SHERIDAN'S CASE.** (ARTHUR GRIFFITHS. *Mysteries of Police and Crime*. 1898. Vol. I, p. 2.) . . .

That we are potential criminals is proved by the natural proclivities of the young. Criminal instincts, more or less strongly developed, are to be seen in all children. Anger, resentment, mendacity, destructiveness, acquisitiveness, are evil traits exhibited by most of them, although in many happily eradicated by careful education. "It is the mother's part," says Dr. Nicholson, one of our best writers on criminal psychology, "to encourage the gradual growth of inhibitory processes, such as prudence, reflection, and a sense of moral duty. . . . In proportion as this development is prevented or stifled, either owing to original brain defect or by lack of proper education and training, so there is the risk of the individual lapsing into criminal-mindedness or into actual crime." Criminals are manufactured no less by social cross purposes than by the domestic neglect which fosters the first fatal predisposition. "Assuredly external factors and circumstances count for much in the causation of crime," says Maudsley. The preventive agencies are all the more necessary where heredity emphasizes the universal natural tendency. The taint of crime is all the more potent in those whose parentage is evil. The germ is far more likely to flourish into baleful vitality if planted by congenital degeneracy. This is constantly seen with the offspring of criminals. But it is equally certain that the poison may be eradicated, the evil stamped out, if better influences supervene betimes. Even the most ardent supporters of the theory of the "born criminal" admit that this, as some think, apocryphal monster, although possessing all the fatal characteristics,

need not necessarily commit crime. The bias may be checked. It may lie latent through life, unless called into activity by certain unexpected conditions of time and chance. An ingenious refinement of the old adage, "Opportunity makes the thief," has been invented by an Italian scientist, Baron Garofalo, who has written that "Opportunity only reveals the thief"; it does not create the predisposition, the latent thievish spirit. . . .

The outside public may think that the identity of that later miscreant, "Jack the Ripper," was never revealed. So far as actual knowledge goes, this is undoubtedly true. But the police, after the last murder, had brought their investigations to the point of strongly suspecting several persons, all of them known to be homicidal lunatics, and against three of these they held very plausible and reasonable grounds of suspicion. Concerning two of them the case was weak, although it was based on certain colorable facts. One was a Polish Jew, a known lunatic, who was at large in the district of Whitechapel at the time of the murder, and who, having afterwards developed homicidal tendencies, was confined in an asylum. This man was said to resemble the murderer by the one person who got a glimpse of him — the police constable in Mitre Court. The second possible criminal was a Russian doctor, also insane, who had been a convict both in England and Siberia. This man was in the habit of carrying about surgical knives and instruments in his pockets; his antecedents were of the very worst, and at the time of the Whitechapel murders he was in hiding, or, at least, his whereabouts were never exactly

known. The third person was of the same type, but the suspicion in his case was stronger, and there was every reason to believe that his own friends entertained grave doubts about him. He also was a doctor in the prime of life; was believed to be insane or on the borderland of insanity, and he disappeared immediately after the last murder, that in Miller's Court, on the 9th of November, 1888. On the last day of that year, seven weeks later, his body was found floating in the Thames, and was said to have been in the water a month. The theory in this case was that after his last exploit, which was the most fiendish of all, his brain entirely gave way, and he became furiously insane and committed suicide. It is at least a strong presumption that "Jack the Ripper" died or was put under restraint after the Miller's Court affair, which ended this series of crimes. . . .

The regular recurrence of certain crimes and the reappearance of particular types or criminals has been often remarked upon by those who deal with judicial records; the fact is established by general experience and is capable of abundant proof. It is to be explained in part by heredity. The child follows the father, and on a stronger influence than that of mere imitateness; and these transmitted tendencies to crime can be illustrated by many well-authenticated cases, where whole families have been criminals generation after generation. There is the famous, or infamous, family of the Jukes, a prolific race of criminals, starting from a vagabond father and five of his disreputable daughters. The Jukes' descendants in less than a hundred years numbered twelve hundred individuals, all of them more or less evincing the criminal taint. These facts have been brought out by the patient investigation of Mr. Dugdale, an American scientist. An old case is recorded of a Yorkshire family,

the Dunhills, the head of which spread terror through the East Riding as the chief of a band of burglars. This Snowdon Dunhill, by name, was convicted in 1813 for robbing a granary, and sentenced to seven years' transportation. He returned from the Antipodes to earn a second sentence of exile, and his son was at the same time sentenced to transportation. One of his sisters, Rose Dunhill, was twice imprisoned for larceny; another, Sarah, had been repeatedly convicted for picking pockets, and was finally sent across the water for seven years. It may be incidentally stated as showing the contamination of evil that nearly all who came into association with the Dunhills felt the baneful influence of the family. Dunhill's wife was transported; so were Rose Dunhill's two husbands and Sarah's three. . . . There is a village in the south of Italy which has been a nest and focus of criminals for centuries. The natives are mostly related to each other by intermarriage, and all seem bound by tradition to prey upon their fellows. Again, in the Madras Presidency, at Trichinopoly, a whole caste of thieves existed, one and all vowed to various kinds of crime, and the practice of crime by certain Indian tribes generation after generation is well known to Indian police officers. . . .

I propose to show now from a number of selected cases how thieves, swindlers, depredators, murderers, and all kinds and classes of criminals who make mankind their prey, have been reproduced again and again. . . . The sharper follows out his long career of successful fraud and imposture century after century. Such men as Hatfield, Collet, Coster, Sheridan, Benson, Shinburn, "Allmeyer, are the seemingly inevitable recurrence of one and the same type. . . .

*Walter Sheridan.*—One of the most successful of modern criminal adventurers has been the American, Walter Sheridan, who was said to be

the originator of the Great Bank of England forgeries for which the Bidwells were afterwards punished. . . . Sheridan is a typical modern criminal, having great natural gifts, unerring instincts in divining profitable operations, uncommon quickness and astuteness in planning details and executing them. No one has better utilized to his own advantage the numberless chances offered by the intricate machinery of modern trade and finance. He began in the lower lines of fraud. Full of an evil, adventurous spirit, he ran away from his home, a small farm in Ohio, when only a boy, resolved to seek fortune by any means in the busy centers of life. St. Louis was his first point; here he at once fell into bad company, and became associated with desperadoes, especially those engaged in the confidence trick. But in 1858, when just twenty, he was caught and tried for horse stealing, and just before sentence escaped to Chicago, where he became the pupil of a certain Joe Moran, a noted hotel thief, with whom he worked the hotels around very profitably for two or three years, but was at last arrested and "did time." On his release, Moran being dead, Sheridan took up a higher line of business and became a "bank sneak," the clever thief who robs banks by bounce or stratagem, being greatly aided in the business by a fine presence and insinuating address. He was the life and soul of the gang he joined, the brains and leader of his associates, and his successes were many in this direction. With two confederates he robbed the First National Bank, of Springfield, Illinois, obtaining some \$35,000 from the vaults. Next he secured \$50,000 from a fire insurance company. Again \$37,000 from the Mechanics' Bank of Scranton. A very few years of this made him a rich man, and he was supposed to be worth some £15,000 to £20,000 by 1867. He had gone latterly into

partnership with the notorious George Williams, commonly called "English George," a well-known depredator and bank thief. About this time he participated in the plunder of the Maryland Fire Insurance Company of Baltimore, and fingered a large part of the \$75,000 taken, in money and negotiable bonds, not one cent of which was ever recovered. One of his neatest thefts was the relieving of Judge Blatchford, of New York, of a wallet containing \$75,000 worth of bonds. Misfortune overtook him at last, and he failed in his attempt to rob the First National Bank of Cleveland, Ohio, in 1870. One of his confederates had laid hands on \$32,000, but was caught in the act of carrying off the packages of notes, and Sheridan was arrested as an accomplice. He was very virtuously indignant at this shameful imputation, and his bail was accordingly accepted for \$7000, which he at once sacrificed and fled. But now the famous Pinkerton detectives were put upon his track. Allan Pinkerton, who was assisted by his son William, soon ascertained that Sheridan owned a prosperous hotel at Hudson, Michigan. . . . Sheridan about this time came in person to his hotel to visit his relatives. The Pinkertons did not lay hands on him here among his friends, but they shadowed him closely when he moved on, and by and by captured him at Sandusky, Ohio. He was taken to Chicago, but made a desperate attempt to escape, which was foiled, and he was eventually put upon his trial. He retained the very best legal advice, paid large sums — no less than £4000 — in fees, and was eventually acquitted through the clever use of technicalities in the law. Sheridan, after this narrow escape from well-merited retribution, went "East," and organized fresh depredations in new localities. They were often on the most gigantic scale, thanks to his wonderful genius for evil. The rob-

bery of the Falls City Tobacco Bank realized plunder to the value of £60,000 to his gang, and Sheridan, now at the very pinnacle of his criminal career, must have himself been worth quite £50,000.

In these days he made a great external show of respectability, and cultivated good business and social relations. They aided him in the still larger schemes of forgery on which he now entered, the largest ever known in the United States, and which comprised the most gigantic creation of false securities and bonds. It was an extraordinary undertaking, slowly and elaborately prepared. . . . It is generally believed that the total losses incurred by the companies and institutions on whom Sheridan forged amounted to nearly a million of money. Many Wall Street brokers and a number of private investors were ruined utterly by these wholesale frauds. A little before the discovery Sheridan quietly gathered all his assets together, divided the spoil, and crossed to Europe, carrying with him £40,000 worth of the forged bonds, some of which he put upon the European markets. . . . But he could not keep away from America, and he

presently went back to his fate, which was the entire loss of his ill-gotten gains. Under the name of Walter A. Stewart, he turned up at Denver as a florist and market gardener doing a large business. He presently established a bank of his own and was caught by the speculative mania; he took to the wildest gambling in mining stock, and by degrees lost every penny he possessed. After this it was believed that he would organize a fresh series of forgeries, and he was closely watched by the Pinkertons. They arrested him as he landed from the Pennsylvania ferryboat. He was brought to trial on no less than eighty-two indictments, including the New York forgeries, and was sentenced to five years' imprisonment in Sing Sing. After that he was again arrested for stealing a box of diamonds, and yet again, as John Holcom, for being in possession of counterfeit United States bills. He received two fresh sentences, following one close on the other, and, as his health was already failing when last apprehended, it is probable that he did not long survive. Now, at any rate, the curtain has fallen upon him and his criminal career.

**93. THE POSTMAN'S CASE.**  
*Am. ed. 1892. p. 204.)*

A postman was indicted for stealing a shilling. A second indictment charged him with obtaining it by false pretenses, with intent to defraud. This was the charge upon which he was tried.

**Evidence:** He received as a letter carrier on the 10th of April from the post office, a letter to deliver on his ordinary round. It was directed "Miss Brown, No. 50 Graham street." The letter was a soldier's letter from Zululand, and was entitled to come post free. The prisoner inquired of a Mrs. Smith where Miss Brown lived, as she had removed from No. 50. Mrs. Smith would show him. The prisoner

(RICHARD HARRIS. *Hints on Advocacy.*)

said, "There is a shilling to pay." Some one, but not the post-office authorities, had marked the letter one shilling in pencil; evidence tended to prove prisoner had marked it himself.

Mrs. Smith took the prisoner to a Mrs. Jones and said that was where Miss Brown had removed to. On arriving, Mrs. Smith said to Mrs. Jones, "Here is a letter for Miss Brown and there is a shilling to pay," whereupon the prisoner handed in the letter and received the shilling; Mrs. Jones remarking that Miss Brown would be only too glad to pay the shilling, for "the letter was one she was expecting from her brother

from the wars." Mrs. Smith said jocularly, "Let us spend the shilling." "No," answered the conscientious postman, "it does not belong to me, I have got to pay it in."

Both these witnesses knew the prisoner; and the would-be spend-thrift, Smith, knew him well, as would seem from her familiarity. A day or two after, the prisoner was on his round and again saw the witnesses, whom one might not irreverently call the "merry wives," and Miss Brown. Mrs. Smith said, "This is the postman who brought that letter from Zululand." "Yes," answered the prisoner, "and if it hadn't been for me she would never have had it at all, for it had been kicking about for several days."

The prisoner was identified by several witnesses, by a whole population one might say. It was a Government Prosecution.

Two months after, in consequence of Miss Brown reporting to the post-office authorities the circumstances above stated, a letter was addressed by them to the prisoner calling his attention to the facts and asking for an explanation.

The prisoner replied (and his letter was in evidence), that, undoubtedly, he must have been on that district at the time and on the particular delivery when the letter was given out, but he had no recollection of it at all, and certainly *never received the shilling*. This absolute denial of receiving the money was the awkward point in the case. The post-office sheets were produced to prove the non-payment over by the prisoner.

This was the case for the prosecution, except the witnesses to identify; and certainly, on paper, it looks a somewhat hopeless one to defend.

The counsel for the defense commenced cross-examining as to identity; the prosecution having taken trouble to call so many witnesses to this point, it was worth disputing, as you will see. It was made the

chief point on behalf of the Crown. If they established that, all other defenses seemed hopeless — so they established it. . . . It was cross-examined to so far as two or three witnesses were concerned and then dropped.

The points elicited in cross-examination were these:

1. The letter had been given out by the post-office authorities on the morning in question without being stamped — an *oversight* on their part.

2. There was another oversight on the part of the authorities at another post office with regard to the same letter.

3. There was nothing to show it was a soldier's letter and entitled to come free.

4. The prisoner might under the circumstances have thought a shilling was due upon it, which would be the postage from Zululand.

5. If he had charged a shilling and then paid it over, it would, although irregular, have been the right and proper thing to do.

6. The sheet for the 11th of April was not produced, and although the shilling did not appear in the pay sheet of the 10th, the witness would not absolutely swear it was never paid in. (Probabilities, however, strong the other way, inasmuch as prisoner said *he had never had it*.)

7. The post office was sometimes guilty of oversights, and the failure to enter the shilling might have been one.

8. The prisoner might by an oversight have omitted to pay it over.

9. His attention was not called to the circumstances till two months after.

10. Multitudes of letters, some requiring payment, others not, had passed through his hands since that time.

11. His frank avowal that he must have received the letter but did not remember the circumstances. . . .

The real question was, whether the accused, who bore a most excellent character, and had been in the service of the post office for ten years, had received the shilling *with intent to defraud*, or whether he had received it and forgotten to pay it over, or whether indeed he may not even have paid it over and its entry be on some other sheet. It was not probable that a young man with so valuable a character would sell it for a shilling.

Witnesses to the young man's goodness were called, and the jury without hesitation acquitted. Those minor incidents and trifling theories, which looked so insignificant while they were being blown about by a breezy cross-examination, took root at last, nevertheless, and grew to be such great probabilities, under the ripening influence of a warm and genial speech. And then character lit them all up with such pleasant sunshine that the jury could never look on the dungeon shadows again — and so acquitted.

This was at first a dreadfully woe-begone case to look at; but where character is to be had, bad cases in appearance are scarcely ever altogether hopeless. And it might be

here remarked that in calling witnesses to character, it is better, in my opinion, to call many than few. One snowflake may not be whiter than another, but an accumulation of flakes gives weight and consistency, and sometimes irresistibility. It is often said by the judge, "You cannot carry character any higher, Mr. Jones, can you, if you call twenty?" No, my lord, not so far as your logical mind is concerned; and to your lordship the forty-seventh proposition might be abundantly clear by the ordinary process of demonstration; but the jury might like to see the two squares measured and cut up, and placed on the big one. How, then, my lord? In that case I would say, call your witnesses; two or three of them may not have made much impression, but here comes one between whom and some of the jury there may be a bond of sympathy or good-fellowship, or of some other equally excellent material; and they may attach very great weight to his opinion, and very little to the opinion of some of the others. I would therefore say, *call all your witnesses to character*, — especially if you have got nothing else to rely upon.

#### 94. THE SELF-SACRIFICING BROTHER'S CASE. (ANON. *Green Bag*. 1891. Vol. III, p. 8.)

Years ago (said one of the well-known members of the Louisville Bar), I was called on to defend a man of nearly middle age, who was accused of having stabbed a man in a quarrel on the street. Imagine my astonishment when at the first consultation he told me these facts: "Yesterday afternoon," said he, "about dusk, my brother, who resembles me somewhat, was crossing the street, when he met a stranger coming the other way. The crossing was muddy, the stranger jostled him, and a quarrel ensued that developed into a fight, in which my brother, who had his pen-knife in his hand, stabbed his opponent several times,

and then ran away as a policeman and several citizens came up. After we were all in bed last night, the officers came to the house after the assailant; and much to my surprise, the warrant was made out against me. My brother is a man of dissipated habits, who has several times been in trouble; and if this case is pressed against him I am afraid he will be sent to the penitentiary. On the other hand, I am a law-abiding citizen, and can prove an excellent character. Now, what I propose to do is to stand trial on this charge, plead not guilty, prove an alibi, — as I can, — prove my character, and take the conse-

quences. If I am convicted, I may get off with a fine, and I am willing to pay that to keep my brother out of prison." I tried to persuade my client out of such a romantic proceeding; but he was determined, and in order to do him justice in the defense, I obtained the assistance of another lawyer, who did not know the facts, and would act in the defense as if our client were guilty. Well, the case came up. My client was identified by the man who had been stabbed and by the policeman and other disinterested parties who had witnessed the fight in the semidarkness and were sure of their man, as they thought. My client swore that he did not commit the assault, but that he was at home at the time when it occurred; and his family swore to that fact. Then several leading mem-

bers of the church testified as to his good character. But the jury found him guilty and fined him fifty dollars. He paid it without a murmur, and the record of his conviction stands in the orders of the court. All through the trial my client's guilty brother sat by his side in the court and heard the testimony without flinching. I asked him what he would have done if his self-sacrificing brother had been sentenced to the penitentiary. "I intended in that event," said he, "to get up in court and acknowledge my own guilt."

The other lawyer was thunderstruck after the trial, when I told him the facts. He refused to believe it, and said the evidence was sufficient to convict any man who lived. Only the proof of good character saved the accused from a severe sentence to the state prison.

**95. EUGENE ARAM'S CASE.** (CAMDEN PELHAM. *The Chronicles of Crime*. ed. 1891. Vol. I, p. 168.)

This is perhaps the most remarkable trial in our whole Calendar. The offender was a man of extraordinary endowments and of high education, and therefore little to be suspected of committing so foul a crime as that proved against him. Much has been written upon the subject of this murder, and attempts have been made, even of late years, to show the innocence of Aram. The contents of the publications upon the subject would be sufficient of themselves to fill our volumes. . . . The peculiarities of the case are twofold; first, the great talents of the offender, and, secondly, the extraordinary discovery of the perpetration of the murder, and of the evidence which led to the conviction of the murderer. . . . That a man possessing powers of intellect so great should have been guilty of such a crime as that which he committed, seems most extraordinary.

Eugene Aram was born at the village of Netherdale, in Yorkshire, in the year 1704, of an ancient and

highly respectable family; but although it is shown by the chronicles that one of his ancestors served the office of high sheriff in the reign of Edward the Third, it appears that at the time of the birth of Eugene, the vicissitudes of fortune had so far reduced its rank, that his father was compelled to support himself and his children by working as a gardener in the house of Sir Edward Blackett. . . . Eugene was employed as an attendant upon that gentleman, and he early displayed a taste for literature, which was fostered and supported by his indulgent master. His disposition was solitary, and every leisure hour which presented itself to him was devoted to retirement and study; and in the employment which good fortune had bestowed upon him, ample opportunities were afforded him of following the bent of his inclinations. He applied himself chiefly to mathematics, and at the age of sixteen he had acquired a considerable proficiency in them. . . . The politer

subjects of poetry, history, and antiquities next engaged his attention. Every day served to increase the store of knowledge which he possessed, and his fame as a scholar having now extended to his native place, he was invited to take charge of a school there. The means of study and of profit appeared to him to be thus united, and he immediately accepted the offer which was made; and after a short time he married a young woman of the village, to whom he appeared tenderly attached. To this marriage, however, which proved unhappy, he attributed all his subsequent misfortunes; but whether with truth or not, the course of the narrative does not distinctly disclose. His deficiency in the learned languages now struck him, and he immediately set about conquering the difficulties which presented themselves in this new field of research; and so rapid was his progress, that ere a year had passed, he was able to read with ease the less difficult of the Latin and Greek historians and poets. In the year 1734 an opportunity was afforded him of adding a knowledge of the Hebrew language to his list of acquirements; for in that year Mr. William Norton, of Knaresborough, a gentleman of great talents, who had conceived a strong attachment towards him, invited him to his house, and afforded him the means necessary for pursuing its study. He continued in his situation in Yorkshire until the year 1745, when he again visited London, and accepted an engagement in the school of the Rev. Mr. Plainblanc, in Piccadilly, as usher in Latin and writing; and, with this gentleman's assistance, he acquired the knowledge of the French language. He was afterwards employed as an usher and tutor in several different parts of England; in the course of which, through his own exertions, he became acquainted with heraldry and botany; and so great was his perseverance, that he also learned the Chaldaic and Arabic

languages. His next step was to investigate the Celtic in all its dialects; and, having begun to form collections, and make comparisons between the Celtic, the English, the Latin, the Greek, and the Hebrew, and found a great affinity between them, he resolved to proceed through all those languages, and to form a comparative lexicon.

Daniel Clarke was a shoemaker, living at Knaresborough; and it appears that this unfortunate man, having lately married a woman of a good family, industriously circulated a report that his wife was entitled to a considerable fortune, which he should soon receive. Aram and Houseman, in consequence, conceiving hopes of procuring some advantage from this circumstance, persuaded Clarke to make an ostentatious show of his own riches, in order to induce his wife's relations to give him that fortune of which he had boasted. It is not impossible that in giving their subsequent victim this advice, they may at the time have acted from a spirit of friendship. . . . Clarke, it seems, was easily induced to comply with a hint so agreeable to his own desires; and he borrowed, and bought on credit, a large quantity of silver plate, with jewels, watches, rings, etc. He told the persons of whom he purchased, that a merchant in London had sent him an order to buy such plate for exportation; and no doubt was entertained of his credit till his sudden disappearance in February, 1745, when it was imagined that he had gone abroad, or at least to London, to dispose of his ill-acquired property. Whatever doubt may exist as to the original intention of the parties, their object at this time is perfectly clear, and there can be no hesitation in supposing that Aram and Houseman had at this time determined to murder their dupe, in order to share the booty. On the night of the 8th February, 1745, they persuaded Clarke to take a



walk with them, in order to consult upon the proper method to dispose of the effects; and, engaged in the discussion of this subject, they turned into a field, at a small distance from the town, well known by the name of St. Robert's Cave. On their arrival there, Aram and Clarke went over a hedge towards the cave; and when they had got within six or seven yards of it, Houseman (by the light of the moon) saw Aram strike Clarke several times, and at length beheld him fall, but never saw him afterwards.

These were the facts immediately connected with the murder, which were proved at the trial by Houseman, who was admitted King's evidence; and, whatever were the subsequent proceedings of the parties in respect of the body, they must remain a mystery. The murderers, going home, shared Clarke's ill-gotten treasure, the half of which Houseman concealed in his garden for a twelvemonth, and then took it to Scotland, where he sold it. In the meantime Aram carried his share to London, where he sold it to a Jew, and then returned to his engagement with Mr. Plainblanc, in Piccadilly. Fourteen years afterwards elapsed, and no tidings being received of Aram, it was concluded that he was dead; and these fourteen years had also elapsed without any clew being obtained to unravel the mystery of the sudden disappearance of Clarke.

The time at length came, however, at which all the doubts which existed upon both subjects were to be solved. In the year 1758, a laborer named Jones was employed to dig for stone in St. Robert's Cave, in order to supply a limekiln at a place called Thistle Hill, near Knaresborough; and having dug about two feet deep, he found the bones of a human body, still knit together by the ligaments of the joints. It had evidently been buried double; and there were indications about it which could not but lead

to the supposition that some unfair means had been resorted to in order to deprive the living being of life. The incident afforded good grounds for general curiosity being raised, and general inquiry taking place; and hints were soon thrown out that it might be the body of Clarke, whose unexpected disappearance was still fresh in the memory of many, and whose continued absence had been the subject of so much surprise. Suggestions of his murder which had been thrown out by Aram's wife were called to mind, and a coroner's inquest being held, she was summoned. By this time a general impression prevailed that the remains found were those of Clarke, and the testimony of Mrs. Aram greatly confirmed the idea which had gone abroad. She deposed that she believed that Clarke had been murdered by Houseman and her husband, and that they had acquired considerable booty for the crime; but she was unable to give any account of her husband, or to state whether he still was in existence or not. Inquiries being made, however, Houseman was soon found; and on his being brought forward to be examined, he exhibited the utmost confusion. The coroner desired that he would take up one of the bones, probably with a view of seeing what effect such a proceeding would produce; and upon his doing so, he showed still further terror, and exclaimed, "This is no more Daniel Clarke's bone than it is mine!" The suspicions which were already entertained of his guilt were, in a great measure, confirmed by this observation; and it was generally believed that he knew the precise spot where the real remains of the murdered man were deposited, even if he had not been a party to their interment. He was therefore strictly questioned; and after many attempts at evasion, he said that Clarke was murdered by Eugene Aram, and that his body was buried in St. Robert's Cave,

but that the head lay further to the right in the turn near the entrance of the cavern than the spot where the skeleton produced was found. Search was immediately made, and a skeleton was found in a situation corresponding exactly with that which had been pointed out. In consequence of this confession an inquiry was immediately set on foot for Aram, and after a considerable time he was discovered, occupying the situation of usher in a school at Lynn in Norfolk.

He was immediately apprehended and conveyed in custody to York Castle; and on the 13th of August, 1759, he was brought to trial at the assizes before Mr. Justice Noel. . . .

Aram's defense was both ingenious and able, and would not have disgraced any of the best lawyers of the day. It is a curious and interesting address, and we subjoin it as affording the best criterion of the talents of the prisoner which can well be adduced. He thus addressed the court:

"My lord, — I know not whether it is of right or through some indulgence of your lordship that I am allowed the liberty at this bar, and at this time, to attempt a defense, incapable and uninstructed as I am to speak; since, while I see so many eyes upon me, so numerous and awful a concourse fixed with attention and filled with I know not what expectancy, I labor not with guilt, my lord, but with perplexity; for having never seen a court but this, being wholly unacquainted with law, the customs of the bar, and all judiciary proceedings, I fear I shall be so little capable of speaking with propriety in this place, that it exceeds my hope if I shall be able to speak at all.

"I have heard, my lord, the indictment read, wherein I find myself charged with the highest crime, with an enormity I am altogether

incapable of; a fact, to the commission of which there goes far more insensibility of heart, more profligacy of morals, than ever fell to my lot; and nothing possibly could have admitted a presumption of this nature but a depravity not inferior to that imputed to me. However, as I stand indicted at your lordship's bar, and have heard what is called evidence adduced in support of such a charge, I very humbly solicit your lordship's patience, and beg the hearing of this respectable audience.

"My lord, the whole tenor of my conduct in life contradicts every particular of the indictment: yet had I never said this, did not my present circumstances extort it from me, and seem to make it necessary. Permit me here, my lord, to call upon malignity itself, so long and cruelly busied in this prosecution, to charge upon me any immorality of which prejudice was not the author. No, my lord, I concerted no schemes of fraud, projected no violence, injured no man's person or property. My days were honestly laborious, my nights intensely studious; and I humbly conceive my notice of this, especially at this time, will not be thought impertinent or unseasonable, but, at least, deserving some attention; because, my lord, that any person, after a temperate use of life, a series of thinking and acting regularly, and without one single deviation from sobriety, should plunge into the very depth of profligacy precipitately and at once, is altogether improbable and unprecedented, and absolutely inconsistent with the course of things. Mankind is never corrupted at once. Villainy is always progressive, and declines from right, step by step, till every regard of probity is lost, and every sense of all moral obligation totally perishes."

96. **LEOPOLD REDPATH'S CASE.** (D. MORIER EVANS. *Facts, Failures, and Frauds.* 1859. p. 432.)

One of the most extraordinary instances of successful swindling, combined with a high moral reputation and a truly benevolent career, is that of Leopold Redpath. Never was money obtained with more wicked subtlety; never was it spent more charitably. The thief and desperate criminal were so intertwined with the philanthropist, that his character presents an admirable study for the metaphysician. A greater rogue, so far as robbery is concerned, it were difficult to find; nor a more amiable and polished benefactor to the poor and the friendless. . . .

The earlier antecedents of Redpath's career present no features of unusual interest. . . . He received a fair education, and evinced good taste in artistic matters, the latter subsequently displayed with reckless extravagance. He possessed also sound information on ordinary topics, and a good capacity for business. Having no friends to push him onward in life, he had to struggle successively with difficulties which fall to the common lot. . . . On the starting of the Peninsular and Oriental Steam Navigation Company, Redpath secured the position of clerk in the establishment. His salary was a fair one, but not adequate to Redpath's now growing ambition. . . . Leaving the Peninsular and Oriental Company, Redpath struck out into a new field on his own account and set up business as an insurance broker in Lime Street, City. And now began that career of spurious philanthropy and affected piety which is so remarkable a feature in his character. His house at Blackheath soon became known as the residence of a gentleman whose name might be reckoned on for addition to any charitable subscription list. Highly moral in his external character, affecting a veneration for religion

which he never felt, he was regarded as a model man. An ardent advocate of every benevolent scheme which was set on foot, he became also a willing supporter of it. . . . He was ambitious to be talked of as a kind-hearted, benevolent, charitable gentleman, whose hand, heart, and purse were ever open. And all this time he was trading in philanthropy with the capital of others. With an affable blandness of demeanor he gave away the property of his creditors, for his career as an insurance broker was a short one. Being more generous than just, in less than three months he became a bankrupt, with liabilities to the extent of £5000, and assets a mere nothing. . . . The auctioneer's inevitable hammer cruelly struck down his suburban establishment, and swept away the luxuries and refinements of his home. But Redpath was not the man to be crushed by an auctioneer's hammer. At the age of about thirty-five he obtained the appointment of clerk in the service of the Great Northern Railway Company. His first situation here was quite a subordinate one . . . as assistant to the registrar, Mr. Clarke.

How soon after his appointment Redpath entered on that reckless path of crime which led him to ignominy and isolation from his fellow men, is not accurately known; but it is certain that he speedily resumed that luxurious style of living which was the acme of his ambition. . . . Meanwhile, his principal, Mr. Clarke, had retired from his position as registrar, and Redpath reigned in his stead. The directors did not place him there without reason. He had already proved himself adequate to the situation, and had devoted himself to the duties of the department with assiduity. The moment he had secured the control of the department, he rushed for-

ward desperately in his career of crime. His previous frauds — supposing that he had committed any — were very trivial to those he now practiced. Looking back upon the trickery of this consummate rogue, it seems scarcely credible that his crimes should have been so easily perpetrated, and should have remained so long undiscovered. But Redpath was a clever swindler, and the directors were unsuspecting. His facilities for the commission of robbery were great, and he used them with diabolical skill. . . . The mode in which the extensive forgeries were committed was this. It was subsequently shown, for instance, that a deed, No. 3623, was forged, the amount represented being £312 10s. This deed would have entitled a Mr. John Morris, of Manningtree, to transfer his interest in that stock, had he gone with it to a stockbroker. The person purporting to attest was a gentleman named Shaw, represented by the deed to belong to the same neighborhood. The transfer was made by Redpath to his own name, and sold through his own stockbroker, the forger receiving the amount represented. On the trial, Mr. Henry Atterbury, a clerk in the Great Northern Railway Company, thus testified to the system of fraud referred to: "I produce a transfer, dated May 7, 1852, the number of which is 3623, and it purports to be a transfer from John Morris to William Henry Hammond, of £312 10s. of the B stock of the company. In this entry, the names of Morris, the transferer, and that of Timothy Shaw, the attesting witness, are, I believe, in the handwriting of the prisoner Redpath. . . ." The witness then detailed other entries in which the name of Morris and of the subscribing witness were in the prisoner's handwriting; the result of his evidence being to show that the total amount of the fraudulent entries upon both sides of Morris's account alone, was £17,600. But

Redpath was quite a connoisseur in the art of forgery, and had more methods than one. Another mode of robbery was elicited in evidence on the trial. Redpath purchased in April, 1853, two separate amounts of stock of £500 and £250 respectively. The sellers duly transferred them to him, and they were entered to his credit in the register. It should be observed, that when a transfer is made and registered, the buyer receives a certificate, termed a coupon, for the amount of stock transferred. This coupon is signed by the transfer clerk; it is then supposed to be compared with the original transfer, and with the entry in the registry, by the secretary, who countersigns it; and it is then delivered to the purchaser of the stock, as his evidence of title. In Redpath's case it was found that he had placed a figure of 1 before each of the above-named amounts, converting them into £1500 and £1250, respectively, thus creating £2000 of A stock in his own favor. Fifty-two transfers were thus made into his own name, and ten out of it. Now although he had falsified the register, the coupon would not tally with it, and as the coupon must accompany the transfer in selling the stock, that had also to be altered. . . . Redpath now saw a perfect Golconda before him, that required very little labor; and, in some respects, very little skill to work. . . .

How the thousands thus easily acquired were disbursed, is a very interesting study. It was not squandered in giddy dissipation. Redpath kept no mistress; he was never known to gamble; the gentry of the turf found no easy prey in him. No, he was a respectable man — a highly respectable man. . . . Nor was this character apparently undeserved. It must be confessed, that to his other qualifications Redpath added the tact of the consummate actor. He thoroughly deceived the world; nay,

his life was so far an acted lie, that it may well be believed that he even deceived himself. . . . His house in Chester Terrace was magnificently furnished with everything that a luxurious ambition in middle life could desire, and with all that a refined taste could suggest. Here he set up his carriage, keeping a groom as well as a coachman. The arrangements of his household were on a liberal scale—the liberality that disburses other people's money. A butler superintended his cellar of choice wines; a footman awaited his lightest wants; and five or six female domestics shared in the splendor of his residence. . . . But the pleasures of the table and of refined company were not the only delights in which Redpath indulged. With him charity was an amusement, a passion, and a source of patronage which brought him flattery and fair friends. Persevering secretaries found in him a pliant gentleman, who was ever ready to place his name upon the subscription list for a new church, a fancy bazaar for a school, or a fund for an orphan or widow. He was, amongst other positions, a governor and one of the managing committee or almoners of Christ's Hospital, and a governor of the St. Ann's Society, an admirable institution for the children of those once in prosperity. . . . There was, doubtless, much ostentation in all this; for to believe that a man who was daily engaged in craftily forging transfer deeds for the sake of wealth, could be constantly actuated by the generous feeling of true charity, is to believe a sham. Redpath's was a spurious charity, a hollow mockery of benevolence. And yet it is hard to suspect that the genuine warmth of true benevolence did not sometimes actuate his movements. He has been known to seek out some poor widow who was trying to get her boy into a school, sympathize with her struggles, and generously relieve her necessities in so kind a way as to

make the mother's heart to leap for joy. . . . Thus was this anomalous double life pursued, forgery and fraud keeping pace with luxury and benevolence. The directors of the Great Northern Railway Company were unsuspecting of the real sources of his wealth. Their clerk had the reputation of a successful speculator, and the salary which he received was supposed to be regarded by them as merely another string to his bow. . . .

An incident occurred, however, which suddenly startled them into a knowledge of the reckless extravagance of Redpath's life. Mr. Denison, the chairman of the line, was standing on a station platform, conversing with Lord D—, when Redpath happened to come up, and lifted his hat to Mr. Denison. The nobleman, however, was on easier terms. Taking Redpath cordially by the hand, "Ah, my dear fellow," said he, "how are you?" Having parted, the chairman turned to Lord D—, and asked what he knew of their clerk. "Oh," said he, "he is the jolliest fellow in life; he gives the most sumptuous dinners and capital balls that I know of." This was an ominous rencontre for Redpath; and, coupled with the then agitated state of the shareholding community, it was determined to scrupulously examine the books of the company. This course once decided, it was deemed advisable to begin the investigation from an early date, and a distinct department was created for the purpose. The officials instructed to carry out this process first met on November 15, 1856. A day or two after, when the actual inquiry was being commenced, Redpath came into the room, and asked what they were going to do. "To go through all the accounts," said the head of the department, "from the commencement of the company." "That is perfectly useless," said the thunderstricken Redpath, smothering his emotion; "you

will find all the accounts right in the gross, and it is of no use entering into special details." Finding this feeble remonstrance unavailing, and not daring, of course, to urge the matter, Redpath carelessly took up a book and threw it down again, remarking, "Well, if that is your intention, I will have nothing to do with it; and if this course is persevered in, I shall resign." He then made some excuse to leave for a few minutes. He went, but never returned. . . .

They found the accomplished forger, sitting at breakfast, between ten and eleven, and he was immediately given into custody. . . . On the morning of Thursday, January 15, 1857, the Central Criminal Court was densely crowded. . . . Mr. Serjeant Parry, for Redpath, endeavored to show that he had merely followed out a system which, the learned Serjeant alleged, was pursued by railway directors gener-

ally — that of dealing in the company's stock in other parties' names. It was contended, in fact, that the transfers were dealings in genuine stock, and that Redpath was sought to be made a scapegoat for the whole of the higher officials; but of course, any such assumption was fabulous. Mr. Justice WILLES, in summing up, clearly analyzed the circumstances, and stated that the question for the jury was, whether the instrument before them was a real or a fictitious transfer, and whether it had been executed by the prisoner for the purpose of fraud. The jury saw this, and after a few minutes' deliberation, without leaving the box, returned, what was naturally expected, a verdict of guilty. . . . His lordship then passed upon the wretched criminal what many persons consider the heaviest sentence which can be pronounced — transportation beyond the seas for the term of natural life.

**97. CASE OF B. (ARTHUR MACDONALD. *Man and Abnormal Man*. 1903. p. 516. U. S. Sen. Doc. 187, 58th Cong. 3d Sess.)**

Received July 25, 1887; offense, —; age, 11; eyes, brown; clothing, fair; resides with parents; never in the almshouse; at police court of — on complaint of —; weight, 34 kilos; height, 1371 mm.; hair, brown; education, second reader; previous arrests, two or three for stealing and staying out; never in orphan asylum, but in reform school; three months ago was in Catholic protectory and assigned to knitting department, first division. Parents: Father, intemperate, dock laborer; he does not know whether any of them were arrested; no stepfather or stepmother; father, Irish Catholic; family consisting of two boys and two girls.

June 20, 1889: Height, 1428 mm.; in chest, 723 mm. April 2,

1890, he was intrusted to the care of his mother.

June 21, 1890, when recommitted by police court for —. Weight, 41 kilos; height, 1485 mm.; clothes, good.

*Record of Complaints against him while in Reformatory.* — 1888, May 14: Leaving the line while returning from chapel last Sunday morning; not going on the yard. (Pleads guilty, case held open.)

May 21: Running around the yard with two others, shouting and making all the noise they could; would not come when called; refused to go on parade; kept running until I caught and locked them up. (Sunday, pleads guilty.)

May 22, by watchman: Disorderly in the yard, kicking stones

<sup>1</sup>[This and the next case are intended as exercises in speculating from the person's character-record what the offense would probably be for which he is now imprisoned. The cases should first be studied with that question in mind. Then in a footnote at the end of No. 98 will be found the answers to Nos. 97 and 98. — Ed.]

up against the shop windows while on parade. (Punished with a strap, 5 blows, 1 week, pleads guilty.)

May 23: In company with other boys entered knitting shop; machines tampered with; a few articles were missing. (Five to ten strokes with a strap, 8 weeks.)

May 31: Throwing his window frame out of the door; spoken to many times about being disorderly. (Five blows with a strap, 1 week, pleads guilty.)

July 15: Loud and disorderly after whistle was blown for parade; crowding where there was no room for him, and when asked to go to another place did not do it until I insisted on it, then he was very insolent; also fought with another boy. (Pleads guilty.)

July 16: Disorderly in wash room and training room almost every day. (Five blows with strap.)

July 21: Leaving dormitory and going to others; also generally disorderly; impossible to keep him in his dormitory. (Pleads guilty.)

August 28: Taking the plate of hash, and refusing the rest of the boys to have any; would not stand up. (One week.)

September 6: Disorderly on parade; scuffling on the bench in the yard.

September 17: Burglarizing with another boy while on parade.

September 18: Kicking another boy. (Excused, with reprimand.)

September 19: Throwing a hat about the sleeping hall, and lying about it. (Reprimanded.) Other complaints on September 21, October 4, October 10, October 15, October 31, November 13, November 22.

November 25: Rank impudence and insubordination; demanded a ticket to hospital in impudent manner; he was told to wait and see Mr. K.; was very impudent. (Punished with strap, 1 week.) Other complaints December 15, December 18, December 20.

December 29: Going to bed with

his clothes and stockings on, which I had forbidden. (Admits it, 1 week.) (In an interview he said he was cold and so kept dressed.)

1889, January 9: Talking on parade in lavatory. (Admits it, 2 weeks.)

January 15: Stealing a pair of second badge pants from boy "S." Other complaints January 16, January 22, January 29, February 1, February 11, February 16, March 30, April 12, April 16, April 22.

April 28-29: Having four keys in his pocket and tobacco; one key fitting drawer in an officer's room, which has been opened several times and articles taken out. (Punished with strap.) Other complaints May 2, May 22.

May 31: Disorderly in ranks when boys were marching to dormitory, getting out of his place, and insolent when spoken to about it. (Held open.) Other complaints June 17, June 25, June 26.

June 27: Going into boys' dormitory for plunder; got under the bed; I told him to come out and he would not do so. (Admits, except plunder, 3 weeks.) Other complaints October 5, October 22, October 24.

1890, January 23: Going into "B's" dormitory. (Admits, held open.)

January 30: Going to bed with his trousers on; I put him on the floor and he was very impudent and abusive and positively refused to do what I told him. (Admits it, under lock and key for one week.) Other complaints February 28, August 29, September 2.

September 26: Refused to go to the superintendent when requested; throwing a chair at the officer and calling him a G—— d—— liar.

September 27: Detected in taking putty off of some freshly glazed windows.

1891, January 12: Impudent to an officer, telling him to shut up and get out.

He escaped by scaling the wall

and was recaptured. He gave his guard the slip at the depot, but was captured again. He was placed in confinement, but succeeded in getting out; search high and low was made for him until he was found by one of the other inmates in the top of a tree late in the evening. After attempting to escape day after day, he was finally transferred to the penitentiary.

*Testimony of Officers as to his Conduct.*—Yardman: “‘B’ is a good boy; gets along with me very well. I let him wear a tie of mine one Sunday for being a good boy. I have to trust the boys a great deal; ‘B’ has not stolen but a few things; he does not feel like taking from me.”

Hallman: “He gets into a room and steals without any one seeing him; I seldom see him steal. He is a good boy to work; when bad he wants to go here and there; he won’t stay at his work, roves around; he has been under me six or eight months; he disobeyed at first, but afterwards with a little pressure he would mind better; he likes to fight; I never saw him cry; he learns quickly; I saw him stealing beans and caught him.”

A teacher: “I had him one or two weeks. He was very lazy; tried to get out of his work the best he could; talked to the boys in school a great deal; did not talk back very much; he got into my desk and took some lead pencils.”

Another teacher: “He is a little villain; does not bother me much more than the other boys at table; a vicious kind of a boy; he turned upon me one time; he would not stop his talking; he kept muttering; I took him by the collar, and he kicked me when I took him out; I had hold of him with one hand.”

Another officer: “He was under me, but never gave me any trouble; never stole anything from me.”

A teacher: “He wrote to another boy about his teacher, and signed a boy’s name whom the teacher liked very much. He tries to steal some-

thing almost every day; I always find something in his pockets that he has stolen.”

A teacher: “He has tried my patience very much; he is bright and peculiar, very stubborn and self-willed, and inclined to take anything in his reach; he never broke into my desk; he would take things from the boys and lie about it; he is disagreeable; he lies, is sulky, no matter how you treat him; he is a fighter; he is perfectly lawless, one of the worst boys I had; he never struck any boy; he is quiet at times; never saw him cry; I have seen him very angry; his face becomes red; he is a good scholar. Since his return his conduct is better the three days he has been under me; he has been absent three or four weeks; he won’t talk much; he is a bright appearing boy, but he is stubborn and is a daring fellow.” . . .

Teacher in painting and graining: “I never saw him take anything. He has admitted everything I accused him of. At first he would say nothing; afterwards he would admit it. His actions were off-handed. He did not want to say anything then. Everything that had been taken was attributed to him. He hates to have any one question him. When I talked to him he cried, probably because he did not want to leave the shop. He has been under me about eight months. He will make a good workman. Is very accurate in mixing colors; has good taste. Decided in his answers after he knows a thing. He doesn’t talk much. He thinks he knows all about badness and malignity. He has improved in his work. If he is going to deny a thing, he would do it at once. He never stole a thing from me, although it was easy for him. He never tried to escape.”

Military instructor: “‘B’ is a good soldier by nature, and a bad soldier, because indifferent. He has no enthusiasm for anything. I have punished him two or three



times. He has more nerve and pluck than any other boy I ever saw. Thought of punishment has no effect on him; he takes it indifferently; but the last time I gave him seven blows, and he said, 'Oh, Mr. —, let me go, and I won't do it again.' He denied it up and down the first and second stroke; the fifth or sixth time he admitted his guilt. After this I made him promise me not to steal for a straight month, and he accomplished it, and was taken out of

the scrubbing gang. He has an indomitable will and enthusiasm if you can get at him in the right way. I have never had any other particular trouble with him. He has not been impudent to me. I have known him to take a whipping in order to shield another boy. He never tells on other boys. He is a boy who would sacrifice to do you a favor."

[Query: Of what offense was he guilty when sentenced to the Reformatory?]

98. CASE OF H. (ARTHUR MACDONALD. *Man and Abnormal Man*. 1903. p. 537.)

As a study in education and criminology the following case of H is of interest, for he is an educated man, as the world goes, a doctor of medicine, graduate of a university, and a man above the average criminal in culture, appearance, and general intellectuality. The importance of studying such a man is to note the gradual steps that led him to his fate.<sup>1</sup> . . .

*Antecedents and Childhood.* — One who knew his family well says in a letter: "I was born in P, N. H., in an adjoining town to the birthplace of H, which was G, N. H, and inasmuch as H and his parents were frequently attendants upon my father's preaching, and as he attended the district school taught by my wife's sister, and as his wife, and part of the time himself, were in the employ of an uncle of mine, I have a definite knowledge of his youth. His people were very upright, God-fearing citizens, living in a quiet, secluded section of the country. There is no trace or taint of open immorality or vice in the family history for at least three generations of which I have any knowledge. I am intimately acquainted with several of his cousins, and they are all upright men. As a boy, H was a quiet, studious, faithful lad, with refined tastes, not car-

ing to join to any extent in the rude and rough games of his companions at school, and easily standing as the first scholar in his class. He was a general favorite with the mothers in that community, because he was such a well-behaved lad. In his youth he was predisposed to a religious life; he was a faithful, painstaking student of the Scriptures, and rather excelled in his Sunday school class, and later in his Bible class, and my recollection is that he took an active part in the weekly prayer meetings, and was known as a religious youth."

*Letter from his First Wife.* — "In regard to his childhood days I cannot say much, as I did not know much of him until he was 17 years old. I always felt that he was pleasant in disposition, tender-hearted, much more so than people in general. He was of a very determined mind, at the same time quite considerate of others' comfort and welfare. In 1881 he was at B, Vt., for the year, and in the spring of 1882 he started for the University, and as far as I knew, was doing very well. I returned to N. H. the spring before he was to graduate, and have known very little of him since, but he has always been called very smart, well educated, and a man of refined ways. Before at-

<sup>1</sup> [See the footnote to No. 97 — Ed.]

tending the medical school he taught school several terms and was very successful — as much so as teachers in general — and when the story came out people who had always known him said: 'We cannot believe this. He would not have the heart or courage to do anything so terrible.' But of course he has worked himself up to it little by little, and I think, having done some little wrong, he had been driven to a greater one for a cover, and each one growing worse, of course it is easy or more easy to go in the wrong after the first few steps."

*University Life.* — Letters of inquiry were sent to his teachers and classmates, many of whom are now prominent physicians.

One of the professors in the university says: "It is true that while a student here he was for a year or two under my roof, but not in any such intimate relations with me as to justify him as looking upon me as his best friend; if so, his friends must be few. However, I am very sorry for him, even although he himself may be the direct cause of his present miseries and threatening punishments. He told me a few months ago, when I visited him in prison, that he and another classmate had worked up a scheme to defraud an insurance company a few months after they graduated in 1884 from the medical department here, but that the scheme fell through because of his friend's death, which occurred within a year after he graduated. I do not know whether he graduated in pharmacy or not. He certainly did not take that course here, as I find he was never entered as a pharmacy student. He may have taken the degree elsewhere, but if he did, it was after he graduated in medicine, as he made no claim to having had a pharmacy course when he was here. There were several things that occurred while he was here as a student that in the light of subsequent events show him to have been even

at that time well practiced in criminal habits. Although he was married and had his wife here for a time doing work as a dressmaker and assisting in supporting himself and her, yet he got into trouble by showing some attention to a grass widow, who was engaged in the business of hairdressing. This woman made some complaints to the faculty during the latter part of his senior year, and the stories that she told, had they been confirmed, would have prevented him from graduating. But I had no reason to doubt his word at that time, and his friends lied for him so vigorously that I was wholly deceived and defended him before the faculty, and he was permitted to graduate. On the afternoon of commencement day he came to me of his own accord, with his diploma in his hand, and said: 'Doctor, those things are true that that woman said about me.' This was the first positive evidence that I had received up until that time that the fellow was a scoundrel, and I took occasion to tell him so at that time. I subsequently learned, however, that he had made two attempts to enter my house in the character of a burglar, and also that he had, while occupying a room in a portion of my house, attempted to force a drawer in my library in which I had been in the habit of keeping some valuables. Three months after he had graduated in medicine, and knowing full well what opinion I entertained of him, he wrote me asking for a recommendation to assist him in getting an appointment as a missionary to Africa. This, I am satisfied, he did simply from the spirit of devilishness, and not that he had any serious intention of carrying out such a purpose. These, and many little incidents that I might relate to you, some of them personal experiences of my own with him, and others that have been told me by members of my family, serve to further illustrate these

traits in his character, but they are all of the same nature as those that I have mentioned." . . .

*Testimony of his Classmates.*—(1) "Myself and family lived in the house with H and his family almost one school year. His family consisted of a wife and one child (a boy about 4 years old). His wife was a very pleasant woman and willing to make any sacrifice that she might help him along in his course. She finally went out to work and gave him her earnings. She was subject to convulsions of some kind, and while at work he gave her such quantities of bromide that her face broke out very badly. Every one thought it too bad for her. He must have been in very straitened circumstances, for he managed different ways of getting along. I remember he built a barn for a widow woman who was studying medicine in the homeopathy department at that time. She told me how H beat her on the barn. He was very dishonest and tricky any place you found him. He would borrow everything of the students that he could to save himself buying. I have no picture of H. Would never have recognized him by his picture in the papers. At that time he had a rather slender face, wore chin whiskers, not considered good looking; but I remember he had treacherous-looking eyes. Another piece of his wife's economy was to borrow our sewing machine and completely turn out a coat for him. He was not a graduate in pharmacy to my knowledge."

(2) "It happened that H acted as steward of a boarding house (only table boarding). It was his duty to keep the places at the table filled with students and collect the money weekly. My recollection of him is quite distinct. None of the boys ever knew much of him (further than that he admitted himself to be married), or had much to do with him. His associations with his fellow students amounted to but

little, because of his way of living. He had no money, at least that is what he always said. For his meals he conducted the club, while he slept at Dr. H's house. (Dr. H was then demonstrator of anatomy in the university.) This brought him to the boarding house only at mealtime. The money was collected by H regularly every Saturday evening. He was, as I remember, always punctual in performing his duties, and also regular at his meals. Even now I can see him sitting at the lower, dark end of the long table, saying but little and laughing seldom. He was of a remarkably taciturn disposition apparently very indifferent to his surroundings, coldly methodical, unresponsive to humor, and very brief in his statements. His topics of conversation were mainly concerning Dr. H's operations upon his private patients. H, as I have said, slept at Dr. H's house. He always accompanied Dr. H upon his night trips. We students, remarking the thing, always thought that H's quietness was due to his rest being broken and irregular, having always to hitch up the horse for the doctor's use, perhaps accompany him, and then stable the horse upon the doctor's return. I remember once of asking a medical student how H answered up in his 'quiz.' The answer I got was that he was not very reliable or exact in his knowledge." . . .

(3) A classmate who is an alienist, says: "My recollection of him is that he was a quiet, unpretentious individual, not a brilliant student by any means, but rather plodding and perhaps below mediocre, but attentive to lectures and operations. My connection with this institution has been continuous since the day of my graduation, and in the light of the experience I have had in seeing a large number of insane and defective people, I cannot now recall anything about H that would warrant me in saying

that he was peculiar, degenerate, defective, or insane, or that he lacked the average mental or moral qualities."

(6) "I was quite well acquainted with him. He always stated to me that he was born in England. He seemed always of a sullen disposition, not caring to talk much, a fair student, although not bright, and still he might be stated to be of average intelligence. We attended many lectures together, and occupied seats close to each other. He was not at all popular and seemingly had very few intimate friends, and the talk was that he would not be able to pass his final examinations, as, if I mistake not, he entered on advanced standing. If I mistake not, he stated that he was a married man, and complained frequently of lack of funds to complete his studies." . . .

(8) "I know of nothing in his character during my acquaintance with him which would mark him as exceptional in any way. I remember he was identified with the Young Men's Christian Association of the university, and took sides with that society in a dispute between the society and one of the professors, and he told me at one time that after graduation he intended to go to New Zealand as a medical missionary. On the whole, his conduct was such as to breed sensation of dislike for him among his fellows. He appeared to be a good deal of a sneak, and I know as a matter of fact that he was a liar. He seemed to be fond of the uncanny things of the dissecting room, and told me at the beginning of one spring vacation that he intended to take home the body of an infant for dissection; that Dr. H had given him one for that purpose. He seemed to derive a good deal of pleasure from the fact. Nevertheless, he was not an industrious worker in the dissecting room."

(9) Classmate, president of a State medical society, says: "I

saw him daily. His appearance was very ordinary. He was of a meditative, unassuming disposition, willing to talk if approached, but his manner was retiring. He was apparently most inoffensive; we then thought him stupid. In his difficulty with the dressmaker we, boylike, believed poor H was being sinned against, and selected a law student, now a member of Congress for Idaho, to intercede for him, with the result that the faculty was lenient and H was 'vindicated.' His bearing so little resembled that of one who sought the company of women that we regarded the incident as a great joke. Even at that time he was given to devising schemes for money making; speculating on projects that might be taken up after graduation. We did not regard them as of doubtful integrity, yet none of them were in line with the profession he was about to be graduated into. We looked upon them as visionary. He had no chums or associates, so far as I knew; always alone, of modest demeanor, and never aggressive. It was a serious struggle with him then for bare existence, and we pitied him without thought of his merit, for he was, as we saw him, a negative character."

(10) "He was a fellow to slide along without attracting any attention, and would be soon forgotten. There was an episode in which he acquired some notoriety, and if guilty, showed much foresight and caution on his part. The facts are as follows: A young widow was running a boarding house, he being one of her boarders. She obtained a letter to him from his wife; she brought her case before the faculty, claiming that he had promised to marry her, and in evidence produced some letters signed in his name. He denied the charge, and produced specimens of his handwriting, including notebooks, etc., which were not in the same hand as the letters produced by her. The evidence

was not such that the faculty could convict on, so they let him off. The opinion among the students was that he was the one who wrote the letters." . . .

(13) "He had a noticeable aversion to familiarity. During the time spent with Dr. H. he took active interest in Sunday-school work of the Presbyterian church, of which Dr. H was a prominent and active member. I remember him as an odd character in the class on account of his seemingly friendless fate and the manner in which he worked himself into the good graces of Dr. H. About the last thing he told me was he had decided to go as a medical missionary to some foreign country after graduating, and that Dr. H had acted in his behalf to secure for him all the necessary credentials for the undertaking."

(14) "To me he was especially noticeable for his rather delicate and fair facial complexion and rather blue and open eyes. He had a thin mustache curled up at the ends. His habits were decidedly of a secretive nature, and consequently he was never much discussed."

(15) "I was quite intimately acquainted with him and can honestly say that he was the last man that I would suspect of doing the deeds of which he was convicted."

(16) "He was sickly looking and troubled quite a little with boils. He was peculiar in that he did not seem to care for any one but himself and paid but little attention to any one. I thought he was rather repulsive in looks, but never thought him a criminal." . . .

(21) "I remember having heard him referred to on one or two occasions as a 'smart Alec.' . . . As I remember, he was looked upon as a bigot and a fellow of so little consequence that it was not worth one's while to pay any attention to him so long as he kept to himself."

(22) "I considered him a quiet, bright, unsophisticated sort of a

young man. I saw nothing abnormal or anything to especially attract attention. He seemed rather gloomy at times and not inclined to be intimate with any one." . . .

(24) "I boarded at the same boarding house as he. After a few months the landlady found that he was cheating her by various methods; each boarder that left, he would report to the landlady that the boarder had not paid him for his board for several weeks, and pocket that amount of money. Also in ordering groceries he would 'beat' the lady. The other students thereby found out that he was dishonest. He appeared to be a sneaking, quiet, unpopular man, other students not associating with him to any extent. I never knew of him drinking. He did not seem to be a 'fast' boy, but a mean fellow. As to his scholarship I remember only that Professor V did not pass him on some branch and H was very spiteful against Professor V—wrote him letters calling him vile names and spoke bitterly against him."

(25) "He never entered into sports of any kind, seldom laughed, sometimes smiled in a dry, half-hearted way—he seemed secretive and afraid of suspicion."

(26) "He was looked upon as one who would attempt to attain favor with the faculty by spying among the students."

(27) "I was well acquainted with him. I have read everything about him since he was arrested, and I know he tells the truth in some of his confessions."

*Letter from one who lived in H's house in Chicago.*—"February 2, 1889, I moved into a room in the Castle and remained there till December 3, 1889. He was always quick and active. If you had seen him in the drug store in Englewood you would have thought him the busiest man you ever saw. Was considered the best druggist and chemist that ever came here, and his store was always filled with

customers. . . . He was one of the biggest swindlers they ever knew, but when he hired a man to do any work he always paid him what he asked without a word, but if he made a bargain with any one that could afford to lose without breaking him up he would 'beat' him almost every time. The iron columns in front of his building are an example. He never paid a cent for them and beat them in three courts. His gas business and using the city water for two years and making them believe it was artesian water were other instances. Bringing the city gas through a tank of water, he put stuff in the water to color the flame until the gas inspectors declared that it was not theirs."

*Letter from a prison chum.*—"It

is very little information that I can give you regarding H. I met him for the first time in the jail, and was only with him for some three or four weeks while he remained in jail in St. Louis. . . . I know nothing about him, but what he told me of some of his former exploits before I met him. Of course you know that he told me all about the scheme to rob the insurance company, and that it was for introducing him to a lawyer who could be trusted to be allowed to know that the scheme to rob the insurance company was a fraud, etc., that I was to have \$500 to enable me to fight my case or secure my liberty."

[Query: Of what crime was this man found guilty, when his case was studied by Dr. MacDonald?]<sup>1</sup>

#### 99. ALFRED SCHWITOFSKY'S CASE. [Printed *post*, as No. 381.]

#### Topic 2. Emotion (Motive)<sup>2</sup>

101. JAMES SULLY. *The Human Mind*. (1892. Vol. II, p. 196.) *Desire*. The phenomenon known as desire has, as we have seen, its dim prototype in instinctive impulse. . . . The Analysis of Desire. (1) Since all definite desire is of some object or perceptible result, one obvious element in the physical state is an idea or representation. When a child desires an object, say an orange, or a playmate's society, he is imagining this object as actually present or realized. In this way all desire is related to the intellectual side of mind. Where there is no knowledge there can be no desire. . . . (2) A closer inspection shows us that all representations do not excite desire. Many images, *e.g.* those of familiar objects in our surroundings, other people's doings, and the like, may arise without any appreciable accompaniment of mental craving or desire. This peculiar psychical state is only aroused by the representation of objects so far as they excite our feeling, and more particularly are thought of as fitted to benefit us or bring us pleasure. In desiring a succulent fruit a child represents the delight of eating it: in desiring a good social position or a high reputation a man represents the coveted situation on its pleasurable side. . . . (3) While desire thus stands in relation to each of the two other phases of mind, it is sufficiently marked off as an active phenomenon. It is in virtue of this

<sup>1</sup>[Answers to Nos. 97 and 98:

No. 97. Petty larceny.

No. 98. Murder. This was Holmes, one of the most ruthless murderers of his generation; ten or more murders were traced to him, and his "Castle" in Chicago was a veritable charnel-house. He was convicted and executed in Pennsylvania; see Official Report of Commonwealth v. Mudgett, alias Holmes. — Ed.]

<sup>2</sup>[Compare the analysis of Motive and Emotion in No. 29, *ante*. — Ed.]

characteristic that it constitutes the connecting link between knowing and feeling on the one side, and willing on the other. In desiring a thing, say an approaching holiday, we are in a state of active tension, as if striving to aid the realization of that which is only represented at the moment, and recognized as such. This innermost core of desire has been variously described as a movement of the mind (*e.g.*) by Aristotle, and more commonly as a striving towards the fruition or realization of the object.

This element of active prompting in desire appears under each of the two phases which, as we have seen, are always present in our active states, viz. attention, and muscular consciousness. . . . We thus see that there is in the very process of mental concentration, as soon as this becomes consciously directed to the representation of something agreeable and desirable, the germ of a purposive activity, the striving towards an end. . . .

*Desire and Aversion.* The great contrast in the region of feeling between pleasure and pain has its counterpart in the domain of activity. While the representation of what is pleasurable excites the positive form of desire, that is, longing to realize, the representation of what is painful awakens the negative form of aversion, or the longing to be rid of. We strive towards what gives us pleasure, and away from what gives us pain. . . .

*Desire and Motive.* Hitherto we have dealt with desire merely as a state of craving without any reference to the nature of the desire as realizable or non-realizable. It is evident that we have many desires which do not go beyond this stage. . . . A desire when thus transformed into a practical incentive, or excitant to action, is what we call a motive.

A motive is thus a desire viewed in its relation to a particular represented action, to the carrying out of which it urges or prompts. . . . As the feelings grow in number and the higher forms of emotion begin to appear, the conative process is prompted by a larger variety of desires. Thus the child begins to act for the sake of earning praise, of giving pleasure to others, or of doing what is right for its own sake. In this way each new advance in emotional development tends to widen the range of desire in a corresponding measure. . . . There now appears as a result of this development of ideation and feeling a new form of conative stimulus, which we can describe as Motive-Idea. . . . The development of reflection and self-consciousness leads to an organization or unification of action into a connected system. Thus, ambition when fixed as a steady incentive means a recurring motive-idea, leading to a succession of progressive actions, the whole constituting the pursuit of a permanent end. . . .

*Nature of Permanent Ends: Desiring Means as Ends.* The pursuit of these permanent ends illustrates in a specially distinct form a common tendency in all states of desire to the fixing of attention not so much on the end itself as on the conditions of its realization. As was pointed out above, the desire for an object begets a desire for the action which is seen to lead on to the realization of it. In order to carry out any line of action, it seems necessary that we should fix attention on the immediate result of the act, as that which guides and controls the process. Hence the tendency to erect this proximate result into a kind of secondary "end" of the action. Thus if a person feels cold and goes to shut the door, realization of the idea of the closed door becomes the immediate object of his action. That is to say, for the moment he loses sight of the initial stimulus, feeling of

cold and the idea of the desired warmth, and is occupied in shutting the door. If an obstacle occurs, as when the latch does not answer, he becomes wholly absorbed in this secondary end. In the case of pursuing a permanent end, as riches, or health, this preoccupation of the mind with the means of obtaining our object becomes still more marked. . . .

*Complex Action.* Our action, as we have seen, gains in representativeness as we take remote consequences into account. And this increase of representativeness implies an increase in the complexity of the action. In a special sense we may call an action complex when it is not the result of a single impulse but involves a plurality of impulses, a representation of a number of objects of desire or aversion. . . . This expansion of the representative stage of action assumes one of two contrasting forms. In the first place, the desires or impulses simultaneously called up may be harmonious and coöperative, converging towards one and the same action. In the second place, the desires may be discordant and opposed, or diverging into different lines of action.

(a) *Coöperation of Impulses.* The combination of two or more elements of desire or impulse in one conative impulse is exceedingly common, and may be said, indeed, to be the general rule. Many actions which seem at first sight to have but one impelling motive will be found on closer inspection to have a number. So simple an action as going out for a walk may be motivated by a number of concurrent impulses, as desire for locomotion, fresh air, and a change of scene. . . .

(b) *Opposition of Impulses.* The second variety of complex action, in which two (or more) impulses come into antagonism, is of yet greater importance. . . . *Arrest of Action: Inhibition.* This variety of complex action is characterized by the clearer emergence of an element in the conative process hitherto neglected, viz. the arrest or inhibition of action. . . . It is when we are simultaneously prompted by a plurality of impulses leading in distinct directions, that is, to different external actions, that the process of inhibition becomes manifest. The opposition of motor forces in this case produces an arrest of action which may be temporary only, leading to a delay of postponement of the action, or may end in its complete suppression. . . .

(1) *Action Arrested by Doubt.* The simplest case of arrested or inhibited action is that in which the belief necessary to the carrying out of an impulse is checked. In the early stages of action we are prone to be confident in our powers. We can easily observe in children's first experiments in movement that they are carried out boldly, that is, with a full assurance of success. To these hopeful tyros in the domain of human action failure comes as a shock. The child looks perplexed, confounded, when he first encounters an object too heavy to be removed. These failures suggest uncertainty, and this sense of uncertainty or doubt will serve to arrest or temporarily paralyze the child's action. . . .

(2) *Recoil of Desire: Deterrents from Action.* A second and in general more effective form of arrest occurs when desire prompts to a certain action with which is associated some painful accompaniment or consequent. In this case the impulse to realize a pleasure is opposed by an aversion to what is disagreeable. And so far as this shrinking from a painful experience frustrates the positive impulse, we are said to be deterred from the action.



. . . The deterring force in this case may reside either in the representation of the action itself as disagreeable, or in the anticipation of some disagreeable result. . . . Here, again, the effect of the prevision of evil in repressing impulse will vary according to a number of circumstances, such as the relative strength of the attractive and deterrent forces, and the strength of the general disposition towards activity at the time. Here, too, we may note marked differences of effect according as the temperament is wary or cautious, and highly susceptible to the deterrent effects of anticipated evil; or, on the other hand, heedless of unpleasant consequences and impatient of delay — a contrast well illustrated in the case of Macbeth and his wife when planning their ambitious crime.

(3) *Rivalry of Impulses*. As a third type of arrest, we may take the case where there arises a plurality of positive impulses. When a man is at one and the same moment stimulated to different lines of action by two disconnected desires, conflict arises through the prompting of incompatible impulses. . . . This rivalry of impulses or desires may assume different forms. Thus two actual feelings may prompt in different directions, as when, tired and hot after a walk, we are at once compelled to rest, and to procure a draft of water.

102. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. pp. 38, 87.) . . . We must next explain "Motive" and what it is that determines conduct. By "motive" is usually meant an ulterior end. But what actually moves us is a felt contradiction, and a thought or idea moves us by exciting desire: desire there is the real stimulus. It is the feeling excited by the idea of the end, or, as Wundt describes it, motives are internal causes of volition, and a motive is a particular idea with an affective tone attaching to it, and the combination of idea and feeling in motives only means that an idea becomes a motive as soon as it solicits the will, feeling itself being simply a definite voluntary tendency. It will be well to dwell for a moment on the part played by desire. "Where, however," says Professor Sully, "circumstances allow of a gratification of the desire, this passes into a new form, viz. an impulse to carry out a particular line of action. A desire when thus transformed into an incentive or excitant to action is what we call a motive. A motive is thus a desire viewed in its relation to a particular represented action, to the carrying out which it urges or prompts."

Now desire does not always follow knowledge, but, on the contrary, "instances are by no means wanting of very imperious desires accomplished by the clear knowledge that their gratification will be positively distasteful." . . .

The writers are unanimous to the effect that what determines conduct, voluntary and impulsive alike, is *not intellect or ideation, but feeling*; and that although in will there is an ideational element, it is through feeling that it influences action. Thus Ribot quotes with approval the saying of Spinoza that "appetite is the very essence of man. . . . Desire is appetite with consciousness of self. . . . From this it results, that the foundation of effort, volition, appetite and desire, is not the fact that a person adjudged a thing to be good; but on the contrary, a person deems a thing good because he tends towards it from effort, will, appetite and desire."

Similarly Professor Hoffding: "Everything which is really to have power over us, must manifest itself as emotion or passion. Mere 'reason' has no power in actual mental life; there the struggle is always between feelings. The frequent talk of the conflict of reason with the passions is consequently psychologically incorrect. No such conflict can take place directly. A thought can suppress a feeling only by exciting another feeling which is in a position to set aside the first." . . . That conduct is guided really by emotion and not by knowledge or understanding, and that intellect is not a power but an instrument which is moved and worked by forces behind it, viz. the passions, is insisted on by Herbert Spencer, who concludes that it is only by awakening appropriate emotions that character can be changed. . . .

Motives, however, are *not mere feelings*: they are combinations of ideas and feelings. "Every motive may be divided into an ideational and an affective component. The first we may call the moving reason, the second the impelling feeling of action. . . . The reason for a criminal murder may be theft, removal of an enemy or some such idea, the impelling feeling, the feeling of want, hate, revenge or envy. When the emotions are of a composite character, the reasons and impelling feelings are mixed, often to so great an extent that it would be difficult for the author of the act himself to decide which was the leading motive. . . . In the combinations of ideas and feelings which we call motives, the final weight of importance in preparing for the act of will belongs to the feelings, that is, to the impelling feelings rather than to the ideas. This follows from the very fact that feelings are integral components of the volitional process itself, while the ideas are of influence only indirectly, through their connections with the feelings."<sup>1</sup>

Of course if you choose to confuse the various meanings of "cause," . . . "motives" among other things may be termed causes, but no good in our opinion comes of confusing the Final with the Efficient Cause. . . . Motive in the sense of that which moves the mind is the idea of physical force contained in Efficient Cause, but "inducing" cause and "influencing" is the idea of purpose contained in Final Cause; and while it is true that no action can be done without an agent to produce it, it is not equally true, if indeed it is true at all, that every act must have a purpose, nor yet does every purpose produce an action. "Between Cause and Motive," says Wundt, "there is a very great difference. A cause necessarily produces its effect: not so a motive. A cause may, it is true, be rendered ineffective, or its effect be changed by the presence of a second and contrary cause, but even then the result shows the traces of it, and that in measurable form. But a motive may either determine volition or may not determine it; and if the latter is the case, then exerts no demonstrable effect."<sup>2</sup> The fact is that, though motives are of the nature of causes, they are a class of causes that will not admit of the mathematical or mechanical treatment which is applicable to the scientific and popular conceptions of the term. It is the principle of sufficient reason rather than of causation which explains the relation between motive and conduct.

On the whole, we should say that the comparison of motives and acts

<sup>1</sup> W. Wundt, *Outlines of Psychology*, 2d ed., p. 204.

<sup>2</sup> Wundt, *Human and Animal Psychology*, pp. 432-433.

with cause and effect above quoted contains more falsehood than truth. It is true that every effect must have a cause, but it is most certainly untrue that overt act must have a conscious motive, which is the sense in which "motive" is there used. Apart from the fact that mere reflex actions have clearly no motives there are many acts which once had a motive but have now become mechanical in the course of evolution, *e.g.* twitching the ears, etc. Again, "in every asylum," writes Professor James, "we find examples of absolutely unmotivated fear, anger, melancholy or conceit; and others of an equally unmotivated apathy which persists in spite of the best of outward reasons why it should give way."<sup>1</sup> Nor does it assist to say that "there must exist a motive for every *voluntary* act," for if any real meaning is to be given to "voluntary," such acts must be distinguished from impulsive ones: as Professor Stout says, "voluntary action is to be sharply distinguished from impulsive action and deliberation from conflict of impulsive tendencies," and a very large part of our actions are impulsive. While if "voluntary" is understood to imply an idea of the end in which the self is realized, then it is little better than tautology to say that every voluntary act implies a motive, for motive is simply such an idea of an end exciting our feeling. It is really the thinking of the end that makes it a motive, and, when this is realized, all analogy at all events to Efficient cause is gone, and with it the necessary connection between antecedent and consequent on which the argument relies.

103. JOHN H. WIGMORE. *Principles of Judicial Proof*.<sup>2</sup> (1913.) It has been noted (*ante*, No. 29) that the term "motive," as commonly used, does not serve to discriminate the two different processes to which it may be applied. (1) It may be attempted, first, to infer, from the existence in A of a desire or inclination to do act X, that this desire, urging him on, probably resulted in the doing of the act; as when it is argued that, because A desired and wished to get rid of B, he probably did do something towards getting rid of B. (2) Secondly, in proceeding in turn to evidence this desire or other emotion, certain circumstances may be offered as tending to show its existence; as when the argument is to the existence of this desire in A (a) from an injury which B has done to A, or (b) from A's outward conduct expressing such a desire, or (c) from the prior or subsequent existence of such a desire. The former inference involves the evidencing of a Human Act. The latter inference involves the evidencing of a Human Quality or Condition.

Both inferences can best be studied together; but they are affected by different experiences of human nature, and by different opportunities for erroneous inference.

1. *Evidence to prove the Existence of an Emotion.* The modes of inference circumstantially to a human quality or condition, as already pointed out (*ante*, No. 3), may be of three kinds, all of which come into use in the present subject: (a) From circumstances tending to excite, stimulate, or bring into play the emotion in question; (b) From outward conduct expressing and resulting from the emotion in question; (c) From the prior or the subsequent

<sup>1</sup> W. James, *Principles of Psychology*, Vol. II, p. 459.

<sup>2</sup> Adapted from the same author's *Treatise on Evidence* (1905, Vol. I, §§ 385-395, 118).

existence of the emotion in question, as indicating its existence at the time in issue. The first of these is a Prospectant indication; the second is a Retrospectant indication; the third is of both sorts. Each sort of inference has its own dangers and difficulties.

*a. Circumstances tending to excite an Emotion.* It must be remembered that this mode of argument is equally available in civil as well as in criminal cases. One is perhaps apt to think of "motive" as a matter involved in criminal cases only. But a recollection of the process involved — that of inferring the existence of some emotion, from which in turn the doing of an act is to be inferred — shows that this process may be equally a feature of proof in civil cases, though not as frequently as in criminal cases.

The general inquiry is, What circumstances tend probably to excite a given emotion? Obviously, the whole range of human affairs is here involved. It would be idle to attempt to catalogue the various facts of human life with reference to their potency in exciting a given emotion. Such an attempt would exhibit two defects. It would be pedantic, because it is impossible to suppose that the operation of human emotions can be reduced to fixed rules, and that a given fact can have an unvarying quantity of emotional potency. It would be useless, because the emotional effect of any fact must depend so often on the surrounding circumstances that no general formula could provide for the infinite combinations of circumstances. Courts have therefore always been agreed that in general no fixed negative rules can be made; that no circumstance can be said beforehand to be without the power of exciting a given emotion; and that, in general, any fact may be conceived as tending with others towards the emotion in question. A few of the commoner illustrations may here be noted.

*Motives for Murder.* The circumstances which might excite a desire to kill are innumerable. Circumstances involving the sexual passion, in one aspect or another, and usually operating through the emotion of jealousy; the expediency of preventing the discovery of a former crime, or of evading an arrest or a prosecution for it; the conduct of the deceased in opposing or injuring or trying to injure the defendant; the defendant's relations with a third person having a desire to kill the deceased may induce him to co-operate, through the sympathy either of friendship or of domestic ties, or by reason of pecuniary hire or of fraternal pledges; finally, and a most common circumstance, the deceased's possession of money or property as leading to the accused's desire to kill.

*Motive for Other Deeds.* The circumstances that may serve as motives for other deeds are innumerable. A few will be noted which serve to show the various discriminations that may arise in using the pecuniary circumstances, of one or another person or thing, as tending to excite a motive in some person. (1) (a) The possession of money by A may tend to show that B desired to rob or to kill him. (b) The lack of money by A may tend to show that B would be unwilling to trust his promises, and therefore probably did not trust him; in particular, that B would be unwilling to lend A money, or to sell goods to A, or to sell to him as principal, or to sell to him absolutely or to sell to him in good faith. (2) (a) The lack of money by A might be relevant enough to show the probability of A's desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much suspicion and at such

a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence.

(b) On the other hand, the fact that a person was in possession of money tends to negative a desire to obtain it by crime or by borrowing, and is always admissible, the foregoing objection not being here applicable.

Two inferences, involving other principles, must be here distinguished :

(a) The inference that A probably did not lend money to B because A had no money to lend ; this is inferring that A did not do an act because he had not the Means or Capacity to do it (*ante*, No. 73) ; (b) the inference that A probably took money because after the time alleged he had large sums while before it he had little or none ; this is inferring an act from the Traces of it (*post*, No. 139). (3) The market value of an article bought may be received to show the probable price agreed upon ; because the actual value would move the buyer to wish to obtain it for not more than that amount, and hence a serious difference between the actual value and the price alleged by the vendor would throw discredit on the latter's claim. In the same way, where the price is not in issue, but the specific article is, a serious difference between the value of the article in question and the concededly agreed price tends to support an allegation that the article in question is not the one agreed upon.

*b. Conduct Exhibiting an Emotion.* Every one of the human qualities or conditions with which the foregoing passages have been concerned may be evidenced by conduct exhibiting it. The interpretation of that conduct proceeds always from experience as to the inferences to be drawn from particular kinds of conduct. But the questions that arise in connection with conduct involve usually the principles of the ensuing inference ; *i.e.* prior or subsequent conduct is offered as showing the emotion at that prior or subsequent time, and the then emotion is thus offered as showing emotion at the time in issue ; the doubt or objection being not as to the first of the two inferences, but as to the second.

*c. Prior and Subsequent Emotion.* Where an Emotion is offered as evidencing an Act (*ante*, No. 101), it is offered as existing at the time of the act ; but its then existence may be proved by its prior or later existence. The nature of the inference, it will be seen, is distinct from those of the two preceding sorts (*i.e.* from extraneous circumstances tending to the excitement of the emotion, and from conduct exhibiting the inward inspiration for the conduct). Here the argument is from an emotional condition once existing to its subsequent or prior prolongation. The peculiar opportunity for error here is that the prior existing emotion may have been brought to an end before the time in issue, and that the subsequent existing emotion may have been first produced since the time in issue. Practically this inference is of course usually associated with two others in a way which may obscure the real evidential question. For example, to show that A struck his wife, the fact is offered that he beat her five years before ; here three steps of inference are involved : (1) the beating five years before evidences a then violent emotion towards her ; (2) the violent emotion five years ago evidences a continuance of the emotion to the time in issue ; (3) the violent emotion at the time in issue evidences the realization of the emotion in the act of striking as charged.

2. *The Emotion as evidence of the Doing of an Act.* Assuming that an emotion exists, the following aspects of it are important.

*a. Kind of Emotion as related to the Act.* The probative value of the emotion depends much on how closely that specific emotion is related to the doing of the act in issue. This varies according to general experience of human nature and to the moral and mental constitution of the individual.

*b. Explanation.* On the principle of Explanation (*ante*, No. 2), numerous hypotheses may serve to destroy the probability of the inference, even when it is certain that an emotion towards doing the specific act did exist. *E.g.* outward events may have physically prevented the action impelled by the motive, or the force of the emotion may have been spent before the time of the act; or a counter emotion may have been stronger.

*c.* An emotion may impel *against* as well as towards an act. Thus, a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him, and would thus be relevant to show the not-doing. This is also the significance of evidence that there was "no apparent motive" for a murder; for a state of emotional indifference — *i.e.* the absence of any anger, jealousy, or the like — is almost equally powerful in its operation against a deed of violence. Sometimes, of course, such evidence merely negatives an alleged murderous emotion, or negatives the tacit possibility of it; but there is also this affirmative aspect to the argument, namely, that emotional indifference makes against crimes.

*d.* It is sometimes popularly supposed that in order to establish a charge of crime, the prosecution *must show a possible motive*. But this notion is without foundation. Assuming for purposes of argument that "every act must have a motive," *i.e.* an impelling emotion (which is not strictly correct), yet it is always possible that this necessary emotion may be undiscoverable, and thus the failure to discover it does not signify its non-existence. The kinds of evidence to prove an act vary in probative strength, and the absence of one kind may be more significant than the absence of another; but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume); the accused must have been present (assuming it was done by manual action); but there may be no evidence of preparation; or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof, but it is not a fatal one, as a matter of law. In other words, there is no more necessity, in the law of evidence, to discover and establish the particular exciting emotion, or some possible one, than to use any other particular kind of evidential fact.

104. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. p. 314.)

*Emotion as Evidence of the Doing of an Act.* The defense, on behalf of the accused, may be founded on the alleged *non-existence* of any motive to the particular crime charged, or the *insufficiency* of the particular motive assigned, to have led to it.

1. The absence of all evidence of an inducing cause to guilt always affording, in such cases, a strong presumption of innocence. But it will avail nothing for the defense that no motive appears or has been affirmatively shown by the evidence adduced. Admitting, as a general truth, that every act must have its motive, it is an obviously necessary inference (independ-

ently of any conclusions of law), that the act proved in the particular case *did* have its motive. It is enough, therefore, to assume that the apparent act had a corresponding motive. To go further, and single out *the* particular motive which was the actual inducing cause, as it would be manifestly impracticable, is never necessary.

2. Supposing, in the next place, that the existence and possible influence of a motive are shown, its intrinsic quality or impulsive power is next assailed, and the argument relied on is, that the supposed or assigned motive could not have been, in point of fact, *adequate* to the inducement of the particular act.

This question of the adequacy or inadequacy of motives to the production of their assumed results, opens an extremely wide field of inquiry.

(1) The first ground of the argument against the adequacy of an assigned *motive* to have induced the commission of a crime charged, is the supposed *disproportion* intrinsically existing between them. So aggravated an offense, it is urged, could not have been committed for so insignificant a gain, or upon so trifling a provocation. But it has already been shown that in order to estimate with any correctness, the inducing power of a motive to crime, or the want of such power, the moral quality of the mind to which it is addressed must always be taken into view. Hence there can be no one rule for all cases, as regards adequacy of motive. It must depend on the moral character of the person accused, in each case. . . . Turning from argument to facts, the evidence recorded in numerous actual trials serves incontestibly to show by how trifling and apparently wholly inadequate motives or causes, men *have been* led to the commission of the most appalling crimes. The mere expectation of obtaining a few pounds for a dead human body, as an anatomical subject, was sufficient to induce Burke and his associates to murder no less than sixteen persons. A few words of reprimand led Courvoisier to cut his master's throat, as he lay asleep in his bed. . . .

(2) Another ground of the argument against the adequacy of assigned motives, in particular cases, consists in what may be called the *antagonism* or conflict of motives, or the assumed existence of *restraining* motives operating in an opposite direction. The principal sources of these are three; — the penalties imposed by the law upon crime; the force of the natural affections; and the influence of the peculiar character and circumstances of individuals. (a) The penalties which the law, for the protection of society, imposes upon crime (and which have been called by Mr. Bentham its "tutelar sanctions") are intended, by the loss and suffering which they hold out as its consequences, to deter men from its commission. These penalties operate, in the most accurate sense, as *motives to restrain* the mass of mankind, who are inaccessible to higher considerations, from giving the reins to criminal desire. Of this argument, no less than of the preceding, it may be said, that it is encountered by actual facts; with this difference, that such facts are of daily occurrence. Notwithstanding the severity of the penalties provided by law, it is notorious that the commission of crime continues to go on. The restraint contemplated is not effectual to the extent intended and desired. A majority, perhaps, of what may be termed the criminally disposed portion of the community are kept in check by the effect of fear, or the natural desire of avoiding threatened loss or suffering. If these were the only influences regarded, the preponderance probably would

oftener lie on the side of restraint and consequent inaction. But, unfortunately for society, this otherwise probable result is, in fact, constantly weakened and overthrown by the presentation of a third class of motives, — those, namely, which involve the *chances of escape or immunity* from punishment. The overwhelming power of the *vengeful* impulse, where it has obtained full mastery of the mind, has already been adverted to. In these cases, the chances of escape from threatened punishment are rarely so much as transiently regarded, much less, accurately weighed. Even the apparent certainty of encountering the full penalty which the restraining motive, in itself considered, presents, fails often to affect the purpose which has been formed. (b) Another class of restraining motives, for which a controlling influence is often claimed in behalf of parties accused of crime, and particularly of murder, consists of those which arise from the influence of the *natural affections*. But it is nevertheless true, that, in particular cases, too numerous, unhappily, for the credit of humanity, these affections have been found to interpose no sort of bar to the gratification of either the gainful or vengeful impulse to murder; or, to speak with more precision, that the affections presumed from the relations of the parties have not, in fact, existed. Cases of parricide, of fratricide, of the murder of children by their parents, of husbands by their wives, and of wives by their husbands, have continually stained the pages of criminal records down to the present day.

105. H. L. ADAM. *The Story of Crime*. (19—. p. 279.) . . . For lesser crimes there may be ample motive, which is invariably made manifest in the task of proving guilt. There are also crimes committed where the motive seems singularly inadequate in comparison with the risk incurred and the consequences which are inevitable upon discovery; and there are crimes for which it is well-nigh impossible to discover any motive at all. It is mainly about the last-named class we are now concerned. I have from time to time sat in criminal courts and listened to cases which have to me presented insoluble problems. I have watched prisoners who have baffled my most strenuous efforts to fathom them — human enigmas. They seem to glide into the dock in a perfectly vacant manner, sit with the face of a Sphinx all through the hearing, and then glide out again to serve the sentence that has been passed upon them. The whole thing seems most painfully perfunctory. It may be accepted as a universal rule of reasoning that for every average human action, however small, there is a motive of some kind, whether it be adequate or not. Even lunatics are said sometimes to have method in their madness. Whenever a man commits a crime, of whatever degree of gravity, for which no motive whatever can be found, it argues the existence of some mysterious mental disorder. It is certainly not the mental disorder which is generally regarded as insanity, for such prisoners as I have referred to above have been closely watched and examined by experts, who have failed to discover any of the symptoms which indicate the presence of ordinary insanity. . . . Their disaffection is one far subtler, more sinister, than ordinary insanity. . . . It is a sudden calamitous visitation, during which the victim commits purposeless deeds; it is a wave of all-powerful emotion which holds captive the mind and impels the victim to extravagant, illogical, and baleful acts. It is intermittent, transitory, and during its prevalence it obliterates all reasoning power, leaving in its



train an aftermath of bewilderment and moral unconsciousness. I have seen prisoners in the dock bereft of all conception of their position, and when they have been called upon to explain or comment on their delinquency they have presented a front of perfect helplessness, as unable to account for their behavior as anybody present in court. . . . This strange malady affects both sexes at all times of their lives, from the period of puberty onward. It is accountable for most if not all of the motiveless crimes committed, and in the case of women it usually culminates in the police court and a charge of "drunk and disorderly." . . . One of the most peculiar prisoners who ever sat in the dock of the Old Bailey was Mrs. Pearcey, who, it will be remembered, was convicted of and executed for the murder of a woman named Hogg. Here again we have the curious neurotic creature, the frenzied and unreasoning slaying. There was no reason that she should have killed the woman with whose husband she was intriguing — she could have gained nothing by it. She had free access to the man, who was a willing party to the guilty connection. It was not for plunder, for the poor woman had nothing with which to tempt the cupidity of anybody. These cases fill one with a vague misgiving. All through the case this woman's behavior was most mysterious. While the police officers were searching her house, in the kitchen of which was the damning evidence of bloodstains, she was playing on the piano in the front room. It seemed incredible that that spare, fragile-looking woman should have been able unaided to have dealt as she did with one so much bigger and heavier than herself, and then afterwards to have wheeled the body in a perambulator for two miles! Such a proceeding betrayed the presence of the supernatural strength which is known to be possessed by the insane. She was defended by Mr. Arthur Hutton, and that gentleman assured me that she was the most mysterious prisoner he ever had to deal with, and that he has always entertained some vague doubt concerning her. He wanted to try and get the charge reduced to the minor one of manslaughter, to work up a theory of some altercation between the two women on the fatal night, — it will be remembered that the deceased woman had gone to the house of the prisoner, at the invitation of the latter, to take tea, — that from words they got to blows, and so the tragedy happened (which, after all, might very well have been), but the prisoner would not consent to this, steadfastly refusing all aid of this kind. She was an exemplary prisoner, going doggedly and resignedly to her doom. . . . But as usual in these cases she was quite unable to give any reason for having committed the deed.

106. ARTHUR C. TRAIN. *Why do Men Kill?* (Collier's Weekly, Jan. 27, 1912.)<sup>1</sup> All crimes naturally tend to divide themselves into two classes — crimes against property and crimes against the person, each class having an entirely different assortment of reasons for their commission: There can be practically but one motive for theft, burglary, or robbery. It is, of course, conceivable that such crimes might be perpetrated for revenge — to deprive the victim of some highly prized possession. But in the main there is only one object — unlawful gain. So, too, blackmail, extortion, and kidnapping are all the products of the desire for "easy money." *But, unquestionably, this is the reason for murder in comparatively few cases.*

<sup>1</sup> Later reprinted in his *Courts, Criminals, and the Camorra*, 1912.

Mr. Charles C. Nott, Jr., Assistant District Attorney of New York, has been trying murder cases for nearly ten years. He has kept a complete record of all of them, and this he courteously placed at my disposal. The list contains 62 cases, and the defendants were of divers races. These homicides included 15 committed in cold blood (nearly 25 per cent, an extraordinary percentage) from varying motives, as follows: One defendant (white) murdered his colored mistress simply to get rid of her; another killed out of revenge because the deceased had "licked" him several times before; another, having quarreled with his friend over a glass of soda water, later on returned and precipitated a quarrel by striking him, in the course of which he killed him; another because the deceased had induced his wife to desert him; another lay in wait for his victim and killed him without the motive ever being ascertained; one man killed his brother to get a sum of money, and another because his brother would not give him money; another because he believed the deceased had betrayed the Armenian cause to the Turks; another because he wished to get the deceased out of the way in order to marry his wife; and another because deceased had knocked him down the day before. One man had killed a girl who had ridiculed him; and one a girl who had refused to marry him; another had killed his daughter because she could no longer live in the house with him; one, an informer, had been the victim of a Black Hand vendetta; and the last had poisoned his wife for the insurance money in order to go off with another woman. There were two cases of infanticide, in one of which a woman threw her baby into the lake in Central Park and in the other gave it poison. Besides these murders, five homicides had been committed in the course of perpetrating other crimes, including burglary and robbery. Passing over three cases of culpable negligence resulting in death, we come to thirty-seven homicides during quarrels, some of which might have been technically classified as murders, but which, being committed "in the heat of passion," in practically every instance resulted in a verdict of manslaughter. The quarrels often arose over the most trifling matters. One was a dispute over a broom, another over a horse blanket, another over food, another over a 25-cent bet in a pool game, another over a loan of 50 cents, another over 10 cents in a crap game, and still another over \$1.30 in a crap game. Five men were killed in drunken rows which had no immediate cause except the desire to "start something." One man killed another because he had not prevented the theft of some lumber, one (a policeman) because the deceased would not "move on" when ordered, one because a bartender refused to serve him with any more drinks, and one (a bartender) because the deceased insisted that he *should* serve more drinks. One man was killed in a quarrel over politics, one in a fuss over some beer, one in a card game, one trying to rob a fruit stand, one in a dispute with a ship's officer, one in a dance-hall row. One man killed another whom he found with his wife, and one wife killed her husband for a similar cause; another wife killed her husband simply because she "could not stand him," and one because he was fighting with their son. One man was killed by another who was trying to collect from him a debt of \$600. One quarrel resulting in homicide arose because the defendant had pointed out deceased to the police, another because the participants got calling each other names, and another arose out of an alleged seduction. Three homicides grew out of street rows originating in various

ways. One man killed another who was fighting with a friend of the first, a janitor was killed in a "continuous row" which had been going on for a long time, and one homicide was committed for "nothing in particular."

This astonishing olla-podrida of reasons for depriving men of their lives leaves one stunned and confused. Is it possible to deduce any order out of such homicidal chaos? Still, an attempt to classify such diverse causes enables one to reach certain general conclusions. . . .

The significant features of this analysis are that about 75 per cent of the killings were due to quarrels over small sums or other matters, drink and women; over 50 per cent to drink and petty quarrels, and about 30 per cent to quarrels simply. The trifling character of the causes of the quarrels themselves is shown by the fact that in three of these particular cases, tried in a single week, the total amount involved in the disputes was only 85 cents. That is about 28½ cents a life. Many a murder in a barroom grows out of an argument over whether a glass of beer has, or has not, been paid for, or whose turn it is to treat; and more than one man has been killed in New York City because he was too clumsy to avoid stepping on somebody's feet or bumping into another man on the sidewalk.

With a view to ascertaining conditions in general throughout the United States, I asked a clipping agency to send me the first one hundred notices of actual homicides which should come under its scissors. This brought in due course 107 clippings, which yielded up the following reasons why men killed: There were 4 suicides, 3 lynchings, 1 infanticide, 3 murders while resisting arrest, 3 criminals killed while resisting arrest, 2 men killed in riots, 8 murders in the course of committing burglaries and robberies, 7 persons killed in vendettas, 3 race murders, and 24 killed in quarrels over petty causes; there were 12 murders from jealousy, followed in four instances by suicide on the part of the murderer; 6 killings justifiable on the "higher law" theory only, but involving great provocation, and 30 deliberate slaughters. . . . The reasons for these homicides were of every sort: police officers and citizens were shot and killed by criminals trying to make "get-aways," and by negroes and others "running amuck"; despondent young men shot their unresponsive sweethearts and then either blew out their own brains or pretended to try to do so; two stablemen had a duel with revolvers, *and each killed the other*; several men were shot for being too attentive to young women residing in the same hotels; an Italian, whose wife had left him and gone to her mother, went to the house and killed her, her sister, her sister's husband, his mother-in-law, two children, and finally himself; the "Gopher Gang" started a riot at a "benefit" dance given to a widow and killed a man, after which they fled to the woods and fired from cover upon the police until eighteen were overpowered and arrested; a young girl and her fiancé, sitting in the parlor, planning their honey-moon, were unexpectedly interrupted by a rejected suitor of the girl's, who shot and killed both of them; . . . a girl of eleven shot her girl friend of about the same age and killed her; several persons were found stabbed to death; a plumber killed his brother (also a plumber) for saying that he stole two dollars; a murderer was shot by a posse of militia in a cornfield; a card game at Bayonne, New Jersey, resulted in a revolver fight on the street in which one of the players was killed; bank robbers killed a cashier at twelve o'clock noon; a jealous lover in Butte, Montana, shot and killed

his sweetheart, her father, and mother; a deputy sheriff was murdered; burglars killed several persons in the course of their business; Kokolosski, a Pole, kicked his child to death; and a couple of dozen people were incidentally shot, stabbed, or otherwise disposed of in the course of quarrels over the most trivial matters. In almost no case was there what an intelligent, civilized man would regard as an adequate *reason* for the homicide. They killed *because they felt like killing*, and yielded to the impulse, whatever its immediate origin.

This conclusion is abundantly supported by the figures of the *Chicago Tribune* for the seven years ending in 1900, when carefully analyzed. During this period 62,812 homicides were recorded. Of these there were 17,120 of which the causes were unknown and 3204 committed while making a justifiable arrest, in self-defense, or by the insane, so that there were, in fact, only 42,488 felonious homicides the causes of which can be definitely alleged. The ratio of the quarrels to this net total is about 75 per cent. There were, in addition, 2848 homicides due to liquor — that is, *without cause*. Thus 80 per cent of all the murders and manslaughters in the United States for a period of seven years were for no reason at all or from mere anger or habit arising out of causes often of the most trifling character. . . .

Now it would be stupid to allege that the *reason* men killed was *because* they had been stepped on or had been deprived of a glass of beer. The *cause* lies deeper than that. It rests in the willingness or desire of the murderer to kill at all. Among barbaric or savage peoples this is natural; but among civilized nations it is hardly to be anticipated. If the negro who shoots his fellow because he believes himself to have been cheated out of ten cents were really civilized, he would either not have the impulse to kill or, having the impulse to kill, would have sufficient power of self-control to refrain from doing so. This power of self-control may be natural or acquired, and it may or may not be possessed by the man who feels a desire to commit a homicide. The fact to be observed — the interesting and, broadly speaking, the astonishing fact — is that among a people like ourselves anybody should have a desire to kill. It is even more astonishing than that the impulse should be yielded to so often if it comes.

This, then, is the real reason why men kill — because it is inherent in their state of mind, it is part of their mental and physical make-up. They are ready to kill, they want to kill, they are the kind of men who do kill. This is the result of their heredity, environment, educational and religious training, or the absence of it. How many readers of this paper have ever experienced an actual desire to kill another human being? Probably not one hundredth of one per cent. They belong to the class of people who either never have such an impulse, or at any rate have been taught to keep such impulses under control. Hence it is futile to try to explain that some men kill for a trifling sum of money, some because they felt insulted, others because of political or labor disputes, or because they do not like their food. Any one of these may be the match that sets off the gunpowder, but the real cause of the killing is the fact that the gunpowder is there, lying around loose, and ready to be touched off. What engenders this gunpowder state of mind would make a valuable sociological study.

107. **GEORGE WACHS' CASE.** (ANSELM VON FEUERBACH. *Remarkable German Criminal Trials.* 1846. transl. Gordon. p. 256.)

[Near Vilsbiburg, in Bavaria, on Thursday evening, April 8, 1819, the family of James Huber, a shoemaker, was found brutally killed, in his little cottage. Father, wife, and two children, had all been murdered with a hammer. Wachs, who had been in the cottage that afternoon and had afterwards left, was arrested, and confessed.] George Wachs, born of Catholic parents, at Solling, in the circuit of Moosburg, on the 17th of April, 1800, and, accordingly, only nineteen years of age when he committed this crime, was the son of a small farmer, who also worked as a day laborer. . . . This young man's immoderate taste for women fully accounts for the suddenness of the change in his moral nature. Wantonness made him riotous, disorderly, and lazy; love of women made him vain and fond of dress, and vanity made him rapacious, until he became first a thief, and then a murderer. . . . Wachs left home at eight o'clock in the morning of Maundy Thursday, the 8th of April, with the intention of making his Easter confession at Vilsbiburg. On his way he met Matthias Hingerl, a peasant's son. . . . Hingerl showed him his watch, which he had fetched from the watchmaker. . . . The sight of this enviable possession painfully recalled to his recollection that, although he certainly had good clothes for the next Easter Sunday, he was still without a watch. At about noon they both went merrily towards home, but stopped by the way at a village. . . . Wachs told him that he had cut his foot with a hatchet, and must have his boot mended before Easter Sunday. With this object only, so at least the accused declared on every examination, he turned back and went to the shoemaker's house. . . . After his boot had been mended, and he had stayed some time with

the shoemaker, he wished, according to his own account at least, to go away at about four o'clock, and asked the shoemaker whether his clock was right? whereupon the latter told him that it was too slow by a quarter of an hour, and desired his wife to fetch him his silver watch from upstairs that he might wind it up. After bringing the watch to her husband, who wound it up, and hung it upon a nail in the wall beside him, she left the house and went to Solling to buy fish for the next day. . . .

"When the woman was gone"

— these are the criminal's own words

— "we talked over a variety of indifferent matters, and for a long time no evil thought crossed my mind, although the watch was hanging before my eyes the whole time. All at once it struck me how beautiful the watch was. I took it from the wall, examined it closely, opened it, and asked the shoemaker how much it had cost. He told me that with a silver chain and seal, the watch had cost fourteen florins, but that the chain was upstairs in the cupboard, as he only wore it on holidays, when I should be able to see it. I remarked that I had a mind to buy them, if I could ever get together enough money, and he appeared quite willing to sell them. I could not get the watch out of my head: I walked up and down the room with my eyes fixed upon it, and the thought struck me that I would run off with it as soon as the shoemaker left the room. But he never stirred from his seat, and continued hard at work upon the upper leathers of a pair of shoes. The desire for the watch grew upon me every moment, and as I walked up and down the room, I turned over in my own mind how I could get possession of it; and as the shoemaker still sat at his work, it suddenly came across me — suppose I

were to kill him? There lay the hammer: I took it up before the shoemaker's face and pretended to play with it; but I did not hit him directly, because I kept thinking to myself that I ought not to kill him. I walked up and down behind his back for some minutes with the hammer in my hand, but still in doubt. Then my longing after the watch gained the upper hand, and I said to myself, 'Now is the time, otherwise the wife will be here too!' And just as the shoemaker was most busily at work, I raised the hammer and struck him with it as hard as I could on the left temple: he fell from his seat covered with blood, and never moved or uttered a sound. I felt sure that I could kill him with one blow. I should think that a quarter of an hour must have elapsed while I went up and down the room thinking how I could get the watch: at length I struck the blow, and this was my last and worst thought. It must have been in an unlucky hour that desire for the watch took so strong a hold of me. I had never thought about it before; nor should I have entered the shoemaker's house, but for my torn boot.

"As soon as the shoemaker was down I put the watch into my pocket and went upstairs to look for the chain. . . . I turned everything over, but did not find the chain; however I did find six florins in half-florin pieces, thirty kreutzers, and a silver hat buckle. . . . My chief object still was to find the silver chain, and it was only during my search for it that the other things fell in my way, and that I took them. When I had got all these things, I returned to the workshop to take a piece of leather, and perceived that the shoemaker still breathed; I therefore gave him a few more blows on the temple with the hammer, and then I thought that I had better remove him into the big chamber, so that his wife might not see him immediately upon entering the house. I accordingly

dragged him out of the shop into the chamber near the bed." . . . George Wachs was on the point of leaving the house when the two children met him at the door on their return from play. These children had seen him during nearly half the day, and knew him; if they remained alive, he was betrayed. . . . He seized the little boy, and dashed him upon the ground at the foot of the stairs with such violence, that the death rattle was in his throat in a moment. He then flung Catherine with equal violence under the stairs among a mass of wood and iron. . . . At last he thought he might escape in safety, but on putting his head out at the door to see if any one was near, he beheld the shoemaker's wife returning from Solling. . . . "When I saw the woman coming, I said to myself, 'Now I cannot escape; I am lost, and must kill her too.' . . . I stood behind her, nearest the door, and before she was aware of it I struck her such a heavy blow with the hammer on the left temple, that she instantly fell close to the chest, and only cried in a low voice, Jesus Maria! I saw that she could not recover, and gave her several more blows as she lay on the floor, to put her out of her misery. I then dragged her on one side towards the inner room, so that people should not tread upon her as they entered the house. . . . The whole affair could not have lasted an hour. It was past five when I struck the shoemaker, and by six the wife was killed.

"If it had not been for the watch chain, I should have not got into all this trouble, and nobody would have been killed but the shoemaker. I never once thought of killing the wife and the children." . . . The truth of this assertion that he entered the shoemaker's shop without any criminal intention, and that it was not until the watch was so temptingly exhibited before his eyes that the idea of murder entered his

mind, seems somewhat doubtful. It certainly looks suspicious that the same man should have murdered another for the sake of his watch at five in the afternoon, who on the morning of the same day feasted his eyes on a watch in his comrade's possession. . . . These conjectures, however, lose all their weight on closer examination. From first to last the criminal never seems to have acted upon any predetermined plan, but merely to have obeyed the inspiration of the moment, and to have yielded to the temptation of an opportunity created by the coincidence of several accidental circumstances. . . . The events of the forenoon had already filled his imagination with the idea of a watch. . . . In order to make his companion share his pleasure, Hingerl took the watch out of his pocket and allowed him to examine it, boasting of its excellence all the while. George Wachs said nothing, but it was impossible that so vain a young man should not envy his more fortunate companion, and long

for the possession of a similar treasure. Thus, without any guilty thoughts or criminal intentions, George Wachs was prepared, by what he had seen, heard, and felt that morning, for the temptation which afterwards met him in the shoemaker's house. An unhappy chance placed before the eyes of one whose thoughts and wishes had on that very morning been directed towards a watch, just such another, and the tempter, opportunity, stood by. This second watch was not merely shown to him and then returned to its case, but was hung against the wall, where it continued to excite his desires: he could not avoid seeing it, and the longer he looked, the more inviting did it appear. . . . To be the owner of such a treasure, to appear before the women thus adorned, to outshine all his companions, was indeed a tempting vision for a vain lad of nineteen; and in this vision he indulged until liking became longing, and longing ungovernable passion. . . .

**108. GEORGE MANNERS' CASE.** (S. M. PHILLIPPS. *Famous Cases of Circumstantial Evidence.* No. XLVI.)

A Miss Lascelles, of Middlesex, England, formed a matrimonial engagement with one George Manners. Her elder brother, Edmund Lascelles, who acted towards her as a guardian, their parents being dead, strongly objected to the proposed union, but was either unable or unwilling to give any satisfactory reasons for his objections. His conduct towards his sister was extremely violent and harsh; and finally, to appease him, she consented to postpone for an indefinite period the proposed marriage. All correspondence between Mr. Manners and Miss Lascelles was not, however, stopped, and they only decided to wait for a more auspicious season.

One evening, about six o'clock, Mr. Manners suddenly appeared at the residence of Miss Lascelles and

her brother. Mr. Lascelles was absent at the time. Mr. Manners complained bitterly that their happiness should be sacrificed to the passionate freak of the brother, and urged Miss Lascelles to leave the house, go to the residence of a relation, and there be married. The plan she willingly agreed to; but as a condition, made Mr. Manners promise to wait and make one last effort with her brother. Mr. Lascelles returned about nine o'clock, and immediately assailed his sister with insults and reproaches. At the request of Mr. Manners, she left the room, and the two men had a stormy interview, lasting about twenty minutes. Then the door opened, and Mr. Manners was heard to say: "Good night, Mr. Lascelles, I trust our next meeting may be a

different one": and immediately afterward, Mr. Lascelles appearing to have refused to shake hands on parting, in a half-laughing way—"Next time, Lascelles, I shall not ask for your hand—I shall take it."

About an hour later, Mr. Lascelles also went out, and about eleven o'clock the house was aroused by two men carrying his dead body into the kitchen, followed by George Manners with his hands and clothes dabbled with blood. Death appeared to have been caused by two instruments, a bludgeon and a knife; and what appeared most singular, the *right hand, on which was a sapphire ring, was gone*. As Mr. Manners had been heard to speak the words, "he would not ask Lascelles' hand, but take it," suspicion at once pointed to him, and he was accordingly arrested, and committed for examination.

On the inquest, the following testimony was given by James Crosby, a farm laborer: "I had been sent into the village for some medicine for a sick beast, and was returning to the farm by the park, a little before eleven, when near the low gate I saw a man standing with his back to me. The moon was shining, and I recognized him at once for Mr. George Manners of Beckfield. When Mr. Manners saw me, he seemed much excited, and called out, 'Quick! help! Mr. Lascelles has been murdered.' I said, 'Good God! who did it?' He said, 'I don't know; I found him in the ditch; help me to carry him in.' By this time I had come up and saw Mr. Lascelles on the ground, lying on his side. I said, 'How do you know he's dead?' He said, 'I fear there's very little hope; he has bled so profusely. I am covered with blood.' I was examining the body, and as I turned it over I found that the right hand was gone. It had been cut off at the wrist. I said, 'Look here! Did you know this?' He spoke very low, and only said, 'How hor-

rible!' I said, 'Let us look for the hand; it may be in the ditch.' He said, 'No, no! we are wasting time. Bring him in, and let us send for the doctor.' I ran to the ditch, however, but could see nothing but a pool of blood. Coming back, I found on the ground a thick hedge-stake covered with blood. The grass by the ditch was very much stamped and trodden. I said, 'There has been a desperate struggle.' He said, 'Mr. Lascelles was a very strong man.' I said, 'Yes; as strong as you, Mr. Manners.' He said, 'Not quite; very nearly, though.' He said nothing more till we got to the hall; then he said, 'Who can break it to his sister?' I said, 'They will have to know. It's them that killed him has brought this misery upon them.' The low gate is a quarter of a mile, or more, from the hall." Miss Lascelles was also forced to testify to the interview before mentioned, and also to the parting words between the two men.

George Manners was fully committed to stand his trial at the ensuing assizes. Upon the trial the same evidence was produced, and the jury found the accused guilty.

A few days before the time set for his execution some circumstances directed the search for the missing hand—which was still being prosecuted by the friends of Mr. Manners—to the cellar of a barn belonging to one Parker, a small farmer in the neighborhood; and as a reward of their diligence, the missing hand was there found, together with a rusty knife. Parker was at once arrested, and confessed his guilt. The wretched man said, that being out on the fatal night about some sick cattle, he had met Mr. Lascelles by the gate; that Lascelles had begun, as usual, to taunt him; that the opportunity of revenge was too strong, and he had murdered him. His first idea had been flight; and being unable to drag the ring from the hand which was swollen,



he had cut it off, and thrown the body into the ditch. On hearing of the finding of the body, and of George Mannors' position, he deter-

mined to brave it out, with what almost fatal success we have seen. He dared not sell the ring, and so buried it in his barn.

**109. THOMAS PATTESON'S CASE.** (CAMDEN PELHAM. *The Chronicles of Crime.* ed. 1891. Vol. II, p. 599.)

The trial of this person took place at Aylesbury, on Tuesday, March 10th, 1840, before Mr. Baron PARKE, when the indictment charged that the prisoner had been guilty of the manslaughter of John Charles, on the 21st of October previous, at Buckland, in Buckinghamshire. The case excited a great deal of interest in the county, from the condition in life of the deceased and the prisoner, who were both respectable farmers, and from the close intimacy which had long existed between them, as well as from the mysterious manner of the death of the former. Though the coroner's jury returned a verdict of manslaughter only, the prosecutors sent up a bill of indictment for murder to the grand jury, which they ignored.

The main circumstances of the case were, that on the 20th of October, 1839, the deceased John Charles went, about ten o'clock in the forenoon, to the "Boot," on Buckland Common, where he had some beer; and while there, the prisoner came in to take lunch, about twelve o'clock. They remained talking and drinking together until about five o'clock in the evening, when the landlord, John Edwards, came in, with whom they had some more drink. About half past ten o'clock at night they rose to go away, their road being the same to pretty near their respective homes. Before they went, however, Charles said, "I think I am the best man now, let us walk the chalk;" meaning that he was the less intoxicated of the two. "Walking the chalk" is, in this part of the country, the test of drunkenness, and the experiment is performed by the attempt to walk straight upon a

chalked line drawn across the floor, or by walking along the straight line between two layers of bricks where the floor is of that material. The experiment was tried in this case, and the result proved that Charles, the deceased, was the less affected by drink of the two; and he therefore undertook, as is usual between two companions on such occasions, to see the other safe home. Neither of them ever reached his home, for the deceased perished on the way, and the prisoner having been taken into custody the same night, remained in Aylesbury jail up to the day of the trial.

The first person who made known the dreadful catastrophe was the prisoner himself, who, about half-past twelve o'clock on the same night, in a very wild and still intoxicated state, went to Johnson, the policeman, in the town of Tring, about two miles from the place where the death took place, and told him "he had killed a man." At first the policeman did not believe him, thinking it the mere folly of drink; but he persisted, and said he would take him to the place where the body lay. The policeman then went with him, and in a lane leading to the homes of both parties, the body of the deceased was found lying on its back on the grass, in a place not exactly on the road, but where a gap in the field, which was the termination of a footpath running parallel with the lane inside of the hedge, led into the road. That path was one which had been made by people going through the adjoining land to avoid a bad part of the road; and having passed that portion of the road, they came into the road again. The prisoner, before the body was

found, had told the policeman that he was sure the person he had killed was "Joe Kibble, the sweep of Tring, who had been sent by Humphrey Bull to kill him." Humphrey Bull was the relieving officer of the union, of which both the prisoner and the deceased were guardians, and was of different politics from the prisoner, the latter being a liberal, and Bull a conservative; but they were on good terms; and nothing could show more strongly the strange state of delusion which the effects of intemperate drinking had wrought upon the prisoner's mind on that fatal night, than that he should give as a reason for killing one of his friends, that he believed him to be an assassin sent by another friend for the purpose of murdering him! On examining the body of the deceased, it was found to bear marks of dreadful beating on the head and face, which had produced great effusion of blood. The bones of the nose were completely broken, and a surgeon deposed to a concussion of the brain, as one of the effects of the violence which caused death. In the pockets of the deceased were found a ten-pound note, a five-pound note, and some sovereigns. On the notes being taken out of the pocket, the prisoner immediately exclaimed, "These are the two banknotes which Bull gave Joe Kibble to murder me!" At that time nobody present was aware that the body was that of farmer Charles. So far from that, the policeman actually sent a person to the house of Charles, to ask him to come to see the body. The prisoner had previously told the police that he had been going home from the Buckland Inn, with his friend Charles, but the latter parted from him somewhere on the road, he could not tell where.

The probable solution of the mystery is, that the deceased, who was proved to be, when in his cups, of a jocose disposition, and rather addicted to the too-often dangerous practice of practical joking, or what

is vulgarly called "larking," had, in going home that night, resolved to frighten Patteson, who, though a man of prodigious bodily strength, was known to be rather deficient in courage, and had before expressed fears of going home by that lonely road. With this view, it is supposed that Charles, taking advantage of the very drunken state in which Patteson was, slipped away from him among some trees which stood at the entrance of the footpath which we have before described, and which ran parallel with the road along which Patteson had to proceed to his home. A high bank and hedge would screen any person going along this pathway from the view of another on the road. At the place where the pathway led again into the road, at the gap, there was a mound of earth with an open space between that and the hedge, so that a person coming from the gap might, by going partly behind that mound, be concealed until he came suddenly in view, and this is probably what the deceased did in order to frighten his companion; and the position of the body near the gap when found seemed to strengthen that supposition. Whether the deceased laid hold of the prisoner before the latter saw him or not must remain forever involved in obscurity, as the panic-terror into which Patteson was suddenly thrown, operating upon the drunkenness, caused him to destroy the unfortunate man immediately; and it is probable that, from his strength, his first blow knocked him senseless. The prisoner said, that, while he was beating the supposed murderer on the ground, he asked him "who sent him to kill him," and that he pronounced the name of "Bull" three times. This of course was the mere hallucination of the temporary frenzy produced by drunkenness and terror. When the prisoner and deceased left the inn together, the latter had a knobbed walking stick in his hand, the other had none. The stick was

found under the body of the deceased, but not marked with blood, or presenting any appearance that could show that it had been used in inflicting the wounds by the prisoner. Those wounds the surgeon was of opinion were inflicted by the fist only. The prisoner was in an agony of grief as soon as he was made aware that it was his friend and companion Charles that he had so unwittingly slain, and continued in a state of deep affliction, even up to the time of his trial.

On behalf of the accused, evidence was adduced which showed that he was a most amiable and respectable man.

Mr. Baron PARKE, in summing up the evidence, told the jury that if they were of opinion that the delusion which operated on the mind of the prisoner, and led to the perpetration of the fatal act, was caused by such an alarm of personal danger as would not have produced a similar effect upon the reasonable mind of a sober man, they must find him

guilty of manslaughter, otherwise the act would be excusable homicide.

The jury returned a verdict of "Guilty of manslaughter," accompanied by a recommendation to mercy.

Mr. Baron PARKE, in pronouncing judgment, observed, that from the time he had read the depositions he believed the fatal act of the prisoner to have been the result of a delusion produced upon a mind which intoxication had deprived of the control of reason; that the prisoner never had the slightest intention of killing his friend, with whom it was proved he never had any quarrel, was clear beyond all doubt. It was not right that he should, however, go altogether unpunished, but in consideration of his having already suffered five months' imprisonment, he should sentence him to be imprisoned for two months only, hoping that this case would be a warning to all who heard it of the danger of indulging in intemperate habits.

110. **THE GLOUCESTER CHILD-MURDER.** (A. C. PLOWDEN. *Grain or Chaff: The Autobiography of a Police Magistrate.* ... 1903. p. 180.)

... Another murder case comes into my recollection, tried also at Gloucester, before Mr. Justice Lopes. I was asked to defend, and I had the rare satisfaction to my own mind of obtaining what is not often looked for in a trial for murder — a clear acquittal. This case profoundly impressed me by its unutterable pathos; a distracted human soul, torn by conflicting emotions and struggling in vain with destiny — the sort of tale that would have moved the chorus to pity in a Greek tragedy. The accused was a young woman leading an ordinary everyday life, with nothing against her but the one fall of her early womanhood; and yet it was the child of this lawless romance she was accused of having murdered. By her own confession

she had willfully taken its life by pushing it into a deep well close to the cottage where she lived. There was no other evidence against her of any kind. Was it true? and what made her do it? were the questions raised by the case.

Alas! she had herself explained the motive. A lover had found his way to her lonely cottage, a lover who was willing and anxious to marry her but for what he considered the incumbrance of the child. Hence the agony of mind which tore the poor woman in two. Either the child or the lover must go, whatever the love she might feel for either. There was no room in her little world for the double joys of wife and mother, which come to most women almost as their natural right and provide their highest

happiness. One can imagine what the struggle must have been to a simple creature, humbly placed, without much education, and without the aid of those distractions in life which serve to divert the thoughts and still the uneasy prickings of temptation. If in the end the forces against which she had to contend proved too strong for her moral nature, it will be seen that the struggle was fierce and bitter.

Let her speak for herself, almost in her own words. The prisoner was the first to mention the calamity that had befallen her child. Wringing her hands and weeping bitterly, she told a neighbor, who was attracted by her sobs, that her poor child had fallen into the well. Later in the day, when the dead body had been recovered, the wretched woman, after a fresh outburst of grief, confessed to her mother that she herself had done it, and begged her mother to pray for her. She had wanted the child to fall in, and had given it apples to throw in, hoping in this way it might fall in, but to no purpose. The next day, in a calmer frame of mind, she adhered to this confession and told her relatives "she knew she would be hung, but she could bear it no longer. She had done it because she saw no other way of being happy with the man she loved." By this time the matter had become known to the police,

and the prisoner, becoming frightened, made a long explanation, which was taken down, to the effect that the child had fallen by accident. This statement she afterwards declared to be false, and again she repeated the story about the apples, and said she had thrown the child in. "Once before," she added, "I took the child to throw him in. I held him over the well, when my dear boy looked up and said, 'Don't put me in this dark hole, mamma.' I had not the heart to do it, and I took him back." This was the whole story; there was no corroboration from any quarter. Which of the prisoner's statements was the true one? Was it her confession or its retraction? I pressed on the jury as well as I could the danger of a conviction under the circumstances, and reminding them of the old adage that truth lies at the bottom of the well, asked if it did not apply with striking force to the case they had to consider. They took an hour to consult together, and returned into Court with a verdict of "Not Guilty." Nine of the twelve, I afterwards heard, were in favor of a conviction. The verdict was not popular. The excuses which pressed themselves on my mind were overlooked by an angry crowd, and the prisoner, as she left the Court, had to be protected by the police to escape their violence.

111. THE KENT CASE. (J. B. ATLAY. *Famous Trials of the Century*. 1899. p. 113.)

In the little village of Road, some four miles to the northeast of Frome, and on the confines of Somersetshire and Wiltshire, stands Road Hill House, and there in June, 1860, resided Mr. Samuel Savile Kent, deputy inspector of factories. He had been twice married, and was the father of a numerous family; by his first wife he had three daughters and one son living, and his second wife was the mother of three children and was then expecting her

confinement at no distant date. On the night of Friday, the 29th of June, the household consisted of just a dozen inmates, Mr. and Mrs. Kent, the seven children, and three female servants, nurse, cook, and housemaid. Eleven o'clock was the usual hour for retiring, Mr. Kent was in the habit of going over the premises with a lantern to ascertain that all doors and windows were safely fastened, and on this occasion he went his rounds as usual.

The house is a substantial one, a little retired from the road, and inclosed in its own grounds. On entering the front door there is a large central hall, on the left side of which is the library with drawing-room behind it, and on the right the dining room, carried out beyond the general area of the house with a flat roof, over which nothing has been built. At the back of the hall is the front staircase, at the foot of which a door leads to the kitchen and offices. There are two floors above, and on each of them is a landing on to which the bedrooms open. On the first floor above the library were the bedroom and dressing room of Mr. and Mrs. Kent; there were two doors to the dressing room, one leading into the bedroom, the other on to the landing close to the nursery door; this latter, however, was fastened up by a heavy piece of furniture placed against it. Over the hall was the nursery, divided into two compartments, in one of which slept the nurse and two of Mrs. Kent's children, Francis Savile, a boy of nearly four, and a little girl of about twelve months; its single window looked out upon the lawn, and a door gave admission into a smaller room beyond, used as a dressing room, with a window looking out over the flat roof of the dining room. Mrs. Kent's eldest child, a girl of five, slept in a cot in her parents' room. The rest of the floor was taken up by a spare bedroom and two lumber rooms. Overhead, the bedroom above Mrs. Kent was occupied by the two eldest daughters of Mr. Kent; in the one on the opposite side the housemaid and the cook slept together; between them and over Mr. Kent's dressing room was the smaller bedroom of Constance, his third daughter, aged sixteen. The bedroom of her brother William, aged fifteen, and two lumber rooms, completed the floor. The nurse, Elizabeth Gough, was a young woman of three-and-twenty. She bore an ex-

cellent character, and had been with the Kents for about nine months.

This Friday had been a hard day for her; the number of servants kept was hardly adequate to the establishment, and in addition to her own duties she had been up early to assist in a house cleaning. She put the children to bed as usual, and after family prayers Mrs. Kent came into the nursery, as was her wont, and exchanged a few words with the nurse, after which the latter, who was thoroughly tired out, undressed herself and went to bed. About five o'clock she woke up, noticed that the clothes had fallen off the body of the baby, who slept close to her bed; and in raising herself up to readjust them she became aware that Savile's cot, which stood on the farther side of the room away from the bed and opposite the door, was empty. This did not seem to strike her as anything remarkable. Mrs. Kent's room was opposite, she was rather fidgety about her children, the boy had been taking medicine, and his mother might have heard him cry, have stepped across the passage and carried him off; so, being unwilling to disturb the household on a false alarm, she composed herself to sleep again, and did not awake till a quarter past six. This was her usual hour for rising, and the young woman got up, made her toilet, read a chapter in the Bible, and said her prayers with a calmness that did credit to her bringing up, and then walked across to Mrs. Kent's room to inquire for the little boy. She knocked at the door and got no answer, went back, dressed the baby, and again knocked at her mistress's door. This time there was an answer, and Gough asked if Master Savile was there. "With me?" replied Mrs. Kent; "certainly not." "Well, ma'am," said Gough, "he is not in the nursery." This at once brought the mother from her bedroom, Gough ran upstairs to inquire of the two elder Miss Kents

if they had seen the missing child. Their answer was in the negative, and while the nurse was talking to them their sister Constance came to her door to hear what was going on. Meanwhile the whole household was aroused, and Sarah Cox, the housemaid, on entering the drawing-room, which she herself had fastened up overnight, found the door open — though Mr. Kent had locked it — the shutters unclasped, and the window a little way up; no force apparently had been used, nor had the window been broken, and there were no traces of footsteps. Mr. Kent, however, was convinced that the child had been kidnaped from outside. No time was to be lost, his carriage was ordered round, and he drove off to Trowbridge, where was the nearest police station.

The confusion in the house may be imagined; Mrs. Kent, overwhelmed with grief, bitterly upbraided Gough for not alarming her the moment she missed the child, and on the latter excusing herself by saying she thought her mistress had fetched him away, Mrs. Kent burst out, "How dare you say so! you know I could not carry him." Gough made no reply, but afterwards, when doing her mistress's hair, said oracularly, "Oh ma'am, it's revenge." All this while the search was going on out of doors and in. The news had spread, and volunteers from the village lent assistance. Two men, Benger, a small farmer, and Nutt, the village cobbler, made an examination of the grounds. Thirty yards from the house, on the side farthest from the drawing-room, in a shrubbery near the back premises, was a disused closet. This they entered, Benger having a "prediction" that he would find something; a pool of congealed blood was on the floor, and the body of the little boy was discovered in the vault, wrapped in a blanket, and clothed in his night-shirt; his head had been nearly severed from his body by some

sharp instrument, and there was a gaping wound in his chest.

The body was taken to the house, and the mournful news broken to the family. Mr. Kent was still away, but by nine o'clock he had returned from Trowbridge, and learnt from the clergyman, Mr. Peacock, that his son had been murdered. Almost immediately the police appeared upon the scene in charge of Superintendent Foley, the head of the Trowbridge force. Mr. Kent welcomed their arrival, and gave them carte blanche with regard to the household and premises. The wife of one of the police was sent for to examine the female inmates, including the young ladies, but with no result. . . . On the following Monday the inquest was held before Mr. Sylvester, the Coroner, at the Red Lion Inn at Road. In the short interval that had elapsed, popular feeling had become greatly excited, and explain it as we may, there was a strong impression that the crime had been committed not only by some one in the house, but by a member of the family.

After the body had been viewed, the inquest was adjourned to the Temperance Hall as a more convenient place, and the room was crowded to its fullest capacity. The witnesses called were the nurse and housemaid, the men who found the body, Foley, and Mr. Parsons, a surgeon. During the taking of the evidence, which practically told the story given above, jury and bystanders alike showed their excitement, and cries of "Hear, hear," were raised at anything which seemed to confirm their suspicions. The Coroner was of opinion that sufficient evidence had been taken, and declined to examine Mr. Kent, who tendered himself as a witness; but some of the jury expressed a wish that the members of the family should be examined, especially the two children, Constance and William. The Coroner consented, but the feeling of the crowd was so evidently

hostile that he refused to expose these children to insult, and adjourned with the jury to Road Hill House. Constance and William were briefly examined, but nothing was elicited beyond the fact that they had heard nothing on the fatal night. The Coroner then charged the jury, and said he saw no reason to attach suspicion to any one in particular, and the total absence of motive rendered the sad affair almost inexplicable.

In accordance with this direction, the jury returned a verdict of willful murder against some person or persons unknown. The result was received with the greatest dissatisfaction. The Coroner was accused of burking the inquiry, and his refusal to examine Mr. Kent was severely commented upon. The magistrates opened a preliminary inquiry, and Gough, the nurse, was taken into custody, but no formal charge was made against her, and she was speedily released. Scotland Yard now felt it was time to step in, and on the 15th of July, Inspector Whicher, of the metropolitan detective force, appeared upon the scene. . . . This reinforcement was productive of speedy results; within five days Miss Constance Kent was arrested and lodged in Devoe's Gaol, and on the 27th she was brought before the local bench.

To fully understand the significance of this arrest some detailed reference to family history will be necessary. A deep gloom had been cast over the early married life of Mr. Kent by the prolonged illness of his first wife. After she had become the mother of the two elder girls mentioned above, and of a boy named Edward, signs of insanity showed themselves, but she was not placed under any restraint, and between the years 1837 and 1842 she gave birth to four children, none of whom survived for more than a few months. In 1844 Constance was born, and in 1845, William; but from this period her mania became

so acute that she was entirely secluded, and the care of the establishment devolved upon a Miss Pratt, the governess and companion. In 1852 Mrs. Kent died, and in the following year Mr. Kent married Miss Pratt. The two eldest girls seem to have got on well enough with their stepmother, and though the eldest boy, a sailor, is said to have shown some disrespect to the governess promoted to fill his mother's place, a reconciliation had taken place prior to his death abroad in 1858, and his last letters to his father were full of affection. With Constance it was otherwise; from her earliest childhood she had been brought up by her stepmother in her capacity of governess; the discipline of the schoolroom is not always compatible with filial affection, especially in the case of a girl of sullen and reserved disposition; and in the month of June, 1856, an extraordinary adventure was planned and carried out. One day Constance, then only twelve, disappeared with her brother William, and was not heard of till the next morning, when news came that the children, both in boy's clothes, had arrived at the Greyhound Hotel at Bath and asked for beds. Their appearance excited suspicion, and they were questioned by the landlady. William soon broke down in tears, but Constance preserved her self-possession, and was even insolent in manner and language. She spent the night at the police station, maintaining the same defiant bearing. In the morning they were fetched home, but Constance could not be induced to express shame or regret. It was discovered that she had secreted and mended some clothes of her brother's, had cut off her hair and thrown it away, together with her own clothes, in that very closet in the shrubbery where the murdered body of little Savile was afterwards found. This escapade became the talk of the neighborhood, and was, no doubt, the foundation of the sus-

pitions which at once attached themselves to these children, and which found vent in the disorderly scene at the inquest.

Since then, an additional circumstance had come to light. On the Monday after the murder, the laundry woman, Mrs. Holly, went as usual to fetch the linen from Road Hill House, and on bringing it home compared it with the list, and found that though a nightdress of Miss Constance's was entered there, no such garment could be found in the basket. The next day she came up to the house and informed Mrs. Kent of the discrepancy. There had been previous disputes about articles lost at the wash; the Kents were indignant, for the housemaid perfectly remembered putting Miss Constance's nightdress into the basket; and Mr. Kent said that unless it was returned in forty-eight hours he would take out a search warrant. Whether this impressed the local police force does not appear, . . . but Whicher's inquiries elicited the following facts. While the housemaid was getting ready the linen basket, but had not quite finished packing it, Constance came to the door of the lumber room and asked her to look in her slip pocket and see if she had left her purse there. Cox looked in the basket unsuccessfully, and then Constance asked her to go down and get a glass of water; she did so, and in about a minute returned with the water, which Constance drank, and then left the room, going up the backstairs to her own apartment. On the 16th Whicher had an interview with Constance, and pointed out the linen list which showed three nightdresses belonging to her; she replied that she had only two as the other was lost at the wash the week of the murder. After a renewed search no trace of the missing garment could be found, and on the 20th Constance was arrested; she cried and said she was not guilty.

At the consequent hearing before

the magistrates, Elizabeth Gough, who after her discharge from custody had gone back to the Kents, was the first witness. She gave substantially the same evidence as on the previous occasion. Then came two of Constance's schoolfellows, unearthed by the vigilance of Whicher. One of them, Miss Moody, said: "Constance told me she disliked her younger brothers and sisters. I believe it was through jealousy, and because the parents showed great partiality. I have remonstrated with her on what she said. I was walking with her one day, and said, 'Won't it be nice to go home for the holidays so soon?' She replied, 'It may be to your home, but mine's different.' She also led me to infer, though I don't remember her precise words, that she did not dislike the child, except for the partiality shown by the parents, and because the second family were much better treated than the first. I remember no other conversation about the deceased child; she has only very slightly referred to him." These peevish outbursts were a very fragile foundation for a charge of murder; but the other schoolgirl, Miss Hatherall, said even less. She had heard Constance speak of her home, and say there was a partiality shown by the parents for the younger children, and that her father would compare the elder son to the younger, and say what a much finer boy the younger would be. Constance had never said anything particular to her about the deceased.

Mr. Parsons, besides repeating his testimony as to the cause of death, said that he accompanied Foley in searching the house on Saturday, the 30th of June, and went with him into the prisoner's room; he examined the linen in her chest of drawers, and the nightcap and nightgown on the bed; they were all perfectly free from any stains of blood; the nightdress was very clean, so much so that he remarked



upon it at the time; the starch was not so much gone from the waist bands and frills as you would expect if it had been worn from the Saturday before. Then followed the story of the missing nightdress as we have detailed it; but there was nothing to bring home the abstraction of the garment to Constance; no trace of it had been discovered; the occurrence was in no way inconsistent with ordinary incidents of a family wash with a not too careful laundry woman.

After a brief appeal from Mr., now Sir Peter, Edlin, who represented the prisoner, she was discharged, on her father entering into recognizances of £200 for her appearance if called upon. The decision was received with applause; public opinion had shifted, and suspicion was falling on another quarter. It was said on all sides that the grounds of accusation were frivolous, and the evidence childish. Whicher was overwhelmed with abuse for officious bungling.

Incredible as it may appear, the next victim sought out by popular rumor was Mr. Kent himself. . . . For some reason he was unpopular in the village; the house had a reputation for never keeping servants; and utterly groundless charges of profligacy were suddenly heaped upon this unhappy man. Gradually a specific charge shaped itself; there were undoubtedly grounds for suspicion against Gough, the nurse; the abduction of the child from her room, the length of time that elapsed before she gave the alarm, and her somewhat lame explanations. . . . Mr. Slack, a solicitor from Bath, had taken up the case in place of Whicher, dismissed with opprobrium. As a result of his investigations Gough, who was now in service near Isleworth, was apprehended and brought before the magistrates early in October. . . . Into the details of the inquiry it is not necessary to go. Suffice it to say that after a four days'

hearing Gough was liberated, on recognizances for her future appearance being entered into. . . . Nearly thirty witnesses were examined, and it is not too much to say that not a single new fact was elicited. Mr. Parsons, however, now expressed himself as of opinion that the cause of death was suffocation, and that the wounds had been inflicted subsequently. . . . The prosecuting counsel went out of his way to express his conviction of the innocence of Constance Kent; she was called as a witness, and testified as to her fondness for little Savile, and that on the very evening of the murder they had been romping together. . . . The mystery was put aside as insoluble, and newspaper readers had plenty of other matter to occupy their thoughts.

Suddenly the silence was broken and the mystery dissipated. In the last week of April, 1865, the London press made known to its readers that Constance Kent had confessed. . . . For years nothing had been heard of the Kent family; they had left Wiltshire and were residing somewhere in Wales, but, since that terrible summer, Constance had ceased to live with them. She had been for some time in a convent abroad, but in 1863, she came as a guest to St. Mary's Home, Brighton, an Anglican sisterhood. . . . In the course of the Holy Week, of 1865, she informed Miss Gream (the Lady Superior), and subsequently, Mr. Wagner (curate of St. Paul's connected with the Home), that it was her desire to surrender herself to justice. . . . On the 20th of July, five years to the day since her former arrest, she was placed at the bar. . . . On being called upon to plead, she said Guilty in a low tone. . . . Before her disappearance into penal servitude, Constance made a full confession to Dr. Bucknill, the medical man who was sent to examine into her mental condition. Let us read in her own words how the crime was committed:

A few days previous to the murder she got possession of a razor from her father's wardrobe and secreted it. On the night itself she undressed and went to bed; she lay awake until the household were all asleep, and soon after midnight she left her bedroom, went downstairs and opened the drawing-room door and window shutters. She went up into the nursery, withdrew the blanket from between the sheet and counterpane and placed it on one side of the cot. She then took the sleeping child from his bed, covered him with the blanket, and carried him downstairs to the drawing-room; she was in her nightdress, and in the drawing-room she put on her goloshes. Having the child in one arm, she raised the drawing-room window with the other, stepped out, went round the front of the house to the closet, lighted a candle which she had secreted there, and while the child, wrapped in the blanket, was still sleeping she inflicted the wound on its throat. It seemed to her as if the blood would never come, and she thrust the razor into the left side. Then she dropped the body, with the blanket round it, into the vault, went back to her bedroom, examined her nightdress and found only two spots of blood upon it. These she washed out and

threw the water away; she put on another of her night-dresses, and got into bed. In the morning her nightdress had become dry where it had been washed. She folded it up and put it into the drawer, as she thought the blood stains had been effectually washed out, but on holding the dress up to the light a day or two afterwards she found the stains were still visible, so she secreted it, moving it from place to place, and five or six days afterwards burned it in her own bedroom, and put the ashes or tinder into the kitchen grate. She had abstracted the nightdress put on after the murder from the clothes basket when the housemaid went to fetch a glass of water. The stained garment found in the boiler hole had no connection with the deed. She replaced the razor on the Saturday morning after cleaning it.

As regards the motive of the crime, says Dr. Bucknell, it seems that though at one time she entertained a great regard for her stepmother, yet if any remark was at any time made which in her opinion was disparaging to any member of the first family, she treasured it up and determined to avenge it. She had no ill will against the little boy except as one of the children; and he failed utterly to detect any trace of insanity in her.

112. **STEVENSON v. STEWART.** (1849. SUPREME COURT OF PENNSYLVANIA. 11 Pa. 307.) . . .

This was an action of debt on a single bill, brought by the administratrix of John A. Stewart, to whom or whose order the bill was made payable, against Stevenson, the maker. The bill was dated July 6, 1844. The defendant pleaded "non est factum," alleging that the bill was a forgery. The plaintiff called several witnesses, who testified that they would take the signature to the bill to be the handwriting of the defendant; and the bill was read in evidence to the jury. The defendant then introduced several

witnesses to prove that he was not in the county at the date of the single bill; he proved and gave in evidence several receipts and letters, to which his signature was attached and undisputed, for the jury to compare with the alleged signature to the bill; and also proved, that this single bill was not exhibited by the administratrix to the appraisers of the estate of the deceased; and rested. The plaintiff then called John Cook, and proposed to ask the witness whether the defendant asked the witness to loan him money in the

year 1844, and to follow this with testimony that defendant wanted to borrow money both before and after the date of this single bill. The counsel for defendant objected to the evidence offered. The Court overruled the objection, and admitted the evidence, and sealed a bill for defendant. The witness then went on to state that he had loaned defendant money; that he loaned him \$40, and took his note when he was in Philadelphia, in June, 1844. The verdict was for the plaintiff. The error assigned in this court was, the admission of the evidence of Cook.

*Watson & Maynard*, for plaintiff in error. *Armstrong*, contra. The opinion of this court was delivered by

BELL, J. — It is, undoubtedly, a rule governing the production and admission of evidence, that the evidence offered must correspond with the allegations and be confined to the point in issue. The effect is to exclude merely collateral facts, having no connection with the subject litigated, and, therefore, incapable of shedding light upon the inquiry, or affording ground for reasonable presumption or inference. . . . But it by no means follows that all collateral facts, presenting at first view no direct connection with the principal fact, are irrelevant, and therefore inadmissible. On the contrary, great latitude is allowed to the reception of indirect, or, as it is sometimes called, circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. . . .

In the case at bar, the question is of the alleged forgery of the defendant's signature to a promissory note, averred to have been given for money loaned. Such investiga-

tions, founded in imputed fraud, naturally take a wide range. Among the most common topics of inquiry is the pecuniary capacity of the supposed lender, and the necessitous condition of the alleged borrower. And these inquiries are legitimate. It is surely competent for the defendant to show that the plaintiff was, at the time of the alleged lending, a poor man, and probably unable to loan the sum in question; or that the defendant was himself possessed of money, and therefore not driven to the necessity of using his credit. If so, why should not the plaintiff be at liberty to prove, that about the critical time the defendant was seeking to borrow? Standing unsupported, neither line of evidence would be sufficient to rebut the adverse allegation. But yet all must feel, that, in a doubtful case, the facts I have supposed to be made out by the defendant, would go far to determine in his favor. On the other hand, where the proofs were otherwise in equilibrium, the fact I have thought the plaintiff might show, would, unquestionless, furnish an argument of some weight in his scale. Had the defendant's effort been to borrow from another the sum for which the note was subsequently given, the inference deducible from the fact would, doubtless, be more stringent than where, as here, the sum first sought for is much smaller than the amount called for by the note. But the convincing power of the inference is for the jury, when weighing the value of the fact proved; not for the judge, in determining the bare question of its relevancy. It is sufficient for the purposes of his inquiry, that it has some affinity with the principal inquiry, though this may be weak or remote. Such we think was the condition of the evidence received here; wherefore, judgment affirmed.

113. **COMMONWEALTH v. JEFFRIES.** (1863. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 7 All. 548.)

Indictment for obtaining goods by false pretenses. . . . At the trial in the Superior Court, before RUSSELL, J., George M. Barnard was called as a witness, and the material portions of his testimony were as follows: "I knew and had dealt largely with the defendant as a broker in linseed, and only as a broker, except in one instance in 1861. He came to my counting room on the 19th of August last, and asked whether I was disposed to sell linseed? I said I would not sell at the price quoted, \$2.90. I said, 'I suppose they will give only \$2.90 and I am not willing to sell.' He said he had an order from parties in New York for two thousand bags of linseed; and after some conversation he said, 'At what price will you sell it?' I said, at \$3.00 a bushel. I think I said, 'Can you buy at \$3.00?' He said, 'Yes; that he could buy of the Tudor Company and William Perkins at that price.' I said, 'I will sell at \$3.00, but I want the money immediately.' He said vessels were scarce, and that there might be some delay in getting vessels to haul to East Boston and take the seed, but that he would send to New York and get the notes of the parties discounted, and so get the money certainly within a week. He said the parties did not wish their names disclosed, as they were constantly using large quantities of seed, and did not wish to be known in the market as buyers. I then made an entry in my memorandum book, in his presence, as follows, to wit: '19th August. Sold to E. P. Jeffries & Co. 2000 bags linseed at \$3.00. Cash within ten days. E. P. J.  $\frac{1}{2}$  Secret.' The word secret refers to the price. The meaning of 'E. P. J.  $\frac{1}{2}$ ' is, that he was to have  $\frac{1}{2}$  per cent brokerage. I do not know that the defendant saw this entry made. If I sold to a broker for himself, I

should make the entry '\$3.00 less  $\frac{1}{2}$  per cent.' The buyer claims that if we save brokerage, he is to have the  $\frac{1}{2}$  per cent though not as brokerage. The linseed was to be sound. That is always understood, unless something else is expressed. In the course of business, linseed is used by the crushers to extract the oil by crushing. I knew all the crushers in New York, I think, and have made myself acquainted with their standing and business credit. After making the entry in the memorandum book, I gave him an order on the warehouse man as follows, to wit: 'Boston, August 19, 1863. Please deliver to the order of Messrs. E. P. Jeffries & Co. two thousand bags linseed, per ship *Resolute* from Calcutta. (B. H. R.) George M. Barnard.' 'B. H. R.' means, Barnard & Hunnewells, per *Resolute*.' . . . The government proved that upon the foregoing order and the order hereinafter referred to relating to the second purchase, the defendant caused the seed to be removed from the warehouse and shipped to New York, to Messrs. T. & G. Rowe and to Messrs. Campbell & Thayer, and introduced evidence tending to show that he afterwards sold the seed to them at a less price than the same were sold by Barnard, on the same days on which he bought of Barnard. . . .

The District Attorney then offered in evidence the defendant's petition in insolvency, with his schedule of creditors and of assets, signed and sworn to by him; the petition on the 14th of September, and the schedule on the 21st of September, 1863; and offered to prove that his indebtedness was not materially different on the 19th and 21st of August, when the transactions with Barnard took place, and that on the 19th and 21st of August, the defendant was in fact deeply insolvent. The Judge admitted this evidence,

against the defendant's objection, solely as tending to prove the intent of the defendant at the time of making the representations alleged. At a subsequent stage of the trial, the said Barnard explained that he was induced to part with the thirteen hundred and seventy bags on the expectation of receiving \$3.00 per bushel from the purchaser in New York, founded upon the representations of the defendant already herein before testified to by him. . . .

The case was submitted to the jury under instructions to which no special exception was taken, and a verdict was returned of guilty upon the first and second counts, and not guilty on the third. The defendant alleged exceptions, and moved in arrest of judgment.

*B. F. Thomas & E. D. Sohler*, for the defendant. . . . The evidence of the defendant's insolvency was incompetent. . . . It had no tendency to show a fraudulent intent on the part of the defendant. Yet this is the precise point in reference to which it was admitted. There is no authority in support of the ruling. Poverty cannot be shown for the purpose of proving crime. It is impracticable to administer justice on such a principle. Before the law, the rich and poor stand on an equality. . . .

*Foster*, A. G., for the Commonwealth. . . .

*BIGELOW*, C. J. . . . The indictment is for obtaining goods by false pretenses. At the trial in the Superior Court, the evidence offered in support of the prosecution tended to show that the defendant, being by occupation a merchandise broker, falsely pretended and represented to the prosecutors that he was authorized as the agent and broker of certain persons in New York, whose names he did not disclose, to purchase a large amount of linseed at the price of three dollars per bushel; that the prosecutors, believing these pretenses and representations to be true and relying upon them, did

agree to sell to said persons in New York for whom the defendant purported to act, several thousand bags of linseed at the price named by the defendant; and that in pursuance of such agreement, they did deliver the same to the defendant, who by means of said false representations and pretenses received and obtained said merchandise with intent to cheat and defraud the prosecutors thereof. . . .

We next come to the consideration of an exception on which great stress has been laid by the learned counsel for the defendant. It is founded on the admission of evidence to prove that at the time of making the alleged false representations the defendant was deeply insolvent. This fact was offered in proof by the government as tending to show the fraudulent intent of the defendant in making such false statements, and was held by the court to be competent for that purpose. It is doubtless true that in a large class of cases the poverty or pecuniary embarrassments of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason of the exclusion of such evidence is, that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. To render evidence of collateral facts competent, there must be some natural, necessary, or logical connection between them and the inference or result which they are designed to establish. It does not follow because a man is destitute that he will steal, or that when embarrassed with debt and incapable of meeting his engagements he will commit forgery. The conclusion in such cases is too remote and uncertain a deduction to be legitimately drawn from the premises. . . . But as a safe practical rule it may be laid down that in no case is evidence to be excluded of any fact or circumstance connected with the

principal transaction, from which an inference as to the truth of a disputed fact can reasonably be made. This rule is especially applicable when it becomes necessary to show a particular intent in a party as an essential ingredient in the crime with which he is charged. . . . Limited strictly to this purpose, other criminal acts have a direct relation to the particular accusation under investigation, and tend to prove the substance of the issue, because they show the state of the mind of the accused in committing the act with which he is charged. . . .

If these views are correct, and we cannot doubt that they are, there is no room for question as to the correctness of the ruling of the court in admitting evidence of the defendant's insolvency. . . . The inability of the person making the false pretense to pay for the goods which he has received becomes a significant circumstance bearing on his intent, and tends to show that the pretense, which otherwise would be innocent or harmless, was made for the purpose of accomplishing a fraud. The insolvency of the party has a direct tendency to show the intent with which the false pretense

was used. . . . If at the time of the transaction he was deeply insolvent, and was cognizant of his condition, the necessary consequence of the act was to deprive the vendor of his property without recompense or the chance of payment, and leads to the just and almost unavoidable inference that it was done with an intent to defraud. Evidence of the pecuniary condition of the accused in such a case is not offered to show that he was under a peculiar temptation to commit the offense, or was more likely to cheat and defraud because he was in embarrassed circumstances, but for the purpose of showing the natural and necessary consequence of his act, which the law presumes he intended. The distinction between the motives which impel a man to commit an act and the effect which he intends his act shall produce on a third party is clear and obvious. Poverty or pecuniary embarrassment may be incompetent to prove the former, but direct and forcible evidence of the latter. . . . For this reason, without enlarging further on the point, it seems to us that the evidence objected to was clearly competent, and had a direct tendency to prove a material issue in the case.

**114. BRADBURY v. DWIGHT.** (1841. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 3 Metc. 31.)

Assumpsit to recover back money alleged to have been paid by the plaintiff to the defendant, upon a consideration which had in part failed. At the trial, in the court of common pleas, before STRONG, J., the plaintiff introduced evidence tending to prove that in December, 1839, he contracted with the defendant for \$300 worth of wood, at \$1.25 per cord, to be cut on the defendant's land, for which the plaintiff gave his promissory note to the defendant, payable in sixty days, and paid the note soon after it fell due. The plaintiff gave evidence of a negotiation between him and the

defendant respecting the purchase of the wood, and introduced a witness, who testified that he (the witness) called upon the defendant, by direction of the plaintiff, and gave to the defendant the above-mentioned note, signed by the plaintiff and by the witness and another person; that the witness took from the defendant a bill of sale of the wood, and carried and delivered it to the plaintiff. Evidence being given that the bill of sale had been lost since the commencement of this action, the witness was permitted to testify as to its contents; and he stated that it purported to be a bill of sale

of \$300 worth of wood, to be cut and taken from a certain lot belonging to the defendant, by the 1st of June, 1840. The defendant contended, and offered evidence tending to show, that the contract between him and the plaintiff was for all the wood standing on the said lot, whether more or less, without any agreement as to the quantity for which the sum of \$300 was to be paid. The plaintiff gave evidence, that there was not on said lot wood enough to amount to \$300, at \$1.25 per cord; and that he, on the 15th of June, 1840, demanded of the defendant a return of part of the money he had paid, or that the defendant should show him where he could procure more wood. In the course of the defense, the defendant offered evidence to prove that the wood, on the lot upon which the plaintiff cut, "was of far greater value than \$1.25 per cord, for the purpose of showing the probability that the contract was such as he alleged it to be, and that it was not according to the claim of the plaintiff." This evidence was rejected by the Judge, and the plaintiff obtained a verdict. The case was brought into this court on exceptions to the rejection of this evidence.

*C. Allen*, for the defendant.  
*Merrick*, for the plaintiff.

PUTNAM, J. — This controversy has grown out of a contract between the parties concerning a sale of wood standing on the defendant's land, and to be cut down by the plaintiff. A bill of sale was given by the defendant to the plaintiff, which expressed the terms of the agreement. But the paper has been lost, and the parties are at issue on its contents; the plaintiff insisting that it was for \$300 worth of wood, at \$1.25 per cord, and the defendant maintaining, on the contrary, that it was for all the wood on a certain lot, for which the plaintiff was to pay, and has paid, \$300. It now appears that there was not wood enough on the lot to amount to the sum of \$300,

paid at the rate of \$1.25 per cord, and that the plaintiff gave notice of that fact to the defendant, fifteen days after the expiration of the time within which the wood was to be cut and taken away, and requested the defendant to show to him and permit him to cut wood on another lot sufficient to make up the deficit, or to return it in money. The witness, who undertook to testify as to the contents of the bill of sale, said that it purported to be a sale of \$300 worth of wood, to be taken from a certain lot of the defendant by the 1st of June next after the time of the sale, which was in December, 1839. Now, if that was the contract, it would be satisfied by the plaintiff's taking all the wood which was on the lot, although it might be of less value than \$300. That witness did not state that the wood was to be at a certain rate per cord. He stated that the plaintiff paid \$300 for the wood; and if the case rested there, the plaintiff would have no just claim against the defendant. But if the contract was for \$300 worth of wood, on a certain lot, at a certain rate per cord, and there was a deficiency, it would be clear that the plaintiff, upon reasonable notice and request, would be entitled to recover the amount of that deficiency, as for money paid upon a consideration that had failed to that extent. The question at the trial was, What were the terms of the agreement?

The defendant offered to prove that the wood, which the plaintiff cut down in his lot, was of far greater value than \$1.25 per cord, as it stood, for the purpose of proving his own statement of the agreement, and disproving the claim of the plaintiff. But the Court rejected that evidence. And the question now is, whether it should have been admitted. If the inference properly to be drawn from the fact tended to prove the agreement to be such as the defendant contended that it was, then it should have been admitted; other-

wise, it should have been rejected as irrelevant, and as having a tendency to mislead. Now the presumption which arises from the uniform conduct of men, under a given state of facts, enters essentially into almost every cause which is tried. Very few cases are established by positive proof. If the fact, alleged by one party and denied by the other, be unusual, unaccountable, and not warranted by the circumstances which attended the transaction, it will not be likely to obtain credit with the jury. If (to come home to the question) the wood, which was standing on the defendant's lot, was worth far more than \$1.25 per cord — and we must now take the fact to be so — is it reasonable to suppose and presume that he would have sold it at that reduced price? We cannot think that such a presumption could be raised from such premises. Suppose the evidence

would have proved that the wood was worth \$2.00 a cord: a sale for the price at which the plaintiff alleges that it was rated would be contrary to the uniform course and conduct of men. The rejected evidence would indeed only raise a presumption, which might be rebutted by some particular circumstances that might have operated upon the defendant to sell for less than the known value. But this would not affect the admissibility of the evidence. The fact should be submitted to the jury, to be properly weighed by them. And if it were established, and not explained or rebutted, it would certainly have a tendency to disprove the allegation of the plaintiff, that the contract was for a price per cord greatly less than the common value. The verdict is set aside, and the case remitted to the Court of Common Pleas for a new trial.

115. **MARCY v. BARNES.** (1860. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 16 Gray 161.)

Action of Contract. Trial and verdict for the plaintiff in this court, before HOAR, J. The defendants alleged exceptions, the substance of which is stated in the opinion.

*P. C. Bacon*, for the defendants.  
*C. Devens, Jr., & G. F. Hoar*, for the plaintiff.

MERRICK, J. — This is an action to recover the contents of the promissory note declared on, purporting to be signed by all the defendants. Zephaniah Baker & Co. were defaulted, and Moses Barnes alone interposed any defense. In his answer, he denied the genuineness of the signature of his name which appears upon it, and alleged that it had been fraudulently placed there. This constituted the issue to be determined; and it was conceded at the argument by the counsel of both parties, that the precise question which arose and was contested upon the trial was whether the

name of Moses Barnes was affixed to the note before or after it came into the possession of the plaintiff.

In addition to other evidence produced by the plaintiff, Lucian Marcy was called as a witness in his behalf, and testified that he was present on a certain occasion, and heard the plaintiff, in reference to a loan about to be made by him to Z. Baker & Co., make inquiries of his father respecting their credit; that his father replied that he would not trust them a dollar; that he then said he was to have the name of Moses Barnes; and that his father said Moses Barnes was good. This conversation was not in the presence or knowledge of either of the defendants; and the whole of this testimony was objected to by the defendant Barnes. But of the admissibility of a part of it we can entertain no doubt. It was competent for the plaintiff to show that, before parting with his money, he exercised



the reasonable precaution of making himself acquainted with the pecuniary responsibility of the parties to whom it was to be lent; and proof that he obtained information from a person, upon whose knowledge and judgment he believed he could confidently rely, that Baker & Co., were worthless and unfit to be trusted, but that Moses Barnes was a man of undoubted credit and ability, would have a tendency to create a high degree of probability that the loan would not have been made without the security afforded by his becoming a party to the note, and thus to show that his name must have been upon it when it was taken. This would be in conformity to the

common experience, that men of ordinary prudence consult their own interest and use reasonable care in securing and preserving their own property, and therefore was a circumstance which, though by no means conclusive, yet had an important bearing upon the question at issue. 1 Starkie, Ev. (1st Amer. ed.) 487. And upon such a question evidence of inquiries made by the party in interest, and of the information obtained in reply, is not obnoxious to the objection that it is mere hearsay, but is primary and original. The whole, taken together, is a fact, which, like any other fact, may be shown and established by any competent means of proof.

### Topic 3. Plan (Design, Intention)

121. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> The existence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out.

The probative value of such a design or plan, for the purpose of admissibility, will depend chiefly on two elements, either of which may be very weak in a given instance, — the fixedness or absolute quality of the design, *i.e.* its subjection to no contingencies or conditions; and the specific direction of it to the act in question, *i.e.* its application, not merely to a class of acts indefinitely foreseen, but to the exact deed in question.

The nature of the inference by which we reach a belief in the existence of the plan has been already examined under Title III, Evidence of a Human Quality or Condition, Subtitle D, Plan (*ante*, No. 39).

122. JAMES SULLY. *The Human Mind*. (1892. Vol. II, p. 255.) . . . The process of active deliberation here briefly described is a higher form of that work of integration or unification in which, as we saw above, the whole development of consciousness consists. To reflect upon our competing impulses and aims is to make them our own, that is, to take them up as elements in a new mode of self-consciousness. . . . *Choice or Decision*. Where the process of deliberation has been carried out normally, that is, in strict subordination to practical ends, it leads on to what is popularly known as an act of choice or decision. Thus, after duly weighing the pleasure and the pain, the good and the evil which will result from any action, the one may seem to preponderate over the other; or, after comparing two competing forms of good, say society and the furtherance of science, we recognize the latter as the greater. In such cases we are said

<sup>1</sup>[Adapted from the same author's *Treatise on Evidence*. (1905, Vol. I, § 102.)]

to consciously choose or decide upon the particular course of action with its attendant result. Here, it is evident, we reach a higher degree of organization of the conative process. . . .

*Resolution: Firmness of Will.* One other common accompaniment of this higher and more reflective type of conation remains to be touched on, namely, resolution. By this is meant the formation of a distinct determination to perform an action which is seen to lead to a desired end. It is something more than selectively deciding on an end as good or desirable. Such decision, where the actual circumstances allow, may instantly pass into action, as when, for example, a gambler decides to stake a particular sum and instantly places this amount. Here, it is evident, there is no time for a resolution, "I will do this particular act," to distinctly emerge in consciousness. In its completely developed form, resolution, like the state of desire itself, has reference to something not capable of being realized at the moment. Thus we resolve to pay a call some hours hence, or to meet some contingency as a wet day, or another person's treatment of us, in a particular way.

Resolution on its psychical side, is equivalent to a complete process of volition. There is not only the presence and unopposed preponderance of a motive to action, but a distinct representation of, and desire to perform, an appropriate action. What differentiates it from a fully executed action is that owing to the circumstances of the moment the motor idea does not instantly issue in the conscious action. . . . On the physiological side resolution appears to involve a partial excitation of the motor and sensory centers engaged in carrying out the action, an excitation which is temporarily inhibited by a reflective process, though steadily maintained through the psychophysical process of expectation, and ready to overflow into peripheral discharge as soon as this ideational process of expectation gives place to the sensational process of a perception of the suitable circumstances.

From this brief account of the process of resolution we may readily see that it is in a manner the crowning phase of the conative process. Action kept, so to say, in suspense prolongs the initiative stage to the utmost. Such prolongation or delay of execution allows of full opportunity for the development of the active form of self-consciousness. The state of mind or psychosis indicated by the expression "I will" here reaches its maximum distinctness. Hence the tendency to look on resolution as the most essential factor in the conative process. According to this common view, we only fully assert our will when we definitely and firmly resolve to do a thing. . . .

It may be added that resolution enters into all action, so far as this becomes complex, in the sense of involving a *prolonged activity*, or a series of combined movements. Thus, in carrying out a mechanical process as carpentering, in looking up a friend, or in preparing for an examination, we must, it is plain, maintain from the outset a state of determination or resolution with respect to the latter stages of the performance. The frequency of incompleted action illustrates this point; for the abandoning of things when only partly done means that the attitude of resolution was not strong enough; that is to say, that the desire for the end, the achieved result, and the readiness to carry out the required actions as the proper moments arrive, were not sufficiently persistent. . . . Since resolution implies the

maintenance of the idea of an end, and further of that of an opportunity of actively realizing this end, it is liable to fail through the lapse of this ideational activity. Hence so many of our resolutions are temporary only and abortive. Again, since resolutions are arrived at in the absence of the appropriate circumstances, they are, even when strong and persistent, no perfect guarantee for actual performance. Their future efficiency will depend on the adequate representation of all the circumstances. This accounts for the ignominious collapse of so many brave resolutions when subjected to the touchstone of actuality. In all such persistent resolution we have a new display of "will power." Strength of will is commonly judged by steadiness and pertinacity of resolve. More particularly, it is tested by firmness, that is, maintenance of the resolute attitude under heavy and prolonged discouragements, as in the now historical crossing of the African forest by Stanley and his party. . . . Where, instead of deterrent difficulty, seductive allurements of any kind comes in to break the spell of a resolution, we have this pertinacity under the form of what is commonly known as firmness or independence of will. Here the attractions of other objects, the suggestions of friends, and so forth, present themselves as competitors with the particular end pursued, as when the Sirens seek to woo Ulysses from the arduous toils of the sea. . . . Such resoluteness or firmness constitutes a particular volitional quality. . . . It is needless to dwell on the moral importance of the quality. It is only as men are known to be resolute that they are to be counted on.

**123. RICHARD GOULD'S CASE.** (CAMDEN PELHAM. *Chronicles of Crime*. ed. 1891. Vol. II, p. 557.)

It was upon the morning of Tuesday, the 17th of March, 1840, that the murder was discovered for which Gould was eventually indicted. Mr. John Templeman, the unfortunate victim of this most dreadful crime, was about seventy years of age at the period of his death. He resided in one of numerous small cottages erected in an open space called Pocock's-fields, near Barnsbury Park, Islington, principally occupied by persons of the poorer grades of life. He lived by himself, and was possessed of a small income, arising from the rents of one or two houses which belonged to him in Somers Town. The supposed miserly habits of the old man, and the great desire which he appeared to entertain to be considered rich, and which he exhibited by constantly boasting of his property, were the undoubted causes which led to the dreadful catastrophe by which he was deprived of life.

It appears that on Monday, the 16th of March, he went as usual to Somers Town to collect the money due to him for the rent of his houses; and having called upon his tenants, he received of them 6l., the whole of which was paid him in silver, except one half sovereign. Upon his return home, he sent for a Mrs. Thornton, who acted as his charwoman, and who lived in an adjacent cottage, to whom he communicated the fact of the receipt of the money; and having instructed her to procure various trifling articles of which he stood in need, at about six o'clock he retired to rest. On the following morning Mrs. Thornton sent her daughter to the house of the deceased with some of the commodities which she had been directed to purchase, and she knocked at the door, and called Mr. Templeman by name. No answer was returned, and she went back and informed her mother of her inability to

obtain admittance to the house; and then upon Mrs. Thornton proceeding to the cottage and looking in at the bedroom window, she was horror-stricken at finding the unfortunate old man stretched upon the floor brutally murdered. For a time she was at a loss to know what proceedings to take in reference to this most dreadful transaction; but being aware that the deceased had a grandson, a solicitor, in Mortimer-street, Cavendish-square, she determined to await the arrival of her son-in-law, a Frenchman, named Capriani, who was employed as a night watchman at Sadler's Wells theater, in order that he might take the necessary steps in the affair. At eleven o'clock in the day he returned home; and then upon his being made acquainted with what had occurred, he at once proceeded to the residence of Mr. Templeman, Jr., to inform him of the murder, omitting altogether to give any information to the police of the discovery which had taken place. During the absence of Capriani, the baker who was in the habit of delivering bread at the cottage of the deceased arrived, but was met by Mrs. Thornton, who sent him away, saying he would get no answer there; but Mr. Templeman, Jr., soon after making his appearance, the police were called in, and informed of the horrid transaction.

A minute examination of the house of the deceased then took place; and from the appearances which presented themselves, it became evident that the murder had been committed in the most savage manner. . . .

The house, which consisted of two rooms only, was in a state of great confusion. The drawers had been forced open, and the box in which it was known the deceased kept his money had been ransacked of its contents. . . . Upon the search being continued, to ascertain the means by which ingress had been obtained to the house, it was discovered that

the outer shutter, which was of slight materials, having been first forced open, a pane of glass in the parlor window had been broken through, and then a hand might have been introduced to open the door on the inside.

The circumstances which had hitherto been disclosed left but little clew to the murderer, but some suspicion being attached to Capriani from the delay which had taken place in the discovery of the murder by him to the police, he was taken into custody. The examinations which were made by the police in the course of the ensuing day or two, however, satisfactorily proved that Capriani was in no wise implicated in the horrid affair, and he was discharged; but soon afterwards Gould, and a man and his wife, named John and Mary Ann Jarvis, were apprehended. The evidence which was discovered in reference to these persons soon demonstrated the innocence of the man Jarvis, and he was set at liberty; and subsequently, although a close intimacy was proved to exist between Gould and Mrs. Jarvis, it was found that no such proofs remained against the latter as to induce a probable belief of her guilt, and she too was discharged from custody.

Gould, in the meantime, underwent many examinations at Hatton-Garden police office, upon the charge of being concerned in the murder, the utmost interest and excitement being occasioned by the mystery connected with its committal.

The case came on to be tried before Mr. Baron ALDERSON, at the Central Criminal Court, on Tuesday, the 14th of April, Mr. Chadwick Jones appearing as counsel for the prosecution, and Mr. Chambers conducting the defense of the prisoner. Witnesses were examined as to the facts which have been already detailed; and other persons were produced, from whose testimony it appeared that the prisoner for some time before the murder had

lodged in the house of a Mrs. Allen, who lived in Pocock's-fields, near the cottage of the deceased. The most important facts proved against him were, that previous to the murder he had frequently declared to many of his companions that he was greatly in want of money, and that he had suggested to one of them, a potboy at the Duchess of Kent public house in the Dover-road, that he knew an old man who had got money, for that he had seen him flashing about a 50*l.* note; that he knew where to put his hand upon it in the drawer where it was kept, and that it was "just like a gift" to him, and that he wished he could get "a right one" to assist him in the robbery. Other witnesses proved that he had expressed to them a desire to procure "a screw" and "a darkey" (meaning a picklock key and a dark lantern), to "serve" an old gentleman in a lonely cottage; and the concluding evidence was that of Mr. and Mrs. Allen, his landlord and landlady, as to his conduct on the night of the murder, and of some police officers, who proved the discovery of some money in the rafters of the washhouse of Allen's cottage, corresponding in its denominations with the silver which had been paid to Mr. Templeman by his lodgers at Somers Town.

Allen's evidence was as follows; "I live at Wilson's Cottage, Pocock's-fields, Islington. I know the cottage in which the deceased lived. I have known the prisoner about twelve months; he has lodged at my house several times, and he came to lodge there seven nights before this occurrence took place. I remember the 16th of March; and at that time, from circumstances that occurred, I am confident that he had no money. On that day the prisoner went out between eight and nine o'clock without having any breakfast. He had on a pair of shoes which I sold him, and they had nails in them. The prisoner wore them constantly. He returned home about three o'clock

in the morning, and he immediately went into his room. My wife said to him, 'Richard, is it early, or late?' and he replied, 'It is early.' The prisoner got up between eight and nine o'clock the next morning, and came into my sitting room, and passed through into the washhouse, which leads to the privy. He stayed out from five and twenty minutes to half an hour when he returned into the house and went out at the front door. I did not observe anything unusual in his appearance. The prisoner returned home about seven o'clock in the evening, and in the meantime I had heard of the murder of Mr. Templeman, and I told him of it. The prisoner said it was a shocking thing, and he asked me if I considered Mr. Templeman could have done it himself. I said, 'Richard, how can a man bind his own hands and eyes?' The prisoner then appeared agitated, and said his inside was out of order, and he went into the yard, and remained for a few minutes. . . . I asked him where he had been so late on the night before. He said he had been at the Rainbow, and had stopped there until twelve o'clock at night, and when he came out he met some friends, who detained him. Before this time I had a piece of wood in my possession, which was about a foot and a half long. The prisoner went to bed about nine o'clock, and I bolted him in and gave information to the police. He accounted to me for the possession of the money by saying that it had been given to him by his relations."

Mrs. Allen's evidence was to the same effect; but she proved in addition, that a stocking in which the money was found concealed belonged to the prisoner.

The evidence otherwise was of a very general description, and although many expressions of a very suspicious character were attributed to the prisoner by the witnesses, none of them amounted to an admission by him of his guilt. The jury, after

having received the customary charge from the learned Judge, returned a verdict of acquittal. . . .

But on the next day, he was surprised at finding that he had again got into the custody of the police, a warrant having been executed upon him, in which he was charged with being a party to the robbery which had been committed in the house of Mr. Templeman, on the night of the murder.

He was carried to London loudly complaining of the breach of good faith on the part of Sergeant Otway, and on being conveyed to Bow-street, he repeatedly expressed his willingness to disclose all he knew upon his being liberated. This condition, however, was refused to be acceded to, and in the hope of obtaining the reward, on the 11th of May he made a statement [confessing to the murder]. . . .

He had already been acquitted

of the murder, and it was impossible that he should be tried upon any fresh indictment upon that charge; but it still remained open to the friends of the deceased to prefer against him a charge of burglary, subjecting him to a penalty of transportation for life. Upon this latter charge he was indicted at the session of the Central Criminal Court, on the 22d of June, and the same evidence which had been before adduced having been again brought forward, together with proof of those additional facts admitted in his own confession, he was found "Guilty."

Mr. Baron PARKE, in addressing the prisoner, declared that there could be no possible doubt that he had been guilty of the murder of the unhappy deceased, and that he was justly brought to punishment. He sentenced him to be transported for life.

#### 124. JONATHAN BRADFORD'S CASE. [Printed *ante*, as No. 57.]

#### 125. THE GREAT OYER OF POISONING. (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 176.)

In the series of trials of the murder of Sir Thomas Overbury, in 1615, in the Tower of London (to which reference has already been made), the prisoners included Anne Turner, Richard Weston, Franklyn, Sir Thomas Elwes (the Lieutenant of the Tower), and the Countess of Somerset. It was alleged that the Countess of Somerset resented the interference of Sir Thomas Overbury, then a prisoner in the Tower, in her matrimonial schemes, or as Franklyn put it in his evidence: The Countess had told him that Sir Thomas Overbury "would pry so far into their affairs that it would overthrow them all." Richard Weston, who had been an apothecary's man but had afterwards become under keeper to the Lieutenant of the Tower, was arraigned on the charge that "he did obtain at the Tower of London certain poison of

green and yellow color, called *rosalgar* (knowing the same to be deadly poison), and the same did feloniously and maliciously mingle and compound in a kind of broth which he did deliver to the said Sir T. Overbury with intent to kill and poison." He was also accused of giving on other occasions poisons called "white arsenic" and mercury sublimate, which he "put and mingled" in tarts and jellies. . . . Anne Turner, who was tried as one of the accomplices, was the widow of a physician, and a friend of the Countess. She pleaded "Not guilty" to the charge.

The evidence as to sorcery used by her has already been mentioned, but the chief witness against her was James Franklyn, who made the following confession: "Mrs. Turner came to me from the Countess and wished me from her to get the

strongest poison I could for Sir T. Overbury. Accordingly I bought seven, viz.: Aqua fortis, white arsenic, mercury, powder of diamonds, lapis costutus, great spiders, and cantharides. All these were given to Sir T. Overbury, and the Lieutenant knew of these poisons. Sir T. Overbury never had salt but there was white arsenic put into it. Once he desired pig, and Mrs. Turner put into it lapis costutus. At another time he had two partridges sent him from the Court, and water and onions being the sauce, Mrs. Turner put in cantharides instead of pepper, so that there was scarce anything that he did eat, but there was some poison mixed. For these poisons the Countess sent me reward. She afterwards wrote unto me to buy her more poisons." It is obvious from this confession that the poisons supplied had no power, and it would seem that Franklyn was making income for himself by supplying harmless preparations for the poisons for which he was being paid. As far as it is possible to judge by reading the evidence, there was proof that attempts had been made to poison Sir Thomas Overbury, but no proof that any poison was ever given to him. However, the evidence appears to have been quite sufficient to convict the prisoners. . . .

After the execution of Mrs. Turner and Weston came the trial of Franklyn, who confessed that poison had not been the cause of Overbury's death. Weldon, who, in 1755, pub-

lished a history of the Kings of England, describes how Franklyn and Weston "came into Overbury's chamber and found him in infinite torment with the contention between the state of nature and working of the poison, and it had been very like that nature had got the better in that contention . . . but they, fearing it might come to light by the judgment of physicians that foul play had been offered him, consented to stifle him with bedclothes, which accordingly was performed. And so ended his miserable life, with the assurance of the conspirators that he died of poison, none thinking otherwise but these two murderers." The account given by Weldon of the manner in which the Lord Chief Justice received this confession is well worth quoting. . . . "Then was Franklyn arraigned, who confessed that Overbury was smothered to death, not poisoned to death, though he had poison given him. Here was Coke glad to cast about to bring both ends together, Mrs. Turner and Weston being already hanged for killing Overbury by poison. But he being the very quintessence of the law, presently informed the jury that if a man be done to death with pistol, poniard, sword, halter, poison, etc., so he be done to death, the indictment holds good, if but indicted for one of those ways. But the good lawyers of those times were not of that opinion, but did believe that Mrs. Turner was directly murdered by Lord Coke's law, as Overbury was, without any law."

126. **REGINA v. CLEARY.** [Printed *ante*, as No. 61.]

127. **WILLIAM HABRON'S CASE.** (N. W. SIBLEY. *Criminal Appeal and Evidence*. 1908. p. 293.)

William Habron, convicted at Manchester Autumn Assize, in 1876, before LINDLEY, J. (now Lord Lindley), for the murder of Police Constable Cock. It may be remembered that the fact which cast a

doubt upon the propriety of his conviction was the confession of Peace, in February, 1879, when lying under sentence of death for the murder of Mr. Dyson, at Bannercross. This led to a free pardon

and £1000 compensation being granted to Habron. . . . It is common ground that the conviction of Habron took place purely on circumstantial evidence, and it was considered, at least at the time, that the case was perhaps the most remarkable case on record of circumstantial evidence. The facts as set forth in the *Times* in 1879—it was not reported in 1876—are as follows:

There were three brothers, Frank, John, and William Habron, living together at Chorlton, a village three miles from Manchester, in the employment of Mr. Deakin, a nursery gardener. In July, 1876, summonses were taken out against John and William Habron for disorderly conduct and drunkenness by Police Constable Cock. After the summonses were served the Habrons were heard to say that if the "Bobby" caused them any trouble, they would shoot him. At the hearing of the summons, Police Constable Cock, immediately on leaving the witness box, went to Mr. Bent, his superior officer, and a superintendent, and stated that William Habron had said to him, "If you get me fined, I will shoot you before the morning." This was on August 1st. The case against John Habron was dismissed, but William Habron was fined. The policeman was evidently laboring under some apprehensions; but Mr. Bent, knowing that coarse and vulgar threats were common enough among people of the condition of life of the Habrons, took no notice of it at the moment; but towards the evening, on reflection, he thought there might be something in it, and he intended next day to have given orders for the men on that beat to go in couples. Here a very singular and undoubted fact has become known; Cock had to go on duty that night at nine o'clock, and, as evening came on, he fell into a state of extraordinary depression, and told his landlady (he being a single man living at lodgings, having

joined the police only a few months before) that he was sure something would happen to him that night. With a great effort he, however, conquered his depression and went on his usual beat. He was on duty at Whalley Range, a district composed entirely of mansions and villa residences, and a few minutes before twelve o'clock he and Beauland, another constable, were together at West Point, near the residence of a gentleman named Gratrix. There they saw two men, one of whom was leaning against a post. A third man whom they did not know, and whom Peace claims to be, passed them. They did not know him. The officers knew all the three Habrons, and therefore this third man could not have been one of them. Beauland looked at this third man as he passed and asked Cock who he was. Cock said he did not know. Beauland then said he would follow him, and he went towards Mr. Gratrix's house, towards which he had seen the man disappear, and examined the place, but could see no traces of the man. He thought from the sudden disappearance that it was young Mr. Gratrix coming home. He turned back, and as he was turning he saw a flash and heard a report, and almost instantaneously it was followed by another flash and a report. The officer described them as following each other just as quickly as one could pull the trigger of a revolver. He heard Cock scream, "My God! I am shot," and ran up to him and found him lying on the footpath. He asked what was the matter, but Cock could make no reply, as he lay writhing on the ground.

Beauland heard a man exclaim, "Here is another policeman!" and then he heard footsteps running away. He whistled for assistance, and some carters and their carts came up, together with a young gentleman named Simpson, who had been talking with the two



officers only a minute or two before and heard the report of the two shots. Cock expired an hour afterwards from a wound in the breast, having been unable to make any statement. Information was at once given to Superintendent Bent, whose house is about a mile away from the scene of the murder. Instantly remembering what Cock told him of the threat to shoot him, he took officers with him and surrounded the cottage of the Habrons, which is about a quarter of a mile from where Cock was shot. As the officers approached the cottage a light was seen in one of the windows, but when they knocked at the door the light was extinguished. The police broke into the cottage and found the three brothers in bed. Mr. Bent ordered them to get up and dress, and each to put on the clothes and boots he wore that night. When the dressing was completed, without one word having been said as to why the arrest was made, Mr. Bent said, "I charge each of you with the murder of Police Constable Cock." Two of the brothers made no reply, but Frank Habron said, "I was in bed at the time." They were taken to Old Trafford Police Station, and Mr. Bent then took a posse of constables and formed a cordon round the spot where the murder had been committed. When daylight appeared it disclosed a number of footmarks at the place, one of which was very peculiar. The boots of the Habrons were sent for, and it was found beyond a shadow of doubt that one of those footmarks must have been made by the boots of the prisoner William Habron. The bullet which had killed Cock was found to be an ordinary revolver bullet, and the police at once set out on a strict search for firearms, but they were never able to find any. Some percussion caps were found in the pockets of one of the brothers, but this was accounted for by Mr. Deakin, who

said that he had given the prisoner a waistcoat and they might have been in it when he had given it to him. It was stated in the course of the investigation, however, that William went to a gunsmith's in Oxford Street and inquired as to the price of revolver cartridges. A box was shown to him, but he hesitated about the price and went out, as he said, to see a person outside, who was supposed to be his brother, and he did not return. It was found afterwards that three bullets had been taken from the box, but here another mysterious circumstance arose — namely, that those bullets did not correspond in size with the one that killed the constable. On this and other evidence William and John, Frank having been dismissed by the magistrates, were committed for trial both before the coroner's jury and the justices.

The trial came on at Manchester Assizes before LINDLEY, J., and the main defense set up was that at the time the accused could not have been in Oxford Street, but were really working at Chorlton, several miles away. On cross-examination, however, the alibi failed utterly as regards the prisoner William Habron, and after a long trial he was convicted and sentenced to death. Much dissatisfaction was expressed with the verdict, and a large number of people signed a petition for a reprieve. . . .

Peace's confession [that he was the real murderer] was received with considerable incredulity in February three years afterwards, and it seems to have been even believed that it was merely made with a view to obtain a respite [from his sentence of death for another murder]. The most serious criticism of his confession was undoubtedly the remarkable fact that if he had run away from the scene of the murder in the direction he represented in his confession, he must have run into the arms of Beauland,

Cock's fellow constable. The former, however, stated he saw nobody immediately after he heard the shots. A pistol has recently been found, thirty-one years after the crime, thrown into a pit on the scene of the Whalley Range murder, but in a direction opposite to that in which Peace declared he fled. . . . The sequence of events after the con-

fession of Peace was that Mr. Cross, then Home Secretary, stated in the House of Commons that he had felt it his duty to advise the Crown to grant a free pardon to William Habron, and that in this course he had entire concurrence of both the learned judge who tried the case and also of the law officers of the Crown. . . .

128. **MADELEINE SMITH'S CASE.** (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 300.)<sup>1</sup>

In a case of the deepest interest, in 1857, before the High Court of Justiciary at Edinburgh, a question whether or not the prisoner had the opportunity of administering arsenic to the deceased was the turning point of the case. The prisoner, a young girl of nineteen, was tried upon an indictment charging her, in accordance with the law of Scotland, with the administration to the same person of arsenic, with intent to murder, on two several occasions in the month of February, and with his murder by the same means on the 22d of March following. She had returned home from a boarding school in 1853, and in the following year formed a clandestine connection with a foreigner of inferior position, named L'Angelier, whose addresses had been forbidden by her parents. Early in 1856 their intercourse assumed an unlawful character, as was shown by her letters. In the month of December following, another suitor appeared, whose addresses were accepted by her with the consent of her parents, and arrangements were made for their marriage in June. During the earlier part of this engagement, the prisoner kept up her interviews and correspondence with L'Angelier; but the correspondence gradually became cooler, and she expressed to him her determination to break off the connection, and implored him to return her letters; but this he refused to do, and declared that

she should marry no other person while he lived. After the failure of her efforts to obtain the return of her letters, she resumed in her correspondence her former tone of passionate affection, assuring him that she would marry him and no one else, and denying that there was any truth in the rumors of her connection with another. She appointed a meeting on the night of the 19th of February, at her father's house, where she was in the habit of receiving his visits, after the family had retired to rest, telling him that she wished to have back her "cool letters," apparently with the intention of inducing him to believe that she remained constant in her attachment to him. In the middle of the night after that interview, at which he had taken coffee prepared by the prisoner, L'Angelier was seized with alarming illness, the symptoms of which were similar to those of poisoning by arsenic. There was no evidence that the prisoner possessed arsenic at that time, but on the 21st she purchased a large quantity, professedly for the purpose of poisoning rats, an excuse for which there was no pretense. On the night of the 22d, L'Angelier again visited the prisoner, and about eleven o'clock on the following day was seized with the same alarming symptoms as before; and on this occasion also he had taken cocoa from the hands of the prisoner. After this attack L'An-

<sup>1</sup>[For a citation of the full report of this trial, see Appendix.]

gelier continued extremely ill, and was advised to go from home for the recovery of his health.

On the 6th of March the prisoner a second time bought arsenic; and on the same day she went with her family to the Bridge of Allan (where she was visited by her accepted lover), and remained till the 17th, when they returned to Glasgow. On the day before her departure for the Bridge of Allan L'Angelier wrote a letter to her. To this letter, the prisoner replied from the Bridge of Allan, that . . . she would answer all his questions when they met, and informed him of her expected return to Glasgow on the 17th of March. L'Angelier, pursuant to medical advice, on the 10th of March went to Edinburgh, leaving directions for the transmission of his letters, and having become much better, left that place on the 19th for the Bridge of Allan. . . .

A letter from the prisoner to L'Angelier came to his lodgings on Saturday the 21st, from the date and contents of which it appeared that she had written a letter appointing to see him on the 19th; he had not, however, received it in time to enable him to keep her appointment. In that letter she urged him to come to see her, and added, "I waited and waited for you, but you came not. I shall wait again to-morrow night, same time and arrangement." This letter was immediately transmitted to L'Angelier, and in consequence he returned to his lodgings at Glasgow about eight o'clock on the evening of Sunday the 22d, in high spirits and improved health, having traveled a considerable distance by railway, and walked fifteen miles. He left his lodgings about nine o'clock, and was seen going leisurely in the direction of the prisoner's house, and about twenty minutes past nine he called at the house of an acquaintance who lived about four or five minutes' walk from the prisoner's residence. After leaving his

friend's house, all trace of him was lost, until two o'clock in the morning, when he was found at the door of his lodgings, unable to open the latch, doubled up and speechless from pain and exhaustion, and about eleven o'clock the same morning he died, from the effects of arsenic, of which an enormous quantity was found in his body.

The prisoner stated in her declaration that she had been in the habit of using arsenic as a cosmetic, and denied that she had seen the deceased on that eventful night; whether she had done so or not was the all-momentous question. . . .

As to the principal charge of murder, his Lordship said, "Supposing you are quite satisfied that the prisoner's letter brought L'Angelier again into Glasgow, are you in a situation to say, with satisfaction to your consciences, as an inevitable and just result from this, that the prisoner and deceased met that night? — that is the point in the case. It is for you to say whether it has been proved that L'Angelier was in the house that night. . . .

"If you think they met together that night, and he was seized and taken ill, and died of arsenic, the symptoms beginning shortly after the time he left her, it will be for you to say whether in that case there is any doubt as to whose hand administered the poison. . . .

"And I say there is no doubt — but it is a matter for you to consider — that after writing this letter he might expect she would wait another night, and therefore it was very natural that he should go to see her that Sunday night.

"But this is an inference only. . . . In drawing an inference, you must always look to the important character of the inference which you are asked to draw. If this had been an appointment about business, and you found that a man came to Glasgow for the purpose of seeing another upon business, and that he

went out for that purpose, having no other object in coming to Glasgow, you would probably scout the notion of the person whom he had gone to meet, saying, 'I never saw or heard of him that day'; but here you are asked to draw the inference that they met upon that night, where the fact of their meeting is the foundation of a charge of murder. You must feel, therefore, that the drawing of an inference in the ordinary matters of civil business, or in the actual intercourse of mutual friends, is one thing, and the inference from the fact that he came to Glasgow, that they did meet, and that, therefore, the poison was administered to him by her at that time, is another, and a most enormous jump in the category of inferences. Now, the question for you to put to yourselves is this — Can you now, with satisfaction to your own minds, come to the conclusion that they did meet on that occasion, the result being, and the object of coming to that conclusion being, to fix upon her the administration of the arsenic by which he died? . . . You may be perfectly satisfied that L'Angelier did not commit suicide; and of course it is necessary for you to be satisfied of that before you could find that anybody administered arsenic to him. Probably none of you will think for a moment that he went out that

night and that, without seeing her, and without knowing what she wanted to see him about, he swallowed about 200 grains of arsenic in the street, and that he was carrying it about with him. Probably you will discard such an idea altogether, . . . yet, on the other hand, keep in view that that will not of itself establish that the prisoner administered the poison. . . .

"Therefore if you cannot say, We find here satisfactory evidence of this meeting, and that the poison must have been administered by her at a meeting — whatever may be your suspicion, however heavy the weight and load of suspicion is against her, and however you may have to struggle to get rid of it, you perform the best and bounden duty as a jury to separate suspicion from truth, and to proceed upon nothing that you do not find established in evidence against her."

The jury returned, in conformity with the law of Scotland, a verdict of not guilty on the first, and of not proven on the second and third charges. On the supposition that the parties met on the fatal evening in question, there could be but one conclusion as to the guilt of the prisoner, the hypothesis of suicide being considered by the learned Judge as out of the question, as it obviously was.

#### 129. O'BANNON v. VIGUS. [Printed *post*, as No. 383.]

#### Topic 4. Habit (Usage, Custom)

130. JAMES SULLY. *The Human Mind*. (1892. Vol. II, p. 224.) Habit is a product of acquisition. In this respect it differs from instinct, with which otherwise it has much in common. We say we do a thing from habit, *e.g.* nod back when a person not recognized nods to us, when as a consequence of long practice and frequent repetition the action has become in a measure organized, and thus shorn of some of its original appanage of full consciousness or attention. The characteristic note of habit is mechanicality. In its most forcible manifestation habitual movement approaches to a sub-conscious reflex, as in the case just referred to. . . . It is thus evident

that in habit we have in a particular way to do with that lapse of the intenser degrees of consciousness which accompanies an approximation of nervous structures to a state of perfect adjustment to the environment. The oft-repeated action becomes habitual and so automatic because the nervous centers engaged have taken on special modifications, have, according to the customary physiological figure, become "seamed" by special lines of discharge. The perfect fixation of a habit appears to liberate the highest cortical centers from all but the slightest measure of coöperation in the process, the greater part of the central work (transmission of a definite kind of afferent excitation into a definite path of motor discharge) being now carried out by help of stably fixed arrangements in subordinate centers. . . . The on-coming of habit is shown by two principal criteria. First of all, repetition of movement tends to remove all sense of effort and to render the movement easy. . . . In the second place, habit involves and manifests itself in a consolidation of the processes of association involved. One of the most familiar characteristics of habit is prompt succession of a movement on the recurrence of the idea of a desired object. Here the intermediate idea of the movement itself is repressed or skipped. . . . A further and more striking result of this fixing of associative connection is the coördination of particular sense presentations with appropriate motor-responses. This is illustrated in the recurring movements of everyday life, as taking out a latchkey on approaching one's door. Where this process is complete there lapses not only the initiative idea of the movement, but even the idea of procurable object. Thus when a man automatically winds up his watch on taking it out of his pocket during the operation of dressing for dinner, the action seems to be wanting in all ideational initiation. . . .

*Habit and Chains of Movement.* As we saw when dealing with the process of association, series of movements tend by repetition to grow consolidated, so that each step calls up the succeeding ones without a distinct intervention of consciousness. Simple examples of this are to be found in the series of movements involved in walking, dressing, and undressing, in playing a piece of music from memory, reciting a familiar poem, and so forth. Such chains of movement approximate in their lack of clear consciousness, their mechanical regularity, and promptness of succession to the motor sequences in breathing, and other primarily automatic movements. . . . What differentiates such habitual chains from primarily automatic successions is the initial volitional impulse. I must consciously and voluntarily start the walking, the dressing, and so forth. But the start is all, so far as volition is concerned. The succession then takes care of itself, and, what is more, is carried out better for the non-intervention of attention. . . .

*Degrees of Habitual Coördination.* It follows from our general definition of the principle, that habit shows itself in very unlike degrees of strength. The process of organic attachment is more or less complete in the case of different movements. We may now glance at these differences in the strength of habit, and seek to determine their conditions. We may estimate the prompting force of habit in more ways than one. The obvious index to its influence is lapse of physical initiation as seen in the swiftness of the motor response. All the popular examples of habit, as the story of the victimized soldier who dropped his dinner at the word "Attention!"

shouted by some practical jokers, illustrate this feature. The swifter the response to a particular sense stimulus, the more of force of habit is there indicated. Another criterion is speciality or precision of response. . . . The soldier's loss of his dinner was due to the unerring precision of the habitual reaction, the swift dropping of the arms into the vertical line on the recurrence of the customary signal. The stronger the habit, the more definite or exact will be the response. Another measure of strength of habit closely connected with the preceding is uniformity, or unfailingness of response whenever the proper stimulus occurs. This criterion, together with speciality or definiteness, gives to habit its unvarying and monotonous character, its resemblance to the actions of a machine, and to those lower nervous reflexes which come nearest to mechanical actions. Lastly, the strength of a habit is directly measurable in terms of the difficulty of modifying it by special volitional effort. Half-formed habits can be easily altered; wholly formed, only by dint of extraordinary volitional effort. Employing such criteria, we can draw up a scale of habitual movement. . . . The main conditions on which these varying degrees of habit depend appear to be the following: (1) The amount of time and attention given to the particular movement or combination of movements so as to make it our own. Since habit is superinduced on a volitional process, it is evident that the action must first be perfectly acquired through a conscious process of acquisition. (2) The frequency with which the particular stimulus has been followed by the particular movement. This condition, repetition, or frequency of performance, is the great determinate of strength of habit. (3) The unbroken uniformity of past responses. By this is meant that a particular stimulus *S* should have always been followed by a particular motor reaction *M*, not sometimes followed, at other times not, or followed by another sort of movement, as *M'*. This condition evidently goes to determine the degree of unfailingness, as also of specialization in the habit. Thus, children who are sometimes required to do a certain thing by their parents, but now and again allowed to intermit the action, never acquire perfect habits.

131. HANS GROSS. *Criminal Psychology*. (1911. transl. Kallen, § 28, p. 158.) We have yet to ask what is meant by "rule" and what its relation is to probability. Scientifically "rule" means law subjectively taken, and is of equal significance with the guiding line for one's own conduct, whence it follows that there are only rules of art and morality, but no rules of nature. Usage does not imply this interpretation. We say that as a rule it hails only in the daytime; by way of exception, in the night also; the rule for the appearance of whales indicates that they live in the Arctic Ocean; a general rule indicates that bodies that are especially soluble in water should dissolve more easily in warm than in cold water, but salt dissolves equally well in both. Again we say: As a rule the murderer is an unpunished criminal; it is a rule that the brawler is no thief and *vice versa*; the gambler is as a rule a man of parts, etc. We may say, therefore, that regularity is equivalent to customary recurrence and that whatever serves as rule may be expected as probable. If, *i.e.* it be said, that this or that happens as a rule, we may *suppose* that it will repeat itself this time. It is not permissible to expect more. But it frequently happens that we mistake rules

permitting exceptions for natural laws permitting none. This occurs frequently when we have lost ourselves in the regular occurrences for which we are ourselves responsible and suppose that because things have been seen a dozen times they must always appear in the same way. It happens especially often when we have heard some phenomenon described in other sciences as frequent and regular and then consider it to be a law of nature. In the latter case we have probably not heard the whole story, nor heard general validity assigned to it. Or, again, the whole matter has long since altered. . . . This, therefore, should warn against too much confidence in things that are called "rules." False usage and comfortable dependence upon a rule have very frequently led us too far.

132. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough.

There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit or custom should receive little weight, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case.

In civil cases, a habit or custom or usage is of particularly frequent use evidentially. Whether it involves the conduct of an individual or of a specific group of persons, or of an indefinite and anonymous group of persons, the principle is the same. But the larger and more indefinite the group, the less likely is it to discover such regularity as gives great probative value to the course of conduct. The less the regularity, the greater the number of hypotheses which (on the principle of Explanation) can be availed of to weaken the inference.

In occasional aspects, habit is the real basis of the inference when resort is had to general experience of human nature without adducing express proof of the habit, *e.g.* if a man is seen going from the train station to his office without a hat, we infer that he had possessed it when entering the train, because of the known custom of persons in general to wear a hat in going to work; thus, our final inference that he lost it on the way, either by theft in the train or by putting his head out of the window, follows a preliminary inference based on habit or custom.

133. TWICHELL'S CASE. (FRANCIS. L. WELLMAN. *The Art of Cross-examination*. 1908. p. 146.)

A very striking instance of the specially in relation to events happening effect of *habit* on the memory, opening in moments of intense ex-

<sup>1</sup>[Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, §§ 92-99, in part.)]

citement, was afforded by the trial of a man by the name of Twichell, who was justly convicted in Philadelphia some years ago, although by erroneous testimony. In order to obtain possession of some of his wife's property which she always wore concealed in her clothing, Twichell, in great need of funds, murdered his wife by hitting her on the head with a slung shot. He then took her body to the yard of the house in which they were living, bent a poker, and covered it with his wife's blood, so that it would be accepted as the instrument that inflicted the blow, and having *unbolted the gate* leading to the street, left it ajar, and went to bed. In the morning, when the servant arose, she stumbled over the dead body of her mistress, and in great terror she rushed through the gate, into the street, and summoned the police. The servant had always been *in the habit* of unbolting this gate the first thing each morning,

and she swore on the trial that she had done the same thing upon the morning of the murder. There was no other way the house could have been entered from without excepting through this gate. The servant's testimony was, therefore, conclusive that the murder had been committed by some one from *within* the house, and Twichell was the only other person in the house. After the conviction Twichell confessed his guilt to his lawyer, and explained to him how careful he had been to pull back the bolt and leave the gate ajar for the very purpose of diverting suspicion from himself. The servant in her excitement had failed either to notice that the bolt was drawn or that the gate was open, and in recalling the circumstance later she had allowed her usual daily *experience* and *habit* of pulling back the bolt to become incorporated into her recollection of this particular morning. It was this piece of fallacious testimony that really convicted the prisoner.

134. **HETHERINGTON v. KEMP.** (1815. Nisi Prius. 4 Campb. 192.)

This was an action on a bill of exchange; and the only question was, whether the defendant had received notice of its dishonor. The plaintiff proved, that on the 14th of November, the day after it came due, he wrote a letter addressed to the defendant, stating that it had been dishonored; that this letter was put down on a table, where, according to the usage of his countinghouse, letters for the post were always deposited; and that a porter carries them from thence to the post office. But the porter was not called, and there was no evidence as to what had become of the letter after it was put down upon the table. A notice to produce the letter had been served upon the defendant.

*Taddy*, for the plaintiff, contended that this was good *prima facie* evidence that the letter had been sent by the post.

LORD ELLENBOROUGH. — You must go farther. Some evidence must be given that the letter was taken from the table in the countingroom, and put into the post office. Had you called the porter, and he had said that although he had no recollection of the letter in question, he invariably carried to the post office all the letters found upon the table, this might have done; but I cannot hold this general evidence of the course of business in the plaintiff's countinghouse to be sufficient.

A letter was then put in from the defendant, in which he acknowledges the receipt of a letter from the plaintiff of the 14th of November, without referring to its contents; and LORD ELLENBOROUGH said he would presume this was the letter to inform him of the dishonor of the bill.

The plaintiff had a verdict.



135. **AMERICAN EXPRESS CO. v. HAGGARD.** (1865. ILLINOIS SUPREME COURT. 37 Ill. 466.) . . .

Appeal from the Circuit Court of McLean County; the Hon. JOHN M. SCOTT, Judge, presiding. David D. Haggard brought this action on the case in the court below, against the American Express Company, to recover for a package of money sent to the plaintiff at Bloomington, Illinois, by his agent, from Clinton, in De Witt county. . .

The plaintiff having proved the delivery of the package to the company, introduced W. Haggard, who testified as follows: "In July, 1863, I was in the employment of the plaintiff, at Bloomington, as clerk. The package of money spoken of by the last witness was never delivered to me. I went to the office of the defendant, in Bloomington, about a week after it was sent, with the plaintiff, and there saw a receipt for said package which I had signed. The receipt was in the book in which the express company took receipts, and was in my handwriting. I did not at first remember anything about it. After reflecting, and seeing the receipt, I then recollected of Jacob Shook, the driver who delivered packages for the express company, coming to the store of the plaintiff, and of my signing the receipt. I did not get the package at the time I signed the receipt. I supposed that it was for a package of castings and was left on the sidewalk. The plaintiff is a hardware merchant, and sells reapers, and other agricultural machinery. I was in the habit of signing for packages of castings often, sometimes two or three times a day, and had receipted for money, and had authority to do so. After it was discovered that the package was lost, I wrote to my father in Chicago about it, stating the facts, and he paid the plaintiff (who is my uncle) the amount of the loss, and charged it to me. I did not request my father to pay it. I was then under

twenty-one years of age, and am still so." . . . Being cross-examined, the witness further testified: "When Shook, the driver, came to the store, I gave him the receipt now shown to me. I think some customers were in the store at the time. Plaintiff was not in the store. I think the receipt book was on the show case when I signed the receipt. Shook stood by the counter. I saw no package, nor did he call my attention to any package. Shook was in the habit of laying packages of castings on the sidewalk and coming in and getting a receipt. If Shook had laid it down on the counter, it might have been taken up by somebody else. I did not look for any package then, nor at any time afterwards. I did not think of it again until I was told that it was lost and that I had receipted for it. I did not then recollect anything at all about it. After two or three days, when I saw the receipt, I recollected that I had given to Shook a receipt, as I have stated." The plaintiff here rested his case.

The defendant then called as a witness, L. W. Fuller, who testified: "I have been in the employ of the defendants about eight years, as agent having charge of offices. The business of drivers is to deliver packages, and collect the charges, and get receipts for packages. He is not allowed to deliver without getting a receipt, and always takes the package to the consignee, when he calls for the receipt." Being cross-examined, this witness testified that Jacob Shook, formerly driver for defendants, stole property that had been brought by express; he took part out of packages that came in bad order, and delivered the balance; he was discharged by the defendants; before he was discharged, he was arrested, and gave up about \$850, and some valuable jewelry to the defendants. This

was not equal to the amount he had stolen. "I do not know that this claim of the plaintiff was included in the claim against Shook; I do not recollect about that. I think I spoke to the detective who had Shook in custody about this claim of plaintiff, and may have stated the amount to him; also about one claimed to have been lost by Mr. Hyde, together with other losses. The detective got all the money and jewelry that was got from Shook, and delivered the same to me. The detective turned Shook over to an officer of the law from whom he escaped and fled from justice." The defendant objected to the testimony called out on cross-examination, which objection was overruled by the Court, and the defendant excepted. The Court found the issue for the plaintiff, and rendered judgment accordingly. The defendants thereupon took this appeal. . . .

Mr. *R. E. Williams*, for the appellants. Mr. *W. H. Hanna*, for the appellee.

Mr. Justice LAWRENCE delivered the opinion of the Court: This was an action on the case brought by the appellee, David D. Haggard, against the American Express Company, for not delivering a package of money containing \$170.30, sent to the appellee at Bloomington, Illinois. . . . The admission of the testimony of W. Haggard is also assigned for error. It appears that the witness was a clerk in the hardware store of the plaintiff, who was his uncle; that he was in the habit of often receipting to the company for goods, sometimes two or three times a day, and that he receipted for the package in question, supposing, as he swears, that he was receipting

for castings that had been left on the sidewalk. He swears he never received the money in question. After its loss was discovered, with the fact that the witness had given the company a receipt for it, he wrote to his father in Chicago, stating the circumstances, and thereupon his father paid to the plaintiff the amount of his loss. . . . It is also urged that the evidence of Fuller called out on the cross-examination was improperly received. Fuller was the agent of the company, and was put upon the stand by them to prove the custom of the drivers of the express wagons, in regard to the delivery of parcels and taking of receipts. The plaintiff, on the cross-examination, proved that it was the custom of the particular driver who had this package to steal money parcels, and that some time after this occurrence the company arrested him, made him surrender \$850 in money and some valuable jewelry, and that the driver escaped from the officer and ran away. We think, after the examination in chief, this evidence was admissible. . . . Here the clerk swears there was no delivery, that he neither saw nor heard of a package of money, and thought he was receipting for a package of castings on the sidewalk. The company is a common carrier and must be held to the strictest responsibility for the honesty of its agents, and if one of them abstract a parcel while in the act of delivering it, the company will be liable even though a receipt be signed and the form of delivery gone through, by the driver's laying the property, for a moment, out of his hands. We find no error in the record. Judgment affirmed.

136. **DENVER & RIO GRANDE RAILWAY CO. v. GLASSCOTT.**  
(1878. COLORADO SUPREME COURT. 4 Colo. 270.)

Error to County Court of Arapahoe. The case is stated in the opinion.

Messrs. *Wells, Smith & Macon*, for

plaintiff in error. Messrs. *Patterson & Campbell*, for defendant in error.

THATCHER, C. J. — Robert A. Glasscott was a conductor of the

defendant company. He brought suit against the company for the balance claimed to be due him for services as conductor rendered to the company, laying his damages at five hundred dollars, for which sum a verdict was returned and judgment entered in the court below. Unless the defendant was entitled to an offset, no dispute arises as to the correctness of the judgment. The company by its pleas and proof offered to offset against the claim of the conductor, the sum of fifteen hundred dollars, which it is alleged that he, as conductor, had collected from passengers traveling on his train, and retained and converted to his own use. To support the allegations of conversion and the amount of the same, plaintiff in error called R. F. Weitbrec, its treasurer, and proved by him that defendant in error had been conductor of passenger trains of plaintiff in error, running between Denver and El Moro, during eleven months next preceding May 1, 1877; that it was the duty of defendant in error as such conductor, to collect fare of all passengers on his trains not provided with tickets; that a round trip of a train run by defendant in error was from Denver to El Moro and back to Denver, a distance of 220 miles each way; that at the conclusion of every such round trip, defendant in error was required to report to the auditor and treasurer of plaintiff in error the number of passengers carried each way, the points on the route to which and from which they were transported, with the number and kind of tickets on which they traveled, the number without tickets, and the amount of money collected from such passengers, which money it was his duty to turn over to the treasurer at the end of each round trip; that he, the witness, had in court every one of such reports made by defendant in error during said eleven months; that plaintiff in error had another conductor, named Cole Lydon, who

conducted trains of plaintiff in error on alternate days with defendant in error; that Lydon made same number of trips as defendant in error in said eleven months; that said Lydon's trains generally, although not always, contained same number of cars as that of defendant in error; that number of cars was liable to be increased or diminished as necessities of travel required; the schedule of fares was the same; that he, witness, also had all of Lydon's reports for said eleven months, and that they were the same as those made by defendant in error, but differed in the amount of money shown to have been received during said eleven months.

The only controversy in this case arises as to the manner in which the company proposed to prove that Glasscott was in default. The theory of the company seems to be that upon the above statement of facts, Glasscott should be held liable for the difference between Lydon's receipts and the amount he, Glasscott, paid to the treasurer. With a view to fix his liability and the amount thereof, the attorney of the company interrogated the witness as to the difference between the receipts of the two conductors. This evidence, and other evidence belonging to the same class, the court excluded. All other evidence offered was admitted. Our only inquiry, therefore, is: Did the court err in excluding the evidence mentioned? The learned counsel insist that had it been made to appear that there was a difference in favor of Lydon between the total sums paid to the treasurer by the two conductors, "if the jury had found for the plaintiff in error, upon that circumstance alone, the court would not have been justified in setting the verdict aside." This proposition is, we think, untenable. The possibility that there might be an exact equality in the receipts of the two conductors is so remote, and subject to so many disturbing

influences, that we cannot believe that it can justly be considered as the foundation of legal liability. One conductor may be more attentive to the patrons of the road, and therefore more popular than another. The current of travel may be very unequal on two successive days, and this may continue for weeks. Excursion trains, crowded with passengers, may have been run on certain days, which might materially increase the receipts on such days. On one day every passenger getting on board at Denver might be provided with a ticket, and the receipts at this point in consequence be nothing. The next day one or a dozen passengers may have boarded the train and have forgotten to buy tickets. The same thing is liable all along the line, so that even if the number of passengers carried by each conductor during the period of eleven months, or any shorter period, should be the same, it is by no means, in our judgment, a fair inference that the receipts will be the same, or approximately so.

Counsel treats us with a metaphysical disquisition on the "Doctrine of Chances" and the "Theory of Probabilities," and even indulge in algebraic equations for the purpose of demonstrating the remoteness of the possibility that the receipts of the two conductors would be the same. We have not thought it necessary to solve the algebraic problem with a view to determine the chance of equality of receipts. It is true that "*cæteris paribus*" the position that an equal number of persons would forget to buy their ticket each day before entering the cars is not unsupported by metaphysical writers. Says Mr. Henry Thomas Buckle, in his work on the *History of Civilization in England* (Vol. I, p. 32): "We are now able to prove that even the aberration of memory are marked by a general character of necessary and invariable order. The post offices of London and of Paris have latterly published

returns of the number of letters which the writers through forgetfulness omitted to direct: and making allowance for the difference of circumstances, the returns are year after year copies of each other. Year after year the same proportion of letter writers forget this simple act; so that for each successive period we can actually foretell the number of persons whose memory will fail them in regard to this trifling, and as it might appear, accidental occurrence." Whether or not forgetfulness is under unvarying laws, certain it is, in our opinion, that in addition to forgetfulness, there is such a complication of causes tending to vary the receipts of the two conductors, that it would be unsafe, as well as unwarranted, to adopt the rule for which plaintiff in error contends. We can find no support for it in the adjudicated cases.

For eleven months Glasscott had been the trusted agent of the company. With regularity at the close of every round trip he accounted to the company for the alleged amount of his receipts. Of his own accord, without the slightest suspicion as to his fidelity having been expressed against him, he quit the company's service. The fact of the difference between the receipts of the two conductors, had it been proved, would have been far from establishing the matter in dispute, viz. that the difference had in fact been collected and embezzled by Glasscott. It is so remote a circumstance that, had the rejected evidence been received, the jury would not have been warranted in rendering a different verdict. The verdict, had the excluded evidence been admitted, not only might, but must, under the law, have been the same. In such case the rule is that the verdict should not be disturbed. *City Bank of Brooklyn v. Dearborn*, 20 N. Y. 246; *Starbird v. Barrows*, 43 id. 200. The judgment of the Court below will be affirmed with costs. Affirmed.

**TITLE IV (continued): EVIDENCE TO PROVE THE  
DOING OF A HUMAN ACT**

**SUBTITLE C: RETROSPECTANT CIRCUMSTANCES**

138. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>  
There remains the third group of circumstantial evidence, namely, facts having a Retrospectant indication. The inference here looks backward from the evidentiary fact to the alleged act; *i.e.* taking our stand at the fact offered, we infer from it that at some previous time the act was or was not done. The common feature of this group of evidentiary facts is that they are all open to a similar source of weakness, and thus offer to the opponent a general mode of explaining away their force. Thus, if, to show that A on January 1 stole a bicycle, there is offered the fact of his possession of the bicycle on June 1, the probative force of this fact rests on the assumption that the hypothesis that will explain his possession is that he obtained the bicycle by stealing it. But there are also in truth other possible hypotheses, for example, that it was given or sold to him by the thief or by a purchaser from the thief, or that he found it. So, if in proving the doing of an act by A as a mark of his identity with B, there is offered (as in the Tichborne case) the fact that A has a recollection of the event, or if, to disprove it, we offer the fact that A has no recollection of it, the opponent may show, in the first instance, that the recollection has come, not from having done the act, but from having heard or read about it; and, in the second instance, that the lack of recollection is due, not to not having done the act, but to the natural fading of memory. In short, the tests of relevancy and the opportunities of explanation are of the same general nature in this group of evidentiary facts. The general argument runs: Is the trace one whose possession (or lack of possession) by the person charged could be explained by the operation of other causes than the doing (or not doing) of the act in question?

The kinds of facts may best be roughly subdivided according to the mode in which such causes might operate, *i.e.* according as the connection between the evidentiary trace and the act in question is Mechanical (Physical) or Mental. The typical case of the first sort is the possession of stolen goods; of the second sort, consciousness of guilt.

**Topic 1. Mechanical (Physical) Traces**

139. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>2</sup>  
(1) *General Principle*. The presence upon the person or premises of articles, fragments, stains, tools, or any other resulting circumstance, is constantly

<sup>1</sup>[Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 148.)]

<sup>2</sup>[Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, §§ 149-160, in part.)]

employed as the basis of an inference that the person did an act with which these circumstances are associated.

In criminal cases the use of this inference is typical. But it is no less applicable in several sorts of civil cases, where its nature is not always so obvious.

(1) (a) When an animal is found in B's possession, and the animal bears a brand or other mark, and one of the issues is whether A is the owner of the animal, it is a natural and immediate inference that the animal belongs to the person whose brand it bears, and, if that brand is A's, then to A. This inference, however, while sufficiently probable in the light of practical experience, is in truth a composite one, made up of two steps: (1) first, the inference, from the presence of A's usual mark, that A placed this particular mark, — a genuine argument under the present principle, from a trace to the source of the trace; and (2) secondly, the inference from the fact that A placed it there, to the fact of his ownership of the animal. The latter step of inference is the vital one; it is perhaps not less natural than the former, but it is more serious in its effect. It would seem that the latter step of inference has been rarely conceded by Courts, as a matter of common law; though the former step was universally conceded, it was said that the presence of A's brand was evidence of identity (*i.e.* of the animal being one of those originally branded by A), but not of ownership. This unduly cautious attitude has been generally corrected by legislation; in most of the stock-raising communities, the *brand on animals* is made evidence of ownership; though in order to encourage registration and thus prevent confusion, the rule is applied only to brands duly registered by law. (b) The postmark on an envelope is, upon the same principle, admissible to show that the envelope bearing it had passed through the hands of the postal officials at the time and place indicated. (c) The payee of money naturally leaves behind him in the hands of the payor some document by way of receipt or evidence of payment; where this document is the instrument of obligation itself, its possession by the debtor is evidence of the discharge of the debt. (d) The existence of a document in a certain kind of place — such as the grantee's custody or office of registry — may be sufficient evidence of the delivery of the document, so far as its delivery may be material. (e) The existence of a document of ownership of land (a deed, lease, or license) may be evidence that the maker of the document had possession of the land at the time of making it. This doctrine, now well settled in English law, is applicable in proof of title by adverse possession in prior generations, where no evidence has survived except the documents themselves which embodied acts of claim of ownership. (f) Finally the reverse of the preceding inference (4) may be made; *i.e.* from the present possession of land the inference that there once existed a deed of it, now lost, may be made:

This is the logical foundation of the presumption of a lost grant, which after long service has finally degenerated into a mere rule of substantive law, although the living principle of the original inference is still occasionally open to application.

(2) *Negative Traces.* If certain results would have followed if an act or an event had occurred (or not occurred), the absence of those results is some indication that the act or event has not occurred (or occurred). (a) A

common class of evidence of this sort is that of lack of news to show probable death of a person or the probable loss of a ship; for as it is usual for living persons to be heard from directly or indirectly, by persons having an interest in knowing, and for ships' officers to leave word of their journey at the ports they touch or with the other ships they pass, the lack of any such news indicates their non-existence. In counterexplanation (*ante*, No. 2) such facts as the infrequency of communication from the place the person went to, the fixed determination of the person to give up all connection with his former home, and the like, may of course be used to explain away the force of the fact of lack of news.

(b) It is a natural propensity of creditors to realize their claims, when left unsatisfied, by process of law, within a fair space of time; and when it is found, after some time, that a creditor has not resorted to law for the realization of his claim, there is a natural inference that this failure was due to the lack of right and necessity to resort to law, *i.e.* that the claim had been satisfied by payment. The fact may be explained away by showing a more probable hypothesis, for example, the insolvency of the debtor, his absence, or other circumstance likely to prevent the creditor from proceeding even though the claim was unpaid. (c) In various other situations a retrospectant inference is permissible from the absence of certain results to the absence of certain causes; the chief of these are the inference, from the non-discovery of a will once existing, to the testator's revocatory destruction of it; the inference from the non-discovery of any document and the lapse of time, to the loss of the document; and the inference, from a debtor's continued possession of property, after its mortgage or sale, of his fraudulent intent to defraud creditors by the transfer. In general, that a certain effect was not seen or heard by those who would naturally have seen or heard it had its cause occurred is some evidence of the non-occurrence. But, though this situation can thus be treated as permitting an inference from circumstantial evidence, it is usually more natural to treat it as involving testimonial evidence; *i.e.* the argument is that witness A is qualified to testify that act X was not done by B, because A would have seen or heard it if it had been done; thus, the principle of testimonial knowledge is here the controlling one.

2. *Traces and Identity.* The question may be asked, What is the distinction between evidence of *traces* and evidence of *identity*? For example, to prove a murder, evidence is offered that a gun found in the defendant's possession is exactly fitted by the bullet found in the body of the deceased; what kind of evidence is this? The truth is that this evidentiary fact is double, and involves both kinds of inferences. The nature of the argument to prove Identity (*ante*, No. 14) is that a certain fact offered is an essential mark of sameness of person, — in this instance, that the fit of the bullet is a necessary and unique mark of the slayer. The weakness of this type of argument is that the mark may not be necessarily associated with one person but may be common to a number of persons; and hence the mode of explaining away such evidence is to show that other persons also have the same mark, — here, that other persons in the neighborhood possessed guns of the same bore. Now the argument from Traces assumes that the argument to Identity has been settled and accepted, *i.e.* here it assumes that the use of the gun in question is an essential or sufficient

mark of the murderer, and it then sets about to prove that the accused possessed that mark, *i.e.* used that gun; and to do this it offers the fact of its subsequent finding in the accused's possession. Here the weakness of the argument is an entirely new and different one, namely, the trace of subsequent possession does not necessarily indicate a use at the time of the murder, since the gun may be one which the accused has recently borrowed, or it may be his own gun which was lent to another person at the time of the murder. Thus, there are two wholly different evidentiary questions involved in the use of this evidence, — first, the question of identity, whether this individual gun is a necessary mark of the slayer; and, secondly, the question of traces, whether its subsequent possession evidences its use at the time of the murder. The present type of argument, then, — the argument from traces to a former act, — is a distinct argument from that of Identity.

3. *Organic Traces.* In this sort of Traces may be included those which are in strictness biologic or organic rather than mechanical. They play an important and well-recognized part in a few classes of cases. (a) When a child X is born to a wife A married to a husband B, it is natural to infer that the intercourse which begot the child was the intercourse of the husband B, *i.e.* that the child is *legitimate*. It is true that this inference is less strong where the birth occurs very shortly after the marriage; but even here the likelihood that the premarital intercourse was B's is greater than that it was another man's. This inference is the foundation of the presumption of legitimacy. (b) If the *corporal traits of the progenitor* are or may be transmitted to the progeny, then a specific corporal trait of the progeny may point back to a person of similar trait as the progenitor, on the condition that the person so charged as progenitor is within the number of those who by association and opportunity may have had intercourse (for otherwise the possible number of similar persons would leave open too many hypotheses). The propriety of the inference rests on the supposed physiological likelihood that traits may be transmitted by procreation. (c) A physiological principle, similar to the preceding one, but attended usually with more clearly marked results, tells us that the progeny of persons of one *race* receive from the progenitors certain corporal traits very different from the traits transmitted from a progenitor of another race. The presence of these peculiar traits of the race are therefore evidential to show a progenitor of the race bearing those traits. (d) That a shock received by the mother during *pregnancy* may leave a mark upon the child has long been a popular belief. Should it ever receive scientific sanction in any defined terms, the child's corporal mark after birth may be taken as evidential of the act which produced it. (e) That the existence of *venereal disease* in a husband is some evidence of an act of adultery on his part has always been conceded; it is merely a question of the strength of the explanatory circumstances. (f) Here also may be classed the evidence furnished by an *animal's conduct* in recognition of a physical fact. *E.g.* the trained bloodhound, after smelling a garment, may follow and point to a particular person; the strength of the inference depends on experience as to the trustworthiness of the animal's senses. Or, a dog or a bird may by conduct indicate recognition of a person said to be his owner; here the inference arises from experience as to the impressions made by familiarity with an owner and as to the certainty of interpretation of the conduct showing recognition.



140. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence*. (1868. pp. 275, 539.) I. Traces, marks, or indications on the person or premises of the accused, derived or supposed to be derived from the scene or subject of the crime, embrace the following appearances and objects.

1. *Wounds* or marks of violence of a *peculiar* kind; that is, inflicted by the assaulted person in self-defense, or in the course of resistance, either with a particular instrument, or in a particular manner: as where, in a case of robbery, the prosecutor, when attacked, struck the robber on the face with a key; and a mark of a key, with corresponding wards, was visible on the face of the prisoner: or where the person assaulted made several cuts at the robber with a clasp knife, and corresponding cuts were found in the clothing and on the person of the accused.

2. *Stains* of particular substances, *visible* on the clothing. These often serve to indicate the presence of the accused at the scene of crime, to trace his movements there, and to trace him from it, as effectually as footprints of a peculiar kind. Thus, in the case of *Rex v. Richardson*, the stockings of the accused, which had been hidden by him, were found to be soiled with mud, which, on examination, appeared to correspond precisely with the soil of a bog or puddle adjoining the cottage where the murder was committed, and which was of a very particular kind, none other of the same kind being found in that neighborhood. . . .

3. *Objects* found on the person or premises of the accused, and shown to have been taken from the scene or subject of the crime; such as a watch, keys, and similar small articles.

4. The *fruits* of the crime; such as money, or papers found in the prisoner's possession, and shown to have belonged to the person upon whom the crime has been committed. . . . Such possession may also sometimes be *inferred* from observed circumstances, as by a sudden and material *change in life* or circumstances, indicating, beyond question, the recent receipt of money or property from some quarter; where a person, previously known to be poor, is found, shortly after a robbery, larceny, or murder, in the possession of considerable wealth, it is always a circumstance of suspicion.

5. The *subject* of the crime itself, discovered on the premises of the accused; such as the body of the murdered person found buried under his house, or dismembered and concealed in a box or other private depository.

In the two species of facts last mentioned, we arrive at the most convincing physical materials that can possibly be made use of in evidence, to connect a person accused with a crime committed.

II. The *exculpatory* considerations applicable to these facts, are brought forward in the shape of *possible causes* or *reasons assigned* for their existence; and these also seem to be divisible into three kinds: accident, innocent conduct of the accused, and conduct of the real criminal or some third person. The following exhibit the principal instances of their application.

1. *Criminative objects or articles found in possession*. First. The fact of the possession of a *stolen article*, or an article alleged to have been stolen, admits of the following suppositions, as its possible causes:

It may have been conveyed to the place where it was found, by some irresponsible agency, such as the act of a child, or even of an animal. It may have been honestly found by its possessor. It may have been purchased, borrowed, or received as a gift or deposit, from the thief himself, in

ignorance of his character: or it may have been purchased, borrowed, or received from a person who purchased or received it from the thief. It may have been taken from the owner, while in a state of intoxication, with the view of keeping it for him, and returning it on his becoming sober. It may have been taken from a person suspected of having stolen it, and kept with the view of seeking out the true owner, or bringing the thief to justice. It may have been deposited with the possessor, without his knowledge or consciousness, by the thief himself, in order to avert suspicion from himself, or from a malicious design to injure the possessor. It may have been deposited with the possessor, by the owner himself (it not being a case of theft at all) from a similar malicious motive. . . .

Secondly. The fact of the possession of a *criminative article*, such as the instrument with which a crime has been committed, or an article known to have belonged to the subject of the crime, or the subject of the crime itself, — may admit of similar suppositions, that is to say :

It may have been thrown away or dropped by the real criminal, and innocently picked up by the possessor; there being nothing in its mere appearance indicative of its criminal use. It may have been purchased, or borrowed, or received as a gift or deposit, from the real criminal, in ignorance of the character both of the article and the person. It may have been deposited on the premises of the possessor, without his knowledge, by the criminal himself, in order to get rid of it or conceal it. It may have been deposited on such premises, or even attached to the person of the possessor, without his knowledge, by the criminal, from a malicious design to criminate the other. It may have been deposited on the premises of the possessor, by a third person, equally innocent as himself, with the mere view of getting rid of it, and escaping its supposed or known criminative effect.<sup>1</sup>

2. *Criminative appearances on the person.* First. Appearances of *blood* on the person or clothing admit of the following suppositions, in the way of explanation: It may not be blood at all, but a stain produced by a liquid or substance of similar color. But supposing it ascertained to be blood, It may have been occasioned by an accidental bleeding from the nose, etc., or a wound on the person. It may have been occasioned by unconscious contact with another person having a bleeding wound. It may have been occasioned by having come in contact with a bleeding body in the dark. It may have been produced by a surgical operation, as by the party's having been recently bled, or having recently bled himself. It may not be human blood, but that of an *animal*, transferred to the person on the occasion of his having slaughtered it, in the way of his calling, or otherwise; or in consequence of his having handled it in any way, or come in contact with it or within reach of blood issuing from it.

Secondly. *Marks*, as of cuts, scratches, wounds, or bruises on the face or person, may have been produced by a fall, or the kick or scratch of an animal, or contact with sharp substances of various kinds.

141. THE BAKER'S CASE. (T. DUNPHY and T. J. CUMMINS. *Remarkable Trials of All Countries*. 1873. p. 453.)

A Maltese judge of the 1700 s, named Cambro, who was an early riser, having left his bed one morning before sunrise, hearing the footsteps of people running violently in the street, was led by curiosity to see what occasioned it at that unusual hour. Most of the houses in Valletta are furnished with balconies, covered and glazed, which when provided with curtains, permit the inhabitants, if inclined, to observe what is going on in the street, without being themselves discovered. The judge, from one of these, though it was not yet daylight, perceived a man running in great terror from another, who followed close behind. Directly under the judge's window the pursuer overtook the flyer, and stabbed him; the wounded man reeled and fell; in the act of striking, it is to be remarked, the assassin's cap came off, so that the judge had an opportunity of viewing his features in the increasing daylight; hastily recovering it he instantly took to flight. A few paces further on, he threw away the sheath of his stiletto and turned into another street; the judge consequently lost sight of him.

Scarcely had he witnessed this extraordinary spectacle, than a baker, with his basket of bread for the daily consumption of his customers, made his appearance. As he walked leisurely along, the sheath of the stiletto, which lay in his path, caught his eye; he stooped, took it up, and, after examining it a little, put it in his pocket and continued his course. Just then a patrol of police, either by accident or drawn by the noise which had attracted the attention of the judge, entered the same street. In the meantime, the baker, a little lower, came to the body just assassinated; the police took the same direction, and the poor man at this instant

perceived them behind him; terrified at the sight of the corpse, and fearful of being suspected and arrested, he lost all presence of mind, and hid himself in the entrance of a gentleman's house near the spot. . . . It was not long before they detected the unfortunate baker in his hiding place; his incoherent and confused replies created suspicion; on searching him they found the sheath on his person; the stiletto had fallen from the wound, and lay near the body; on applying it to the sheath, they found it corresponded exactly, and less than all these circumstances would have warranted the arrest of the poor baker. He was accordingly carried to prison, and public report gave out that he was undoubtedly the murderer.

Nor was this prepossession any way contradicted or removed by the judge, who, though he had witnessed the whole occurrence, kept it a profound secret in his own breast. Official report was made to him within an hour after the event — still he communicated the fact to no one. The only way of accounting for his extraordinary conduct is, that he presided in the criminal court, and that there was a doubt in the existing jurisprudence, how far a judge ought to act from his own private knowledge of a case, and whether he ought not altogether to limit himself to the disposition of witnesses and other evidence brought forward on the trial, without any reference to information he might have casually received from other sources. The dull and heavy intellect of Cambro, unable to distinguish between the rule and the exception, embraced this opinion.

The unhappy baker was, in due time, brought to trial. Circumstances were certainly against him; the stupid judge, who knew his innocence, particularly listened to,

and punctually noted, all the apparent proofs of his guilt. . . . The hapless wretch was condemned to death, and horrible to relate, soon after underwent the sentence of the law.

It was not long before the dreadful truth was brought to light: the

real murderer, arrested, brought to trial, and condemned to death. . . .

The grand master not only degraded and dismissed Cambro from all his employments, but obliged him to provide handsomely, from his private fortune, for the family of this victim of judicial murder.

#### 142. THE CASE OF THE SAILMAKER'S APPRENTICE.

(S. M. PHILLIPPS. *Famous Cases of Circumstantial Evidence*. No. XL.)

In the year 1723, a young man who was serving his apprenticeship in London to a master sailmaker, got leave to visit his mother, to spend the Christmas holidays. She lived a few miles beyond Deal, in Kent. He walked the journey, and on his arrival at Deal, in the evening, being much fatigued, and also troubled with a bowel complaint, he applied to the landlady of a public house, who was acquainted with his mother, for a night's lodging. Her house was full, and every bed occupied; but she told him, that if he would sleep with her uncle, who had lately come ashore, and was boatswain of an Indiaman, he should be welcome. He was glad to accept the offer, and after spending the evening with his new comrade, they retired to rest. In the middle of the night he was attacked with his complaint, and wakening his bedfellow, he asked him the way to the garden. The boatswain told him to go through the kitchen; but, as he would find it difficult to open the door into the yard, the latch being out of order, he desired him to take a knife out of his pocket, with which he could raise the latch. The young man did as he was directed, and after remaining near half an hour in the yard, he returned to his bed, but was much surprised to find his companion had risen and gone. Being impatient to visit his mother and friends, he also arose before day, and pursued his journey, and arrived home at noon.

The landlady, who had been told of his intention to depart early, was not surprised; but not seeing her uncle in the morning, she went to call him. She was dreadfully shocked to find the bed stained with blood, and every inquiry after her uncle was in vain. The alarm now became general, and on further examination, marks of blood were traced from the bedroom into the street, and at intervals, down to the edge of the pierhead. Rumor was immediately busy, and suspicion fell, of course, on the young man who slept with him, that he had committed the murder, and thrown the body over the pier into the sea. A warrant was issued against him, and he was taken that evening at his mother's house. On his being examined and searched, marks of blood were discovered on his shirt and trousers, and in his pocket were a knife and a remarkable silver coin, both of which the landlady swore positively were her uncle's property, and that she saw them in his possession on the evening he retired to rest with the young man. On these strong circumstances the unfortunate youth was found guilty. He related all the above circumstances in his defense; but as he could not account for the marks of blood on his person, unless that he got them when he returned to the bed, nor for the silver coin being in his possession, his story was not credited. The certainty of the boatswain's disappearance, and the blood at the pier, traced from his bedroom, were

two evident signs of his being murdered; and even the judge was so convinced of his guilt, that he ordered the execution to take place in three days. At the fatal tree the youth declared his innocence, and persisted in it with such affecting asseverations, that many pitied him, though none doubted the justness of his sentence.

The executioners of those days were not so expert at their trade as modern ones, nor were drops and platforms invented. The young man was very tall; his feet sometimes touched the ground, and some of his friends who surrounded the gallows contrived to give the body some support as it was suspended. After being cut down, those friends bore it speedily away in a coffin, and in the course of a few hours animation was restored, and the innocent saved. When he was able to move, his friends insisted on his quitting the country and never returning. He accordingly traveled by night to Portsmouth, where he entered on board a man-of-war, on the point of sailing for a distant part of the world; and as he changed his name, and disguised his person, his melancholy story never was discovered. After a few years of service, during which his exemplary conduct was the cause of his promotion through the lower grades, he was at last made a master's mate, and his ship being paid off in the West Indies, he, with a few more of the crew, were transferred to another man-of-war, which had just arrived short of hands from a different station. What were his

feelings of astonishment, and then of delight and ecstasy, when almost the first person he saw on board his new ship was the identical boatswain for whose murder he had been tried, condemned, and executed, five years before! Nor was the surprise of the old boatswain much less when he heard the story.

An explanation of all the mysterious circumstances then took place. It appeared the boatswain had been bled for a pain in his side by the barber, unknown to his niece, on the day of the young man's arrival at Deal; that when the young man wakened him, and retired to the yard, he found the bandage had come off his arm during the night, and that the blood was flowing afresh. Being alarmed, he rose to go to the barber, who lived across the street, but a press gang laid hold of him just as he left the public house. They hurried him to the pier, where their boat was waiting; a few minutes brought them on board a frigate, then underway for the East Indies, and he omitted ever writing home to account for his sudden disappearance. Thus were the chief circumstances explained by the two friends, thus strangely met. The silver coin being found in the possession of the young man, could only be explained by the conjecture, that when the boatswain gave him the knife in the dark, it is probable that as the coin was in the same pocket, it stuck between the blades of the knife, and in this manner became the strongest proof against him.

143. JOHN JENNINGS' CASE. (JAMES RAM. *On Facts as Subjects of Inquiry by a Jury*. 3d Amer. ed. 1873. p. 439.)

A gentleman, traveling to Hull, in the year 1742, was stopped late in the evening, about seven miles short of it, by a single highwayman, with a mask on, who robbed him of a purse containing twenty guineas. The highwayman rode off a different

road, full speed, and the gentleman pursued his journey. It, however, growing late, and he being already much affrighted at what had passed, he rode only two miles farther, and stopped at the Bell Inn, kept by James Brunell. He went into the

kitchen to give directions for his supper, where he related, to several persons present, his having been robbed; to which he added this peculiar circumstance, that when he traveled he always gave his gold a particular mark; that every guinea in the purse he was robbed of, was so particularly marked, and that, most probably, the robber, by that means, would be detected. Supper being ready, he retired. He had not long finished his supper, before Brunell came into the parlor. After the usual inquiries of landlords, "Sir," says he, "I understand that you have been robbed, not far from hence, this evening."—"I have, sir."—"And that your money was all marked?"—"It was."—"A circumstance has arisen which leads me to think that I can point out the robber."—"Indeed!"—"Pray, sir, what time in the evening was it?"—"It was just setting in to be dark."—"The time confirms my suspicions!" Brunell then informed the gentleman that he had a waiter, one John Jennings, who had, of late, been so very full of money, at times, and so very extravagant, that he had had many words with him about it, and had determined to part with him on account of his conduct being so very suspicious; that, long before dark, that day, he had sent him out to change a guinea for him, and that he had only come back since he (the gentleman) was in the house, saying, he could not get change; and that Jennings being in liquor, he had sent him to bed, resolving to discharge him in the morning. That, at the time he returned him the guinea, he (Brunell) did not think it was the same which he had given him to get silver for, having perceived a mark upon this, which he was very clear was not upon the other; but that, nevertheless, he should have thought no more of the matter, as Jennings had so frequently gold of his own in his pocket, had he not afterwards heard (for he was not

present when the gentleman was in his kitchen relating it) the particulars of the robbery, and that the guineas which the highwayman had taken, were all marked; that, however, a few minutes previously to his having heard this, he had unluckily paid away the guinea which Jennings returned him, to a man who lived some distance off, and was gone; but the circumstance of it struck him so very strongly, that he could not, as an honest man, refrain from giving this information.

Brunell was thanked for his attention. There was the strongest reason for suspecting Jennings; and if, on searching him, any of the marked guineas should be found, as the gentleman could swear to them, there would then remain no doubt. It was now agreed to go softly up to his room: Jennings was fast asleep; his pockets were searched, and from one of them was drawn forth a purse, containing exactly nineteen guineas. Suspicion now became demonstration, for the gentleman declared them to be identically those of which he had been robbed! Assistance was called, Jennings was awaked, dragged out of bed, and charged with the robbery. He denied it firmly, but circumstances were too strong to gain him belief. He was secured that night, and the next day carried before a neighboring justice of the peace. The gentleman and Brunell deposed the facts on oath; and Jennings having no proofs, nothing but mere assertions of innocence to oppose them, which could not be credited, he was committed to take his trial at the next assizes.

So strong were the circumstances known to be against him, that several of his friends advised him to plead guilty on his trial, and to throw himself on the mercy of the court. This advice he rejected, and, when arraigned, pleaded not guilty. The prosecutor swore to

the being robbed; but that, it being nearly dark, the highwayman in a mask, and himself greatly terrified, he could not swear to the prisoner's person, though he thought him of much the same stature as the man who robbed him. To the purse and guineas, which were produced in court, he swore, — as to the purse, positively, — and as to the marked guineas, to the best of his belief, and that they were found in the prisoner's pocket.

The prisoner's master, Brunell, deposed to the fact of the sending of the prisoner to change a guinea, and of his having brought him back a marked one, in the room of the one he gave him unmarked. He also gave evidence as to the finding of the purse, and the nineteen marked guineas, in the prisoner's pocket. And, what consummated the proof, the man to whom Brunell paid the guinea, produced the same, and gave testimony to the having taken it, that night, in payment, of the prisoner's master. Brunell gave evidence of his having received of the prisoner that guinea, which he afterwards paid to this last witness. And the prosecutor comparing it with the other nineteen, found in the pocket of the prisoner, swore to its being, to the best of his belief, one of the twenty guineas of which he was robbed by the highwayman.

The judge, on summing up the evidence, remarked to the jury, on all the concurring circumstances against the prisoner; and the jury, on this strong circumstantial evidence, without going out of court, brought in the prisoner guilty.

Jennings was executed, some little time after, at Hull, repeatedly de-

claring his innocence to the very moment he was turned off.

Within a twelvemonth after, lo! Brunell, Jennings's master, was himself taken up for a robbery done on a guest in his own house; and, the fact being proved on his trial, he was convicted, and ordered for execution. The approach of death brought on repentance, and repentance confession. Brunell not only acknowledged the committing of many highway robberies, for some years past, but the very one for which poor Jennings suffered!

The account he gave was, that he arrived at home, some time before the gentleman got in who had been robbed. That he found a man at home waiting, to whom he owed a little bill, and that, not having quite enough loose money in his pocket, he took out of the purse one guinea, from the twenty he had just got possession of, to make up the sum; which he paid, and the man went his way. Presently came in the robbed gentleman, who, whilst Brunell was gone into the stables, and not knowing of his arrival, told his tale, as before related, in the kitchen. The gentleman had scarcely left the kitchen, before Brunell entered it; and being there informed, amongst other circumstances, of the marked guineas, he was thunderstruck! Having paid one of them away, and not daring to apply for it again, as the affair of the robbery and marked guineas would soon become publicly known, — detection, disgrace, and ruin appeared inevitable. Turning in his mind every way to escape, the thought of accusing and sacrificing poor Jennings at last struck him. The rest the reader knows.

**144. COURVOISIER'S CASE.** *and Evidence.* 1908. p. 191.) . . .

The facts shown in evidence at Courvoisier's trial were, that Lord William Russell, an old gentleman of the age of seventy-three, who

(N. W. SIBLEY. *Criminal Appeal*

lived by himself in Norfolk Street, with only two female servants and his valet, was found brutally murdered in his bedroom, his throat

being cut, and the bone at the back of the neck being cut through, at one desperate blow. The hypothesis of suicide was quite untenable; it was not only opposed to medical evidence, but no instrument was found, at or near the spot, by which suicide could have been committed. Suspicion early attached to Courvoisier, but it has always been recognized that the evidence was entirely circumstantial. TINDAL, C. J., in his charge to the jury, observed that "the case was one of circumstantial evidence. No eye saw the act committed."

The question really at issue, according to the summing up of the Chief Justice, was, whether the house was entered from without or whether the robbery was committed by some of the inmates, who also committed the murder. Was it a genuine robbery, or were valuable articles secreted in the pantry and scullery, and marks made on the back area door, with the view of diverting the attention of the officers of justice, so that the guilty party or parties might escape detection? The hypothesis of burglary derived some *prima-facie* support from the fact that the back area door was found open and certain marks were found on it, and also from the fact that there was a ladder in the yard that would have enabled the burglars to scale the wall of the area yard. The hypothesis of burglary was, however, negatived on what seems very conclusive evidence. Assuming it, it became also necessary to assume that the burglars deliberately selected a difficult mode of access and broke open a door which required considerable force to break through, when they had a much easier access through a glass door. There were also no marks on the walls or leads, over which, according to the hypothesis of burglary, the burglars must have passed. Yet these leads were covered with dust, which was undisturbed. Finally, the Chief Justice

asked: "Was it possible to believe, if thieves had entered the house for purposes of plunder, they would have made their exit, leaving so many small but valuable articles behind them, which might so easily have been disposed of about their persons?" The hypothesis of burglary and constructive murder seemed highly improbable; but when it was once dismissed, it became essential to conclude, that either Courvoisier, or the two female servants, must have murdered Lord William Russell. TINDAL, C. J., directed the jury that no one except the prisoner, the two female servants, and Lord William Russell were there that night in the house. The hypothesis that any one might have concealed themselves on the premises seems to have not been adverted to, as, presumably, there was not the slightest evidence of it.

The circumstantial evidence against Courvoisier comprised some five facts: (1) He had observed to the female servants, "I wish I had old Billy's money, I would not be long in this country." (2) His agitation and contradictory statements to the police. (3) The discovery of gloves and handkerchiefs in his own portmanteau slightly stained with blood. (4) The secreting of certain valuable articles, including a ten-pound note, all belonging to Lord Russell, in the scullery and pantry (no stranger, TINDAL, C. J., observed to the jury, could think of putting these articles where they were found). (5) About the date of the murder, Courvoisier called at a place of entertainment (also used as a hotel) in Leicester Square, where he had previously been employed as a waiter, under the name of John, and deposited a brown-paper parcel for safekeeping with a Mrs. Piolane, the wife of the master of the establishment. As Courvoisier was not known in the establishment in Leicester Square under his proper name, at the time the parcel



was left, he was not suspected. There seems a conflict of evidence whether the parcel was left before or after the murder. It may be assumed that it was left before, this being so, according to Mrs. Piolane's evidence, while her servant, who failed to identify Courvoisier, thought it had been left after the date of the murder. Some six weeks afterwards, during the first day of Courvoisier's trial, Mrs. Piolane was attracted by the suggestion in a paragraph in a French newspaper, in which the crime was discussed, to the effect that the articles taken from Lord William Russell's house, for which a reward of £50 had been offered, might have been deposited in some foreign hotel in London by Courvoisier. The parcel was opened with some ceremony in the presence of three persons, including a solicitor, and an inventory was taken. It was found to contain silver spoons and forks marked with Lord Russell's arms, two pairs of new stockings, a pair of gold auricles, a pair of dirty socks, and an old flannel waistcoat. A jacket and tow were wrapped round the things to prevent them rattling. Thomas Davis, formerly in the service of Mr. Webster, an optician, gave evidence at the trial of Courvoisier that he made a pair of gold auricles for Lord William Russell similar to those found in the parcel left by the prisoner at the hotel in Leicester Square. John Ellis, his lordship's former valet, recollected that Lord William Russell wore such "ear-instruments." Mr. Molteno, a print-seller in Pall Mall, identified the brown paper in which the spoons and forks were wrapped up as the covering of a print sent from his

shop, and he believed to Lord William Russell; he knew the brown paper was sent from his shop; his own stamped label was on it, and he was in the habit of selling prints to Lord William Russell. Finally, Lydia Banks, a washerwoman, identified the socks as Courvoisier's.

It may be doubted if a more dramatic moment was ever reached in a trial for murder than this discovery of Lord Russell's plate and the identification of Courvoisier as the mysterious bearer of the parcel to the depositary, Mrs. Piolane. The *Times* observed that "the fact of the plate having been discovered, and the identity of the prisoner proved, a communication to that effect was made to the prisoner, and on hearing a piece of intelligence so astounding and unexpected he turned deadly pale and became extremely agitated, and before the time arrived for his being again placed at the bar he sent for Mr. C. Phillips, his counsel, and disclosed his guilt to him." On the night of the fatal occurrence he was in the lower part of the house in the act of secreting the different valuable articles described at the trial in the scullery and pantry, where they were found by the police. Lord William Russell, being taken suddenly ill, came downstairs unexpectedly while he was so employed and caught him in the act and told him he would discharge him from his service. This roused him to a state of madness and he cut his throat with a carving knife. . . . It seems impossible to doubt that Courvoisier was a guilty man; his confession to his counsel on the second day appears to conclude the question.

145. **STARNE COAL CO. v. RYAN.** (1891. APPELLATE COURT OF ILLINOIS. 48 Ill. App. 216.) . . .

Opinion of the Court, the Hon. CARROLL C. BOGGS, Judge. The appellee, while in the employ of the appellant company as a driver

of coal cars on a track in its mine, was thrown from a car and injured. This is an appeal from a judgment in his favor because of such injuries.

The declaration contained three counts, the gravamen of the charge in each being that the appellant company negligently suffered a portion of the track of its road in the mine to become and remain in bad and unsafe repair and condition, and that by reason thereof the car upon which appellee was riding and driving left the track, causing the injuries complained of. . . .

The injury was received at a point where the track passed upon a somewhat descending grade through a rather dark entry. The appellee was driving a mule attached to a train of three cars, upon the front one of which he was riding. He came down the track at a rather rapid rate, the mule, according to the testimony, being in a "lope," when the car "jumped" the track and threw him against one of the props of the mine. He had been employed as a driver in this mine for some ten months and had been driving through the entry in which he was hurt for three weeks, during which time he passed and repassed frequently over the place where he was hurt, often passing there, as he testified, fifteen to twenty times per day. On the day that he was hurt he began work at 7.30 in the morning, passed the place in question seven times, and was passing it for the eighth time when the accident occurred. His testimony is that he observed nothing wrong with the track during any of the trips prior to the last one, and he thinks there was nothing wrong before that; that the car jumped the track because the end of one of the rails of the track was turned in at the joint; that it could not have been in that condition when he passed there on the preceding trips, nor when another driver passed down over it in advance of him or that driver would have been thrown off. . . . The appellee contends that the tie, upon which the rail rested and to which it ought to have been securely nailed, was defective and

insufficient to hold the nails or the rail, and for that reason the rail was moved from its place at the end where it should join with the next rail.

To support this contention and as the only evidence in its support, the appellee sought to show that, immediately after he was injured and before the cars from which he fell were moved, a new tie was placed in the track. From this, if true, it might reasonably be inferred that the track was unsafe with the ties already there, and that another tie was necessary to put the track in good and safe condition for use. Upon this point, in behalf of the appellee, J. R. Burns testified that he saw Michael Lynch, appellant's roadmaster, putting a tie in the track immediately in the rear of the car that left the track, before such car was moved after the accident; and Michael Laudregan, also a witness for the appellee, testified that he saw Lynch there at the time with a tie in his hands and that he seemed to be working at the track. This was all the testimony favorable to the appellee on this point.

Lynch testified that he went at once to the place of the accident, found two cars off the track, replaced them, examined the track and the iron rails carefully to see that they were safe for use, and found them in good condition; that he had a wooden gauge used for ascertaining whether the track is level, and that he and Michael Hickey, who was assisting him, placed this gauge upon the track to see that it was level; that he had no tie there; did not find it necessary to use one; and did not use one; that the rail was not bent nor turned in at the joint, but that the track was in good and safe condition for use, and they began at once and continued hauling cars over it after the accident as before. John Hickey, a coal miner, stated, as a witness, that he was with Lynch,

assisting in the work, and remained with him until the cars were running again over the track; that he examined the track and the rails, testing the rail carefully with a hammer; that there was nothing wrong with either; that he and Lynch gauged the track and found it level; that no tie was removed, nor was a tie put in the track; that it was not necessary to put one in. That the cars were hoisted on the track and the track at once used for the passage of cars as before. George Courdice, engineer of the mine, and Comack Cunningham, official state inspector of mines, officially examined the track at the place in question the next day after the appellee was injured. Both testified that the track and the rails were in good and safe condition; that they saw nothing to indicate that a tie had been placed in the track, and that if such had been done, indications of the work would have been found; that there were no such indications. Both join in the opinion that no tie had been placed in the track. The state inspector, with a lamp and hammer, examined carefully the rail and

spikes by which it was attached to the ties, and could find nothing indicating that any change whatever had been made in the track, the rail, or the ties.

We do not think that, under this evidence, the jury were warranted in finding that a tie was placed in the track, as claimed. Such a conclusion seems to us to be manifestly against the greater weight of the testimony. It would appear more reasonable to conclude that Burns, in the darkness prevailing in the entry, mistook for a tie the guage which Lynch and Hickey were using, than to conclude that both Lynch and Hickey willfully and knowingly testified falsely, and that they did break the ground and place a tie in the track, in such manner as to leave no discernible trace of the work. If this view is correct, the evidence fails to show that the injury received by the appellee was occasioned by the failure of the appellant company to discharge its duty toward the appellee as its employee in the respect charged in the declaration. In the absence of such proof there can be no recovery.

146. **MOUDY v. SNIDER.** [Printed *post*, as No. 382.]

## Topic 2. Mental Traces

147. JOHN H. WIGMORE. *Principles of Judicial Proof.* (1913.)<sup>1</sup>  
 (1) *General Principle.* The struggle of a victim for his life, and the act of taking his life, may leave upon the perpetrator indelible traces of blood, wounds, or rent clothing, which point back to the deed as done by him; these traces come from a mechanical contact with the body, weapons, and other things involved in the deed, and they remain upon him or are divested from him by a mechanical process. But a deed may also leave traces upon the doer through other than a mechanical process, *i.e.* through a mental, moral, or psychological process. These traces may be as significant in their way as the others, — perhaps more so; and they may be equally relevant evidentially to show their bearer to be the doer of the act. These traces, like those of the other sorts, may be employed either affirmatively or negatively;

<sup>1</sup>[Adapted from the same author's *Treatise on Evidence.* (1905. Vol. I, §§ 172-177, in part.)]

the presence of such a trace may be used as indicating the doing of the act by the person bearing it; and the absence of the trace may be used as indicating the not doing it by the person not bearing the trace. The traces of this mental or psychological sort will be some form of a mental condition, — memory, belief, consciousness, knowledge, or whatever other name may be more usual and appropriate.

How to evidence this mental condition — by conduct or the like — is a second question. Here the inference is to a mental condition, usually from conduct as evidence. This falls under Title III, Human Condition, Subtitle C, Knowledge and Consciousness (*ante*, No. 30). This second sort of inference, in its present aspect, is seldom forced into obviousness. We are apt to infer, *e.g.* from an accused's flight to his guilt, forgetting that there are two steps of inferences, one from flight to a consciousness of guilt, and the other from consciousness to actual guilt of the past deed in issue. The cases usually present the evidence with the two inferences merged. In the study of the subject, they must be separately analyzed.

It is in criminal cases that the present class of inferences is most common. But in civil cases it may become equally valid; the following are some of the principal forms:

(2) *Civil Cases.* (a) *Legitimacy as evidenced by Parents' Conduct.* Upon an issue of the legitimacy of a child, the conduct of the parents towards the child is admissible on the present principle, as involving an inference from the parents' conduct to their belief as to the fact on which the legitimacy depends (time of birth, time of marriage, identity of the child, and the like), and then from that belief to the fact itself. Such evidence has traditionally been used since Solomon's day:

*The Judgment of Solomon*, (First Book of the Kings, III, 16), "Then came there two women, that were harlots, unto the king, and stood before him. And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house. And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house. And this woman's child died in the night, because she overlaid it. And she arose at midnight, and took my son from beside me, while thy handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear. And the other woman said, Nay; but the living is my son, and the dead is thy son. And this said, No, but the dead is thy son, and this is my son. Thus they spake before the king. Then said the king, The one saith, This is my son that liveth, and thy son is the dead; and the other saith, Nay; but thy son is the dead, and my son is the living. And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in nowise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said, Give her the living child, and in nowise slay it: she is the mother thereof. And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment."

(b) *Marriage, as evidenced by the Parties' Conduct.* A man and a woman cohabiting as husband and wife show by their conduct that they believe themselves to have made a contract of marriage, ceremonial or informal, at

some prior time. This is the commonest evidence of marriage. The conduct will vary in its significance; but the inference is obviously of the present sort.

(c) *Personality, as evidenced by Belief and Knowledge of Personal Doings, Family History, and the Like.* On an issue of personal identity, the present principle finds one of its simplest and commonest applications. The situation is this: Whether X is A is the fact in issue; A is shown to have done a certain act, to have had certain marked and individual experiences; if X did this act or had this experience, he probably is A; thus, as indicating whether X did or had it, the fact of his present belief or consciousness or recollection becomes relevant, and therefore his conduct as evidencing that belief. This sort of evidence, of the commonest use in the affairs of everyday life, has of course its weaknesses; the fact of X's belief or recollection of the act may be explained away as due, not to his having actually done the act, but to his having heard of it from others; while the fact of his non-recollection may also be explainable as due merely to that failure of memory which increases in proportion to the lapse of time and the insignificance of the act. Thus the strength of the inference is proportionate, on the one hand (when he claims to recollect), to the improbability of the person's having learned of the act from others, and, on the other hand (when he fails to recollect), to the improbability of a forgetfulness of the particular act. The theory of this sort of evidence, and its application, are well expounded in that marvelous feat of judicial skill and endurance, the charge of the presiding judge in the second Tichborne trial:

COCKBURN, C. J., in *R. v. CASTRO, alias ORTON, alias TICHBORNE*. (1874. Official Report of the Charge, I, 16; II, 327, 403.) [The claimant to the rich Tichborne estate purported to be Roger, the long-lost son, who had been given up for dead, after the news of his loss at sea, some twenty years before, in a vessel last heard of off the coast of South America; Roger had been brought up a Catholic, and attended a Catholic school at Stonyhurst, but had spent most of his youth in France, where he became more fluent in French than in English; he afterwards served awhile in the army; he was some twenty-five years of age when he left on his travels. The claimant had lived for most of his manhood life in the backwoods of Australia; and was said to be really Arthur Orton, a butcher of Wapping. At the civil trial for the title to the estates, in 1871, the claimant's case finally broke down and was not submitted to the jury; he was then, in 1874, put on trial for perjury and convicted; in this trial he was not competent as a witness, but his testimony at the civil trial was used against him; and it is in this cross-examination that most of the instances referred to by the Chief Justice were found. On the claimant's cross-examination by Sir J. Coleridge, it appeared that though Roger had been three years at Stonyhurst School and lived on the quadrangle, the claimant thought that the quadrangle was "a part of a building"; that, though Roger had studied Latin and Greek, the claimant replied, when asked, "Was Cæsar in verse or prose," "I don't recollect"; and "Was Cæsar a Latin writer or a Greek writer?" "I can't say; I suppose it was Greek"; and when shown a copy of Virgil, "It appears to me to be Greek"; and when asked, "Is mathematics the same thing as chemistry?" "I have no recollection"; and "Has Euclid anything to do with mathematics?" "I don't know"; and when asked, "What is physiology?" "The formation of the head, I believe"; and when asked the meaning of the Stonyhurst motto, "Laus Deo Semper," answered, "They mean, 'The laws of God forever.'" A list of Roger's library was read to him; he thought that the "Theatre de P. Corneille" was written "by one of the Fathers"; asked as to the "Life of John Bunyan," whether he was "a sportsman, a general, a bishop, a master of fox hounds, or a prize fighter," the claimant said it was "difficult to give an answer

to such a question." Taking up these instances, the Chief Justice commented as follows:]

"Although outward appearance may deceive, yet if you are acquainted with what has passed through the mind of a man, and another man were to come forward and say, 'I am that man,' you have only to ask him as to the events of the other man's life, those at least which must have remained impressed on his memory, and which, therefore, if he be the man, he must of necessity retain, to enable him to demonstrate that he is the man he says he is, or to enable you to pronounce that he is not. If his memory is not the memory of the man he seeks to personate, if he does not know the events of that man's life, if he does not know what thoughts, what feelings, what emotions, that man's mind underwent, he cannot be the individual. . . . Now you are in danger, in an inquiry of this nature, of being led into error by one of two alternatives. You may require too much; you may be satisfied with too little. You may require too much if you expect a man . . . to recollect every trifling individual occurrence of his life. . . . But there are things which it is next to impossible any one should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge when you know that they happened to a person whom he represents himself to be. . . . You must consider what it is you may fairly and reasonably and justly expect that a man should recollect. . . . Again, you may . . . also be satisfied with too little if you are led to accept, as true genuine knowledge, that which is not the honest production of the unaided memory, but knowledge derived from extraneous and adventitious sources. This is the danger into which persons too credulous have before now been led by imposture. . . . What, then, are the things which would have impressed themselves on the mind and memory of a boy growing up into the period of adult life? For the recollections of boyhood still cling to us in after years with the freshness of the age to which they belong, and, though less vivid, even those of childhood do not wholly disappear. . . . [After the recital of various instances, the cross-examination is then quoted]: 'Do you recollect [from your studies] whether Cæsar was written in verse or prose? No, I do not. — . . . Did you ever do any Cæsar? — I do not remember whether I did or not. — Is Cæsar a Latin writer or a Greek?' . . . To which comes the memorable answer, 'I should suppose *Cæsar is Greek*.' . . . Cæsar a Greek! Would Roger, do you think, have made that mistake? When Roger read Cæsar, did he believe he was reading Latin, or did he believe he was reading Greek? Is that a thing about which a person could make a mistake? Do you think that is what a man would be likely to forget?"

(d) *Contracts, Deeds, Appointments to Office, Etc.* The same mode of reasoning may, of course, upon occasion, be resorted to in evidencing the execution of a contract or the doing of any other important act. In its application to contracts and deeds, the principle is probably oftener applied than the number of recorded rulings indicates:

ERLE, J., in *R. v. FORDERINGBRIDGE*. (1858. E. B. & E. 678, 684; admitting conduct of master and apprentice to show the previous execution of an indenture of apprenticeship): "The execution here is whether upon this evidence a reasonable man would infer that the man had been bound apprentice. . . . The presumption of the existence of the deed [may be made] from the circumstances. . . . The relations of landlord and tenant, of partnership, of marriages, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that than with any other."

148. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence.* (1868. pp. 420, 459, 465, 555, 567.) I. That the legal consequences of crime, — the loss of character, liberty, and life, attached to their commission, — are rarely contemplated in their true light beforehand, has been remarked under a former head. It is *after* the criminal act (especially if of a high grade) has been done, and when the author of it (if perchance touched with a feeling of penitence) finds that it cannot possibly be undone, and that his connection with the facts of the transaction is irrevocably fixed, that the impending consequences flash upon his mind with all their force. They are now not contemplated as ulterior and remote contingencies and possibilities, but seen close at hand, with no seducing or absorbing objects to intercept the view; and, thus seen, they have power to agitate the natures of most men thoroughly, and to occupy their thoughts exclusively. To avoid these consequences, by the concealment of either the crime, or the criminal, if not of both, is now a sort of natural impulse, which, observation shows, is almost universally obeyed. . . .

But even in cases where, apparently, the most effectual precautions for concealment have been taken, the *idea* of discovery may be said to haunt the mind, and the *fear* of discovery not unfrequently to agitate it, in spite of all determination to assume an exterior of calmness or indifference. Hence, where a case of suspected crime has become the subject of judicial investigation, . . . the idea — now converted into the prospect — of discovery, and that becoming a more and more probable event, as fact after fact is brought to light, naturally, and almost necessarily, fills the mind with alarm; particularly where the criminal finds his own person drawn within the sphere of the investigation.

*Destruction, Suppression, and Eloignement of Evidence.* Among the most common expedients resorted to for the purpose of hiding a crime are: the destruction or concealment of the subject of the crime itself; such as the concealment of a dead body, by interment, or otherwise; the removal of it to a distant spot, without burial; the mutilation or destruction of it, where concealment of the entire body is impracticable; concealment or destruction of the clothing of the body, or other articles upon it, by which the crime might be traced out; concealment or destruction of the instrument of the crime; removal of the physical marks and traces of the crime; concealment of the scene of the crime, and of the criminal himself, while engaged in such work of concealment or destruction; destruction of the scene, the subject and the evidence of the crime, by one single act of arson; concealment of the fruits of the crime; getting witnesses out of the way, and the like.

The presumption arising from any of these acts of destruction, suppression, or eloignement of evidence, where they have been fastened upon the accused by satisfactory proof, is always unfavorable. Assuming that an act of this kind was done with a motive, the logical inference is that it was done in order to get rid of something which would otherwise prejudice the actor. Hence, the conclusion is warranted, that the subject of action, if presented in evidence, would, in fact, operate against him. The principle of this presumption is a general one, applicable in civil as well as criminal cases; and is embodied in the well-known maxim, *Omnia præsumuntur contra spoliatores*. It must be borne in mind, however, that the getting rid of evidence,

or of the sources, materials, or instruments of evidence by any of the methods which have just been considered, is not, in itself, and necessarily, incompatible with the innocence of the party who is proved to have resorted to such expedients, as will be more fully shown under a future head.

*Fabrication or Forgery of Evidence.* This fabrication is effected in two principal ways: first, *indirectly*, by intentionally producing on the senses of observers, impressions which shall, without fault on their part, lead to wrong ideas and conclusions, and thus, from the earliest stages, divert suspicion and inquiry to other objects and into other channels; or, in the event of actual discovery and consequent trial, aid, in the form of testimony, in disproving the criminal charge; secondly, *directly*, by prevailing upon individuals who, it is supposed or feared, may be called on for information or testimony, to misstate one or more of the facts of the case; or even to state, as facts, what they themselves know to be absolute falsehoods.

*Conduct, Demeanor, and Language after the Commission of a Crime.* The principal criminative circumstances usually classed under this head are, the alarm and confusion of a suspected person in prospect of his discovery; his concealment and flight; his agitation and other conduct on arrest; his silence under accusation; his giving false, evasive, or inconsistent replies to inquiries made of him; his unsatisfactory explanations of suspicious appearances; and his statements of a confessional character, whether judicial or otherwise.

II. *Infirmative Hypotheses.* (1) *Suppression of Criminative Objects.* The criminative article or appearance sought to be destroyed, suppressed, or eloiigned, may have been, in the first instance, *fabricated* by the real criminal, by placing it in the possession of the innocent party, or even annexing it to his person; and the removal of it may be prompted by the desire of avoiding the effect apprehended to follow from the possession of such an article or appearance. . . .

(2) *Fabrication or Forgery of Evidence.* An innocent person, finding a criminative article — such as a blood-stained garment or a bloody knife — upon his premises, and naturally (however injudiciously) desiring to rid himself of it, may carry his action farther than mere eloiignment or removal, by conveying the article upon the premises of a *neighbor*; thus actually fabricating evidence against the latter. . . .

(3) *Giving Different and Inconsistent Accounts of the Cause of the Death of a Person.* This fact may be explained, consistently with the innocence of the accused, on the supposition of the statements being merely *conjectural*, without any claim to the character of accurate information; or on the supposition of the information having been received from *various* persons, and at different times, or obtained from mere general report.

(4) *Objecting to the Examination of a Dead Body.* The objection, especially in the case of a near relationship to the deceased, may arise from a natural feeling of *repugnance* against having the body of a friend subjected to anatomical examination. . . .

(5) *Refusal to look at a Dead Body.* This circumstance, also, may be explained on the supposition of a natural feeling of *repugnance* (which cannot be pronounced uncommon in its occurrence) against looking at the body of a person who has come to a violent end; especially if in a bleeding, mangled, mutilated, or decaying state. . . .



(6) *Alarm in view of Discovery.* . . . A weak or ignorant person might be led to overrate the effect of circumstances, really immaterial, but seemingly tending to criminate him; and by the exhibition of needless alarm in consequence, actually create against himself evidence to strengthen the force of these very circumstances.

(7) *Concealment and Flight.* It may be one of those *ordinary* cases of simple change of residence in the same community or vicinity, or of departure from it, in pursuit of health, business, or pleasure, which are constantly occurring in all communities. . . . But, supposing it a case of actual *concealment* or *flight*, in the proper judicial sense, induced or impelled by a *fear of the power of the law*, it may have arisen from a source wholly unconnected with the *particular* crime charged; such as a desire to avoid the service of civil process, or the inquiry into some other offense. Finally, supposing that the observed act of departure or disappearance, on the part of a suspected person, was actually caused by a desire to avoid the charge of having committed the crime which has been discovered, even this circumstance, though proved ever so clearly, is, in itself, by no means conclusive evidence of guilt. Under certain circumstances, the most innocent person may deem a judicial trial too great a risk to encounter. . . .

(8) *Conduct and Language on Arrest; Fear as expressed by Deportment.* The force of these manifestations, as criminative circumstances, depends on the correctness of the inference that the particular symptom observed has been produced by the emotion of *fear*; that is, of fear of detection, or punishment for the offense charged. They may be considered as subject to the following infirmative considerations:

The appearance observed may not be the effect or manifestation of any *mental* emotion whatever, but of a purely *physical* fact; namely, bodily indisposition. The appearance may be the effect of mental emotion, but of a *different* emotion from that inferred; such as astonishment, anger, or grief. Supposing the appearance observed to be actually the effect of the emotion of *fear*; that emotion may be referable to other causes than a consciousness of *guilt*; thus, It may arise from a consciousness that appearances are against the party, and a consequent apprehension that he may be subjected to judicial annoyance and vexation, or possibly condemned as guilty, although innocent, . . . or, it may arise from an apprehension that a fact which has no criminal character whatever will be publicly exposed, to the injury, mortification, or vexation of the party himself, or some other individual connected with him by some tie of sympathy.

Supposing, finally, that the appearance observed is not only, in truth, the effect of the emotion of *fear*, but that such emotion arises from a consciousness of *guilt*, . . . it may be a consciousness of some *other crime*, committed either by himself, or by some other individual connected with him, and on whom the inquiry may bring down suspicion or punishment.

*Confusion* manifested on being charged with participation in the commission of a crime, or questioned as to some circumstance connected or supposed to be connected with it may arise from a feeling of mortification at the discovery of a fact supposed to have been known only to the party himself. The apparently strongly criminative fact of *resisting a search* of the person may arise from a similar feeling. A story related by Mr. *Bentham*, as one which he had often heard or read of, may be repeated in his own language, as

an illustration of this supposition. "An entertainment was given by some great personage to a numerous and mixed company: in the course of it, a trinket was displayed, the value of which had, by I know not what operation of the principle of association, been raised, in his imagination and affections, above all ordinary estimation. On a sudden, an alarm was given that the precious article was missing. 'Let every man of us be searched,' said one of the company. 'Yes, let every man of us be searched,' said all the rest. One man alone refused: the eyes of all were instantly upon him: his dress betrayed symptoms of penury: no doubt remained about the thief. He entreated and obtained of the master of the house a moment's audience in a private room. His pockets were turned inside out, when in one of them was found — not the lost trinket, but something eatable. He had a wife who, for such or such a time, had gone without food." This was a secret, the public exposure of which he had resisted.

(9) *Silence under Accusation.* This circumstance is subject to the following infirmative considerations: The accused or suspected party, owing to deafness, or any other cause, may not have *heard* the criminative question asked, or observation made. If he heard it, he may not have *understood* it as conveying an imputation against himself. If he heard and understood it, he may not have been *able* to reply at the moment, owing to temporary impediment of utterance, or a feeling of surprise at the imputation conveyed. The subject of the statement may have been a matter not within his *knowledge*. The statement may have been made under circumstances *not calling* for a reply.

(10) *Evasive and Incomplete Response.* The following infirmative considerations may be mentioned under this head:

It may be a case where the appearance observed, and required to be explained, such as blood on the clothing, although criminative on its face, was not so in fact; but the accused having been subjected to it without his knowledge, as by having come in contact with a bleeding body in the dark, was, although innocent, actually *unable* to explain its existence. It may be a case where the accused, though innocent, could only explain particular circumstances, by criminating *other* individuals whom he was unwilling to expose, or disclosing facts which he was anxious, if possible, to conceal. It may be a case where the accused, though not guilty of the offense charged, could only prove himself so by showing his guilt of some *other* offense. It may have been considered by the accused his best policy not to disclose the particulars of his defense, until *judicially* demanded of him on his trial.

(11) *False Response.* It may be attributable to the same cause which has sometimes led innocent persons to resort to *false evidence* in their defense, as by actually fabricating facts and appearances, in order to produce false impressions.

149. THE ESCAPED CONVICT'S CASE. (H. L. ADAM. *The Story of Crime*. 19—. p. 171.) . . .

Some time ago, a prisoner who escaped from Dartmoor was recaptured in a curious manner. He had succeeded in getting beyond the boundaries of the prison property, had secured a change of clothing, and was within an ace of getting clear away. He had to pass a police

station, and as he approached it, he observed a police constable standing outside with a dog. Pulling himself together he put on indifference and managed to pass the policeman without raising his suspicions. Having got a few yards away, he suddenly heard the dog bark behind him and run towards him. Thinking that the policeman had "spotted" him, he took to his heels. This brought the policeman after him, and he was taken. The dog was merely barking at him as dogs will bark at passing people, and it was not until he ran away that the policeman's suspicions were aroused. . . .

Some years ago a schoolmaster was found murdered in his study. He had been hit over the head with a blunt instrument. The assistant master, who it was proved had been enamored of his employer's wife, was arrested and charged with the crime. The theory propounded by the prosecution was as follows. At the time the crime was committed the pupils were playing in the open ground adjoining the school, and the assistant master was with them. The deceased had gone into his study to seek a little repose, and was dozing. The assistant, so the prosecution argued, left the pupils, crept noiselessly into the house, secured the weapon,

made his way to the study, committed the crime, rejoining the pupils in the playground as though nothing had happened. The defense, however, were able, by means of timing the man's supposed movements, to make it appear a physical impossibility for him to have committed the deed in the manner set forth. But the most pregnant evidence of all was that which turned on a mere trifle. One of the witnesses for the prosecution was a small boy, a pupil, who testified that he saw the prisoner emerge from the house and come up to the boys as they were tossing coins in the air. He exclaimed, said the witness, "You don't know how to toss coins, let me show you," at the same time taking hold of a coin and spinning it in the air. Whereupon the judge put this question to the witness, "Did the prisoner's hand shake?" to which the witness replied that it did not. That practically saved the prisoner's life; if the reply had been in the affirmative, it would probably have sealed his fate. The judge argued that it was highly improbable that a man could come fresh from such a violent deed as that and toss a coin in the air without his hand shaking. Opinions, however, will differ on this point.

150. **MULLINS' CASE.** (ARTHUR GRIFFITHS. *Mysteries of Police and Crime*. 1898. Vol. I, p. 23.)

. . . Criminals continually "give themselves away" by their own carelessness, their stupid, incautious behavior. It is almost an axiom in detection to watch the scene of a murder for the visit of the criminal, who seems almost irresistibly drawn thither. The same impulse attracts the French murderer to the Morgue, where his victim lies in full public view. This is so thoroughly understood in Paris that the police keep officers in plain clothes among the crowd which is always filing past the plate-glass windows

separating the public from the marble slopes on which the bodies are exposed. An Indian criminal's steps generally lead him homeward to his own village, on which the Indian police set a close watch when a man is much wanted. Numerous instances might be quoted in which offenders disclose their crime by ill-advised ostentation: the reckless display of much cash by those who were, seemingly, poverty-stricken just before; self-indulgent extravagance; throwing money about wastefully; not seldom

parading in the very clothes of their victims. A curious instance of the neglect of common precaution was that of Wainwright, the murderer of Harriet Lane, who left the corpus delicti, the damning proof of his guilt, to the prying curiosity of an outsider, while he went off in search of a cab.

One of the most remarkable instances of the want of reticence in a great criminal and his detection through his own foolishness occurred in the case of Mullins, the Stepney murderer, who betrayed himself to the police when they were really at fault, and their want of acuteness was the subject of much caustic criticism. The victim in this case was an aged woman of eccentric character and extremely parsimonious habits, who lived entirely alone, only admitting a woman to help her in the housework for an hour or two every day. . . . She was last seen on the evening of the 13th of August. When people came to see her on business on the 14th, 15th, and 16th, she made no response to their loud knockings, but her strange habits were well known; moreover, the neighborhood was so densely inhabited that it was thought impossible she could have been the victim of foul play. At last, on August 17th, a shoemaker, named Emm, whom she sometimes employed to collect rents at a distance, went to Mrs. Elmsley's lawyers and expressed his alarm at her non-appearance. The police were consulted, and decided to break into the house. Its owner was found lying dead on the floor in a lumber room at the top of the house. Life had been extinct for some days, and death had been caused by blows on the head with a heavy plasterer's hammer. The body lay in a pool of blood, which also splashed the walls, and a bloody footprint was impressed on the floor, pointing outwards from the room. There were no appearances of forcible entry to the house, and the con-

clusion was fair that whoever had done the deed had been admitted by Mrs. Elmsley in all good faith. . . . Yet the police made no useful deductions from these data.

While they were still at fault, a man, named Mullins, a plasterer by trade, who knew Mrs. Elmsley well and who had often worked for her, came forward voluntarily to throw some light on the mystery. A month had nearly elapsed since the murder, and during this long period Mullins' attention had been drawn to the man Emm and his suspicious conduct. Mullins had served in the Irish constabulary; his powers of observation had been quickened by this early training, and he soon saw that Emm had something to conceal. He had watched him, had frequently seen him leave his cottage and proceed stealthily to a neighboring brickfield, laden on each occasion with a parcel he did not bring back. Mullins, after giving this information quite unsought, led the police officers to the spot, and into a ruined outbuilding, where a strict search was made. Behind a stone slab they discovered a paper parcel containing articles which were at once identified as part of the murdered woman's property. Mullins next accompanied the police to Emm's house, and saw the supposed criminal arrested. But to his utter amazement the police turned on Mullins and also took him into custody. Something in his manner had aroused suspicion; and rightly, for eventually he was convicted and hanged for the crime.

Here Mullins had only himself to thank. Whatever the impulse—that strange restlessness that often affects the secret murderer, or the consuming fear that the scent was hot, and his guilt must be discovered unless he could shift suspicion—it is certain that but for his own act he would never have been arrested. It may be interesting to complete this case, and show how further suspicion settled around

Mullins. . . . The most conclusive evidence was the production of a plasterer's hammer, which was also found in Mullins' house. It was examined under the microscope, and proved to be stained with blood. . . . So far as Emm was concerned, he was able clearly to establish an alibi, while witnesses were produced who swore to having seen Mullins coming across Stepney Green at dawn on the day of the crime with bulging pockets stuffed full of something, and going home; he appeared much perturbed and trembled all over. Mullins was

found guilty without hesitation, and the judge expressed himself perfectly satisfied with the verdict. The case was much discussed in legal circles and in the Press, and all opinions were unanimously hostile to Mullins. The convict steadfastly denied his guilt to the last, but left a paper exonerating Emm. It is difficult to reconcile this with his denunciation of that innocent man, except on the grounds of his own guilty knowledge of the real murderer. In any case, it was he himself who first lifted the veil and stupidly brought justice down on himself.

**151. THE UNCLE'S CASE.** (Sir E. COKE. *Third Institute*, c. 104, p. 232.)

In the county of Warwick, there were two brethren; the one having issue a daughter, and being seized of lands in fee, devised the government of his daughter and his lands until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, etc., and she was about eight or nine years of age; her uncle for some offense correcting her, she was heard to say, "Oh! good uncle, kill me not!" After which time the child, after much inquiry, could not be heard of, whereupon the uncle, being suspected of the murder of her, the rather for that he was her next heir, was upon examination, anno 8 Jac. Regis, committed to the jail for suspicion of murder; and was admonished by the justices of assize to find out the child, and thereupon bailed him until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, took another child as like unto her both in person and years as he

could find, and appareled her like unto the true child, and brought her to the next assizes; but upon view and examination she was found not to be the true child; and upon these presumptions he was indicted and found guilty, had judgment, and was hanged. But the truth of the case was, that the child, being beaten overnight, the next morning, when she should go to school, ran away into the next county; and being well educated was received and entertained of a stranger; and when she was sixteen years old, at which time she should come to her land, she came to demand it, and was directly proved to be the true child.

Which case we have reported for a double caveat; first, to judges, that they in case of life judge not too hastily upon bare presumption, and, secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he, offending God (the author of truth), overthrow himself as the uncle did.

**152. GEORGE RAUSCHMAIER'S CASE.** (ANSELM VON FEUERBACH. *Remarkable German Criminal Trials*. 1846. transl. Gordon, p. 291.)

[In Augsburg, April 20, 1820, Maria Holzmann, a charwoman, aged 55, disappeared from her home.

She lived on the upper floor, and sublet a room below to George Rauschmaier and Joseph Steiner.

Her body was afterwards found in the loft. Rauschmaier and Steiner were arrested. Rauschmaier afterwards confessed. Meanwhile Steiner denied his own guilt, but sought to turn suspicion on Rauschmaier.]

On his first regular examination of the 2d of January, 1821, he asserted not only his own innocence, but also his ignorance of the cause of Holzmänn's disappearance. . . . He was examined on the 15th of January, merely with regard to his family and to his means of subsistence, when he began suddenly and of his own accord, a long, rambling narrative to the following effect:

That he returned home about ten or eleven at night on Good Friday, and went to wish his landlady good night, as was his usual custom; but not finding her in bed, he thought that she would not return that night, and thereupon got into her bed himself. During the night he heard a heavy fall overhead, and a noise as if something was being dragged backwards and forwards. On the Saturday he came home about ten at night: his comrade opened the door to him, and would not allow him to enter his landlady's room, but lighted him at once to his own. He had scarcely lain down when something dropped from the ceiling upon his nose, and when he turned in bed, upon his back. In the morning he found that this was blood. He called Rauschmaier's attention to this, who answered that he could not account for it, but that it was of no consequence. At first he thought nothing of it; but, on seeing Holzmänn's remains in the churchyard, the thought struck him that she must have been murdered by Rauschmaier. He himself had never harmed her. . . .

On the 4th of February he requested another audience. . . . He now modified his former statement; it was not on Friday, but on Saturday, that he had slept in Holzmänn's bed, and the blood had

dropped upon his nose on the Thursday night, not on Good Friday. He had said to Rauschmaier, early on Friday, "Surely, in God's name, you have not murdered our landlady?" whereupon Rauschmaier threatened to kill him if he said a word about the blood or their landlady. He then showed him a thick knotted club, saying, "I will strike you dead with this if you say a word of the matter!" . . . He then proceeded, after some interruption, "It now strikes me that the blood must have been wiped up on Easter Sunday with my shirt, which I found in a corner soaked with blood. No doubt my comrade did this on purpose to throw the suspicion on me." . . . He further added, that a week after Easter he was with Rauschmaier at a tavern, and when they were alone his comrade offered him a silver ring and a pair of earrings, to say nothing about the blood or their landlady; but he would take nothing from him.

Steiner's statement had every appearance of truth, and agreed in the main with what was already known: and so long as Rauschmaier withheld his confession it appeared of the utmost importance. But when the latter was asked, after making a full confession, whether any one was privy to the murder which he had committed, he answered, "No human being; I resolved upon and committed the murder alone, exactly as I have already confessed it, because I trusted no one; if, perchance, Joseph Steiner or Elizabeth Ditscher are suspected, I hereby attest their innocence; nor do I believe that Steiner saw anything, at any rate he never gave me to understand that he suspected me." In the following examination when he was told that Steiner asserted that he had discovered traces of the murder, and that he had taken Rauschmaier to task about it, the latter replied, "It is a thorough lie; he never said a word to me of the matter." . . .

At Steiner's third examination the discrepancy between his statement and Rauschmaier's repentant confession was fully explained. The judge called Steiner's attention to some marked contradiction, whereupon he exclaimed, "I am an ass, and have said a great deal that is not true. I must beg pardon for having lied so much. I thought to myself that, perhaps, my comrade murdered the woman, and that I was suspected, although I am innocent; I therefore said whatever came into my head to strengthen the suspicion against Rauschmaier, and to convince you of my own innocence. All that I have said about the blood dropping upon my nose, and my shirt, about the noise of one falling and being dragged over head, and about my observations to Rauschmaier, his threatening words, promises, and so forth, are mere inventions. I neither saw nor heard anything; but I suspected that

Holzmann had been murdered by Rauschmaier. I then considered how it must all have been done, and told it accordingly. I wonder how it all came into my head; I should soon have believed the story myself. Forgive my stupidity. I am a mere ass. Only think how stupid! I now begin to see what trouble I have got myself into by my lies; but I hope I shall not suffer for them, as I did not harm the old woman. I thought I was doing the court a pleasure by saying what I fancied about Rauschmaier, for I still believe him to be guilty." . . .

On the 9th of May, 1822, Rauschmaier was found guilty of murder, and condemned to death by the sword, with previous exposure for half an hour in the pillory. Steiner was acquitted, and Elizabeth Ditscher was condemned to an eight days' imprisonment for receiving stolen goods.

**153. ROBERT HAWKINS' CASE.** (G. L. CRAIK. *English Causes Célèbres*. 1844. p. 146.)

[The accused, a clergyman, was charged in 1668 with robbery from one Larimore. The facts are more fully stated *post*, No. 335. The charge was said by the defendant to be due to a long-standing spite of Larimore, and to his plot to ruin the accused. But one of the circumstances against the accused was that he had refused to let his house be searched for the robbed goods.]

*L. C. B. HALE.*—Sir, but if you were innocent of this robbery, why did you refuse to open your doors, or to have your house searched?

*Hawk.*—My Lord, I had several reasons that moved me so to do. 1. In general, most of those persons that were present were my inveterate enemies, and several of them had threatened to ruin me and my family; and therefore I had reason to suspect that they came to injure me, either in my profession or goods. For the first, Sir John Croke and

Larimore had often threatened to pull down my house, and for that end had hired several persons to make a forcible entry upon it; and, particularly they had lately hired Jaires, the son of Leonard Styres, of Thame, in the country of Oxon, by a ladder to climb up, and run down my chimney, and open my doors, when we were all abroad. And about the same time they also contracted with one Christopher Tyler, of Chilton, for the same purpose. And—2. I feared the seizing of my goods by the said persons, because they had then a writ of *Levari* (or execution) to seize them, which Larimore's son had a few days before in part executed, and he was then present. And if these reasons are not sufficient, I have more to justify my act in refusing to have them search my house. . . .

*L. C. B.*—Mr. Hawkins, can you prove what you have said? *Hawk.*

—Yes, my Lord. Which particular shall I prove?

*L. C. B.* — Prove that about the ladder, if you can. *Hawk.* — I pray, my Lord, call *John Acreman*. He, being called, did fully justify what was said concerning their intended forcible entry, and added further, that he did help to set up the ladder for that purpose, being called by Sir John Croke's own sons, they and

Larimore standing by all that time to watch.

*Hawk.* — And touching the second particular, concerning the seizing of my goods, Mr. Sheriff himself can justify, that they had then in their hands such a writ. . . .

My Lord Chief Baron *HALE* hearing these reasons fully proved, commended *Hawkins'* discretion in not opening his doors.

154. **DONELLAN'S CASE.** (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 114.)

Perhaps in no case have circumstances of this kind told with such fatal effect as in the case of *Donellan* [stated more fully, *post*, No. 379], who was convicted of the murder of Sir *Theodosius Boughton* by poison. The prisoner, after having [supposedly] administered the fatal draft in the form of medicine, rinsed out the vial which had contained it, and when that fact was stated before the coroner, he was observed to check the witness by pulling her sleeve. In his charge to the jury, Mr. Justice *BULLER* laid great stress upon that circumstance. "Was there anything so likely," said the learned judge, "to lead to a discovery as the remains, however small they might have been, of medicine in the bottle? But that is destroyed by the prisoner. In the moment he is doing it, he is found fault with. What does he do next? He takes the second bottle, puts water into that, and rinses it also. He is checked by Lady *Boughton*, and asked what he meant by it — why he meddled with the bottles. His answer is, he did it to taste it; but did he taste the first bottle? Lady *Boughton* swears he did not. The next thing he does, is to get all the things sent out of the room; for when the servant comes up, he orders her to take away the bottles, the basin, and the dirty things. He puts the bottles into her hand, and she was going to carry them away, but Lady *Bough-*

ton stopped her. Why were all these things to be removed? Why was it necessary for the prisoner, who was fully advertised of the consequence by Lady *Boughton*, to insist upon having everything removed? Why should he be so solicitous to remove everything that might lead to a discovery?" After dealing with the prisoner's conduct in other matters, the learned judge continued: "Then as to the conduct of the prisoner before the coroner. Lady *Boughton* had mentioned the circumstance of the prisoner's rinsing out the bottle — one of the coroner's jury swears that he saw him pull her by the sleeve. Why did he do that? If he was innocent, would it not be his wish and anxious desire, as he expresses in his letter, that all possible inquiry should be made? What passes afterwards? When they got home, the prisoner tells his wife that Lady *Boughton* had given this evidence unnecessarily; that she was not obliged to say anything but in answer to questions that were put to her, and that the question about rinsing out the bottles was not asked her. Did the prisoner mean that she should suppress the truth? that she should endeavor to avoid a discovery as much as she could by barely saying Yes or No to the questions that were asked her, and not disclose the whole truth? If he was innocent, how could the truth affect him? but at that time



the circumstance of rinsing out the bottles appeared even to him to be so decisive that he stopped her on the instant, and blamed her afterwards for having mentioned it.

All these," said the learned judge, "are very strong facts to show what was passing in the prisoner's own mind."

155. **ROBERT WOOD'S CASE.** (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 121.)

... The most sensational trial that has taken place in this country for many years was that of Robert Wood, a young artist, in 1907, on the charge of murdering a woman. The story of the crime itself is a particularly sordid one, but the behavior of the prisoner in court, and the excited state of public feeling on the subject gave a profound psychological interest to the trial. A woman had been found brutally murdered in her lodgings in a small house in Camden Town, and no trace could be found of the murderer. In the fire grate, however, had been found some charred fragments of a letter, while in the chest of drawers a postcard that had escaped notice had been discovered. A reproduction of this postcard was posted up at the police stations and published in the papers, and was soon recognized by several people as being in the handwriting of Robert Wood.

In the meantime, Wood, finding that suspicion was likely to attach to him, persuaded a girl of his acquaintance, named Ruby Young, to promise to support his statement that he had been with her upon the evening when the murder took place. A day or two later Ruby Young became uneasy as to the effect her promise was likely to produce, and asked the advice of a journalist as to what would be the best thing to do, putting the case as a hypothetical one. The man, however, at once saw to what she alluded, and immediately telephoned to the police, and this led to the arrest of Robert Wood.

At the police court proceedings an expert opinion was given that

the fragments of charred paper found in the grate of the dead woman were in the handwriting of Wood, and evidence was also given by the present writer that the pigment in which the characters were written was identical with that of a marking-ink pencil found upon the prisoner. For a long time Wood denied that he had had anything to do with these fragments. Subsequently, at the beginning of the trial at the Old Bailey, he admitted that he had written them, though to the end he strenuously refused to admit that the words had the meaning which they appeared to suggest. He denied that they referred to any appointment made with the dead woman for the day upon which she was murdered. The proof of the fact that these bits of charred paper had really been written by Wood brought him very close to the scene of the crime, and his attempt to create a false alibi and to get Ruby Young to bear this out still further strengthened the suspicion against him. The most telling evidence, however, was the statement of a carman, who had, he asserted, seen a man leave the house of the murdered woman at five o'clock in the morning. He had not seen the face of the man, but had noticed that he had a characteristic swinging walk, and when taken to the police station had identified the prisoner among a number of other men, who had been made to walk round the yard, as the man that he had seen coming down the steps of the house. Other evidence was given as to Wood's having been seen in the company of the deceased woman on several occasions in the past, although he

asserted that he had only known her a few days and had seen her only once or twice. The bad reputation of most of these witnesses detracted from the value of their evidence. Mr. Marshall Hall, who conducted Wood's defense, made a very brilliant speech, in which he laid stress upon the weak points in the case for the prosecution — the evidence that had been gathered from a tainted source, the complete absence of any motive for the crime, and the fact that the jury were trying the prisoner for murder and not for immorality or lying. He urged that the keynote in this case was that Wood, who had a great deal of vanity, could not take upon himself the responsibility of admitting what would cause him to occupy a lower position in the estimation of those who had given him their undivided respect and affection. . . .

The chief evidence called for the defense was that of Wood's father and brother, who stated that he was at home on the night of the murder, and that of a neighbor who had lived beneath them, who had seen Wood come home that evening. A ticket collector named Westcott, employed at King's Cross station, stated that he lived in the same road, and that on the early morning, when Wood was stated to have been seen, he left his house at five minutes to five. He was then wearing a loose overcoat. Westcott was a broad-shouldered man, and a boxer, and had a brisk swinging walk. It was this man, it was suggested, whom McGowan had mistaken for Wood. Wood, himself, was put into the box and gave his evidence in a low, and at times, nearly inaudible voice, though he showed not a sign of nervousness. He gave emphatic denials to the questions put to him in cross-examination by Sir Charles Matthews, but he admitted having lied in the matter of the false alibi that he had attempted to set up. He was, he said, in a tight corner, and any man would have done the

same if placed in the same conditions. With reference to the fragments of paper on which were words in his handwriting he denied that they were part of a letter, and suggested that it might have been some scrap of writing taken from his pocket by the dead woman. The theory of its referring to an assignation was, he suggested, an act of imagination on the part of the prosecuting counsel.

The judge, Sir William GRANTHAM, in summing up the case, pointed out that had it not been for the conduct of Wood himself in telling lies and keeping back what he knew, there would have been no justification for such a lengthy trial. The evidence of McGowan was, he said, open to a certain amount of doubt owing to the fact that the witness had not mentioned at once about having noticed a peculiarity in the walk of the man he saw leaving the house in St. Paul's Road, just before five o'clock on the morning of September 12th. . . .

It was a quarter to eight in the evening when the jury retired to consider their verdict, and before eight had struck they were back again in court, and had pronounced their verdict of "Not guilty." Cheer on cheer swept through the court, and for some minutes it was impossible for the judge and the court officers to obtain silence. Men and women thronged round the dock eager to grasp the hand which Robert Wood held out to them over the rail. Outside, in the street, the dense mob that thronged up to the very doors of the court, took up the cry, and yelled itself hoarse with the words "Not guilty. Not guilty." . . . Robert Wood had become the popular hero of the hour. It is difficult how to account for this hero-worship of a man who had done nothing to justify such worship, except upon the theory of an emotional infection that had destroyed the balance of collective judgment.

## TITLE V. THE DATUM SOLVENDUM

156. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)

In the foregoing outline of the classes of Probanda and the principal kinds of circumstantial inference usable to prove each kind, it has been assumed that the Probandum is a simple and known fact. But in practice neither of these assumptions is usually correct. The Probandum may be more or less *complex*, and it may be more or less *disputed*. What is the effect of these two features on the reasoning process in dealing with the evidential circumstances?

*A. Probandum Complex.* When the Probandum is complex, each item of complexity affects the range of evidential facts, and the force of the inferences, by fixing some detail of the Probandum to which the proof must be directed. Take the simple fact of a murder on Jan. 21. When a particular person is charged as the doer, we may argue that the accused was near the place at the time when the death occurred; that he was seen running away soon afterwards; and that he has a bad character for robbery by violence. These are generic evidences suitable for any murder in general. But if the further details are given, that the deceased was killed by poison which must have been taken twelve hours before, on Jan. 20, and that a large sum of money was found untouched on his person, the Probandum now becomes: an act of giving poison on Jan. 20, and no motive of taking the deceased's money. Thus the direction of the proof is substantially changed, and with it the relevant evidence. Presence on Jan. 21, and the motive of robbery, do not now point to this killing. The added details thus are essential to know in estimating the proof. Take again the case of a robbery of a bank vault. If the article missing is a roll of money, the kinds of evidence pointing to a particular person will be of one sort; but if the article missing is a contract needed for closing an investment at the next director's meeting, the evidence would be quite different; and if it were a bundle of non-negotiable securities essential for showing a correct balance to the bank examiner at his next visit, the proof must be given a still different direction.

In another aspect, Complexity of detail is important. It may, and usually does, involve more than one of the foregoing classes of Probanda, — External Event, Identity, Human Quality, and Human Act. A Probandum involving only one of these is indeed the unusual feature. Hence, the Probandum must be analyzed into its components, so that the various evidential facts can be grouped so as to exhibit their respective indications. In a murder charge (for example, Courvoisier's), where the one question is whether the murderer was an inmate of the house, or an intruder, and a

back door is found with breaks and marks, the cause of these breaks and marks depends on their physical features, *i.e.* it is a fact of External Nature. So in a railroad accident, a part of the issue may be whether a broken rail or a misplaced switch was its cause; this is a fact of External Nature; but along with it may thus be involved the issue, Who turned the switch; and here a Human Act and its appropriate evidences become a subject of proof.

Every Probandum, then, may be complex; and the details of its complexity will affect the probative use that may be made of facts offered as evidence.

*B. Probandum Disputed.* When the Probandum is disputed, the probative effect of specific evidential facts cannot be surely known until the Probandum is settled. Hence, to this extent, its effect is only hypothetical in the meantime. The Probandum sometimes is disputed, sometimes not, in practice. For example: A tree on a suburban lawn is cut down; if this is undisputed, the only issue is, Did X cut it down? But, instead, suppose that it is disputed whether a tree was cut down at all; we may be able to prove that there was a tree there yesterday and that there is only a deep hole there to-day, and we may not prove that a tree was cut down at all; thus the issue whether X cut it down is never reached. Or suppose that the X Co. is charged with the loss of a bag of valuables left in a railroad car; whether an intruder or an employee took it, is here the issue. But perhaps it is disputed whether there was ever any bag there to be taken; here arises a prior issue, and the other issue may never really arise. Or, again, on a charge of the murder of M, M's body is found; and the only issue is, Did X kill him? But perhaps the death of M is itself disputed; we may proceed to show that M was last alive seen in his office on Saturday afternoon; that he did not come home that night, and that a body was found in the river two weeks later. If this is not enough to prove the death, then no issue as to X's causing it can arise. This feature, in criminal cases, leads to the well-known maxim that the "*corpus delicti*" must first be clearly proved.

Thus, the Probandum may be in dispute; and this dispute may itself involve a separate mass of proof directed to an External Event, a Human Act, etc.

Furthermore, a dispute as to a detail in a complex Probandum may leave the whole direction of proof of the Act in a hypothetical condition until the detail be regarded as settled. For example, if a homicide is committed, a detail of the Probandum may be that a pocketbook full of money was missing from the deceased's person. Suppose this is disputed; then the Probandum becomes, not a homicide for money, but a homicide for some other motive; and thus the direction of the whole line of motive evidence remains in suspense until this detail be regarded as settled. Again, in the Holt Will Case (*post*, No. 390), the supposed will arrived by mail in the hands of the registrar of probate, and was a document partly burned and bearing the attesting signatures of General Grant and General Sherman. One hypothesis was that the document was not genuine; the other was that it was a genuine document revoked by the testator. But these hypotheses were inconsistent, and obviously affected in essential ways the probative bearing of various evidential facts. Again, in the Kent Case (*ante*, No. 111), if it could have been determined whether a deceased was

killed by choking, or by cutting the throat with a razor, the direction of proof as to the doer would have been materially affected.

Thus, in the common case where the doing of a Human Act is to be the main issue, the fixing of the Probandum and its details becomes a preliminary and independent process of great importance. This may be termed the process of *fixing the datum solvendum*.

The canon which rests on the feature of *Complexity* may be thus phrased :

(A) *Determine, classify, and state with precision, as many details as possible of the Datum Solvendum.*

The canon which rests on the feature of *Disputability* may be thus phrased :

(B) *Distinguish the (practically) disputable and indisputable details of the Datum Solvendum; treat as hypothetical all lines of proof of the Act which are dependent on the former; and for each disputable detail trace beforehand the effect of either settlement of it upon the lines of proof.*

Ordinarily, to be sure, the importance of thus giving explicit statement to the Datum Solvendum ends with the process of the detection of the doer and the preparation of the evidence. By the time a case is presented before the jury, all of the details of the Datum have taken a fixed shape, and all of the evidence is marshaled with a view to that precise shape. *E.g.* whether the deceased was a man or a woman would doubtless be important in searching for clues to the murderer, and in collating the evidence; but by the time the case is presented, the prosecution will have made up its mind which is the fact; and if that fact be that the deceased was a woman, then all the evidence *pro* and *con* will be directed to the issue, Did the deft kill this woman? Thus, the labor devoted to the settlement of this detail will have been spent before the issue is joined; the course of the evidence will already have been settled; and the deliberations of the tribunal will not be affected by any uncertainty of the Datum Solvendum.

But from time to time cases are presented in which both the complexity and the uncertainty of the Datum Solvendum remain after the evidence has been prepared. It is presented, in part, therefore, hypothetically. Thus the tribunal must use caution in separating the detailed issues and in noting the uncertainty of some part of the probandum. In Thornton's Case (*post*, No. 162), for example, the uncertainty of the place and time of death made all the difference in the effect of the alibi evidence. In *Hatchett v. Com.* (*post*, No. 378) the fact that the deceased had died from poison or from colic was open to argument. In such cases, therefore, the Datum Solvendum and its details remain for the consideration of the tribunal during the course of the evidence; and the tribunal's ultimate application of the evidence cannot be made until it has reached a conclusion as to the Datum Solvendum.

The following cases (Nos. 159-162) serve to illustrate the importance of an accurate fixing of the Datum Solvendum.

157. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence.* (1868. pp. 253, 583.) In the application of circumstantial evidence to the judicial investigation of the truth of criminal charges, the principal or central fact just spoken of is the crime supposed and charged to have been committed. The proof of the general fact of a crime committed, or "*corpus delicti*" (as it is technically termed), is sometimes a short and simple process ;

the circumstances being few, but cogent in their indications, and the conclusion sought, manifest and irresistible. A cry of distress is heard from a building or apartment, followed, successively, by sounds as of a mortal struggle and a heavy fall. The place is entered as quickly as possible, and a person is found extended on the floor, dying from mortal wounds visibly inflicted with a sharp instrument, in such a part of the body, or in such numbers or directions, as to forbid the supposition of suicide, and the instrument itself is nowhere to be found. . . .

Supposing it proved, and returning to the general view just taken, of minor facts in their relative position as surrounding a principal fact, the process of *aggregating* these elementary circumstances into a body of evidence may be most conveniently illustrated by beginning with a single circumstance, and adding to it another; and so proceeding gradually by a succession of additions.

The original basis of all the investigation which is undertaken, is the case or transaction, *as it actually occurred*; composed, in addition to the principal act of the crime itself, of a variety of circumstances, — precedent, concomitant, and subsequent, — of physical facts, psychological facts, and facts of conduct, — all consistent with each other, and all connected with each other and with the criminal act, in a certain order and relation. This is the case or transaction, in its *absolute* form of reality and truth. But this transaction, having had only a transient existence, has passed away. . . . As a whole, in its full character and extent, and in the true relation of all its parts, it was unknown to any human being besides the perpetrator (supposing it the work of a single agent), and none but he can fully represent it in a narrative of the past. It has, however, left traces, more or less numerous, consisting of physical objects and appearances (some still existing in specie) and contemporaneous impressions made on the senses and memories of individual observers. The great object of all investigation is to collect these scattered remnants and vestiges of action; to examine and compare them; to adjust them to each other, by means of indications which they themselves immediately furnish, as well as by the aid of general principles of presumptive reasoning; to ascertain, as it were, their original places and positions; and, by this means, to *reconstruct* the case, as far as possible, out of them; to *recall* it from the past, and to present it as a subject for consideration, in a state of as close approximation to the form of its original occurrence as may be practicable. The more adequately this is done, the more easy does the process of investigation become, and the more accurate are the conclusions ultimately reached by it.

The following list of items illustrates the kinds of detail there to be sought in *Physical Facts or Circumstances*:

1. The *subject* of the offense. As, in murder, the person killed, or mortally injured, or the remains of such person: in arson, the building burned, or its remains: in rape and robbery, the person assaulted or violated: in robbery and larceny, the thing stolen: in burglary, the building broken into: in forgery, the money or instrument fabricated: and the like.

2. The *appearances* of such subject. As, in murder, the position of the body, as left by the criminal, or as concealed by burial, immersion in water, or otherwise; wounds and marks of violence visible upon it; the position, direction, and number of the wounds, and their particular appearances;

foreign substances, attached or adhering to the body; marks of violence visible upon the dress; mutilation, dismemberment, and destruction of the body, or portions of it; outward appearances indicative of poison; detection of poison in the body: in rape and robbery, marks of violence, stains of blood upon the person or clothing: in arson, the appearances of a fire kindled by design: in burglary and robbery, marks of violence upon windows, doors, walls, and the like.

3. The *instruments* of the offense. As, in murder, the weapon or instrument of death, — the gun, pistol, knife, dagger, razor, hatchet, axe, club, or stone; the poison and its vehicle; the cord or handkerchief for strangulation; the explosive machine: in rape and robbery, the stupefying liquor or drug: in arson, the combustibles, matches, lights, and inflammable substances: in burglary, the keys, picks, crows, saws, chisels, and other burglars' tools: in forgery and counterfeiting, the dies, presses, coining tools, chemical agents, and the like.

4. The *appearances* of such instruments: such as signs of a firearm having been recently discharged; stains of blood upon a knife, sword, or hatchet; curvature of a sword blade; indentations or fractures of a club; fragments of an exploded machine; combustible substances strewn about and saturated with an inflammable liquid.

5. The *place* of the offense, or scene of the crime: as the building, yard, street, road, field, thicket or wood, vehicle or ship, where the victim of the murderous or violent assault is found, or to which he or she is decoyed or forcibly carried; the chamber where the poison is administered, or into which the explosive machine is conveyed; the apartment where the coin is counterfeited; and the like.

6. The *place* of the offense, considered as the instrument or *means* of its commission: as the pond, pit, well, or stream where the body is drowned; the rock or precipice over which it has been pushed or thrown; and the like.

7. The *appearances* of the place or scene of the crime, or of neighboring bodies or places. As, in murder, the bloody floor, bed, chair, path, or road; spots or stains of blood on the walls, doors, etc., of a house; or on well curbs, gates, stiles, or fences; or on trees, grass, snow, or the ground itself; especially when concealed or attempted to be concealed from view; marks of instruments of violence, as indentations, discolorations, or perforations made by a ball from a firearm, or the stroke of a heavy implement; marks made by the explosion of a machine; marks of struggles, or resistance to violence; marks of footsteps at the place, or leading to or from it; marks or impressions of certain parts of the offender's body, as of the knee, or hand, bloody finger marks, etc.; marks made by dragging a body into a place of concealment; lights burning on premises at unusual hours; lights suddenly extinguished. In arson, traces of smoke or flame. In burglary, marks of burglars' instruments, and the like.

8. *Sounds* heard at the scene of crime, or in its vicinity: such as cries of distress; reports of firearms; sounds of an explosion, of bodies falling, of footsteps, of a scuffle, and of voices; alarms given by animals; the sound of wheels, or sleigh bells, or of the trampling of a horse; noises made by bursting in a door; sounds heard from locked-up premises, such as the clashing of steel, the shivering of glass, the moving of articles about, the tearing

of cloths, the rubbing of a floor, the running of water, the sawing of boards, hammering, and the like; total silence immediately following unusual or alarming sounds.

9. *Smells* of smoke or burning substances; the odor of poisonous substances; the odor of inflammable liquids prepared for arson and the like.

10. Impressions on the sense of *touch*: as the heat of a wall, indicating an unusual fire; the heat or coldness of ashes in a stove; and the like.

11. Impressions on the sense of *taste*: as of a poison to which the tongue is applied; of a garment saturated with salt water; and the like.

12. *Detached bodies* found at the scene of crime, or in its vicinity: as articles of dress, or portions of them; patches for the charge of a rifle; a ball extracted from the woodwork of a house, or found at the foot of a tree; the ramrod of a pistol; grains of wheat scattered about; and the like.

13. Symptoms of *poison*: as contortions of the body, spasms, vomiting, swelling, discoloration, complaint of burning and pricking sensations.

14. *Peculiarities* about the person of the *accused*: such as wounds, scratches, bruises; stains of blood upon the person or clothing; rents, incisions, and other injuries to clothing; disorder or wetness of the dress; stains of earth, or other substances; natural marks, such as the want of an eye, finger, or front tooth; the being left handed, or carrying the head on one side; peculiarities of size, shape, gait, and voice; appearances as of something concealed under the dress; and the like.

15. Peculiarities about *objects* in the possession of the accused: as the sweating and smoking of a horse in his stable, horsehair and lint adhering to a newly discharged rifle.

16. *Materials* of the subject-matter of the offense, or capable of being converted into instruments of the offense, including the means of their production. As, in murder, lead for casting bullets, bullet molds, leaves from which a poison could be distilled, utensils for distilling; in arson, materials for making inflammable substances; in forgery and counterfeiting, metal for coining, bank-note paper, bank-note plates engraved, or in process of being engraved, metallic or paper money in process of being fabricated; and the like.

17. *Receptacles* inclosing or having inclosed the subject, the instrument, or the fruits of the offense. As, in murder, the clothes of the person killed; the box or chest in which the body or its remains are concealed; the box for holding an explosive machine; the drawer, case, or trunk, in which pistols are found, or have been kept; vials or papers containing or having contained poison; in arson, the box or case for holding combustibles or secreting a candle; barrels containing inflammable liquids; in larceny or robbery, the closet, drawer, trunk, package, or case, containing or having contained the articles stolen; the floor or wall beneath or behind which they have been concealed; and the like.

158. HANS GROSS. *Criminal Investigation*. (transl. J. and J. C. Adam. 1907. p. 127.) . . . The investigator, however inexperienced, will commit no grave mistake if he always remembers the old and precious maxim of the jurist,



Quis, quid, ubi, quibus auxiliis, cur, quomodo, quando?

Who, what, where, with what, why, how, when?

"What was the crime, who did it, when was it done, and where,  
How done, and with what motive, who in the deed did share?"

If these words be always kept prominently before one in one's office, they will be impressed on the memory and imagination, and prevent many a grave mistake. . . .

The extent of the description in the first place naturally depends on the nature of the crime. In all cases (we are not dealing with accidents) the following must be described:

1. The place itself; 2. The direction from which the guilty person came; 3. That in which he went away; 4. The spots whence the witnesses have seen, or could have seen, anything; 5. All points where traces of the crime are to be found or where they might have been expected to be found, but where in fact there are none.

The notification of even purely negative facts should not be neglected, for on the one hand they may lead to positive inferences and on the other reassure the reader and show him that they were not forgotten altogether. Suppose, *e.g.*, traces of blood are mentioned as having been found in the room of a murdered man; it is not sufficient merely to enumerate these, but what has not been found must also be stated, as *e.g.* that there was no bloody water in the wash-hand basin nor any imprints of blood-stained fingers — or hands; or if the report concerns a search for compromising papers which has been without result, it must be expressly stated that no ashes of burnt paper were to be found in the fireplace. The special circumstances attaching to each particular crime must of course be set out, *e.g.* in cases of arson the objects more especially exposed to danger or anything that may have assisted or impeded the wind — in riots, places from which weapons have been taken (such as a fence, pile of wood, thatched roof of a hut, etc.). After the general sketch, the actual place of occurrence must be described in detail, as *e.g.* in cases of murder the room containing the body of the victim, in cases of burglary the place where the house was broken into, or in arson the place where the fire first started. . . .

In doing this the Investigating Officer must proceed step by step examining minutely at the same time its description as written down. A piece of cloth, for instance, lying on the ground will be primarily described according to the impression it produced when first observed, as *e.g.* "Quite near the corpse, an inch from the left hand, a red cloth rolled up in a ball, apparently of cotton and about the size of a pocket handkerchief, one corner sticking out, lying on the ground in the direction of the head of the body. On picking up this piece of cloth it is found not to be cotton, but half silk. It is a three-cornered scarf with hemmed borders and each side 17 inches (43 cm.) in length. It is unmarked, and has a hole in the middle about the size of a pie-piece probably due to use. Under the scarf is no trace of blood or anything remarkable. It is not identified by any one present (naming those present, A, B, C, etc.); it probably therefore did not belong to the murdered person." He then passes on to all the important details that may serve to throw light on the case, footprints, marks caused by firearms or tools, impressions of all kinds, in short everything which may

have been produced by the guilty person, and everything which may have been articles left behind by him. . . .

It is impossible to notice everything which may subsequently turn out to be of importance, even though folio volumes be written; for there are always certain details which will be passed over owing to the difficulty of foreseeing their value. In one case it turned out to be of great significance to know whether the sun shone into a certain part of the room at a certain hour of the day, and for this purpose the locality had to be specially revisited, though very far distant from the place where the court was sitting. In another case everything depended upon whether any sand was strewn about on the floor of the room, a point that no one had thought it worth while to observe. . . . The old axiom of the Civil Law "*De minimis non curat lex*" does not hold good for the Investigating Officer. Only too often he must seek the strongest proof in the smallest details. Every one has seen, every one has read in thousands of criminal tragedies, cases where some trifle has become the pivot upon which the whole case turned; and yet the capital fault in inspecting localities very often consists in the neglect of small details, the importance of which would have been apparent if a proper and sustained attention had been brought to bear upon them. The following cases are cited from the author's own experience. On one occasion everything rested on whether or not at the hour of the crime the latch of the door was oiled or made a noise; on another, whether a half-burnt cigar was in an ash tray or beside it; again, whether there was a spider's web near a nail in the wall; on another, whether there was still some kerosene in a lamp (*i.e.* whether it had been extinguished or had burnt itself out). In a murder case the assailant would certainly have gone undiscovered if the Investigating Officer had not thought of examining the top of a wooden partition about eight feet in height and not reaching to the ceiling. He saw that the top of the partition was covered with a thick coating of dust save in one place where the dust had been displaced, and naturally concluded that a man must have quite recently climbed over the partition at the spot. He made a search and discovered the accused among people living in the room separated from the scene of the crime by the partition in question.

**159. CHRISTOPHER RUPPRECHT'S CASE.** (ANSELM VON FEUERBACH. *Remarkable German Criminal Trials.* transl. Gordon. 1846. p. 112.)

In the year 1817 there lived in the town of M—— a goldsmith of the name of Christopher Rupprecht. He was between the ages of sixty and sixty-five, and in easy circumstances. He had been twelve years a widower, and had but one child living, a daughter, married to a furrier named Bieringer, a brother and two sisters. Rupprecht could neither read nor write and therefore kept no account either of his

trade or of the money he lent out at interest, but trusted entirely to his memory and to the assistance he occasionally received from others in arranging and drawing up his bills. He was a man of vulgar mind and coarse habits, fond of associating with people of the very lowest class, and of frequenting alehouses, where his chief delight was in slang and abuse, and where he suffered himself to be made the butt of the

roughest jokes and the most vulgar witticisms. His ruling passion was avarice and his favorite business the lending money at usurious interest. . . . For about a year he had been in the daily habit of frequenting a small beer shop, commonly called the Hell. . . . The party assembled there consisted of eleven respectable burghers, who sat talking and drinking together till about half past ten, when Rupprecht called for another glass of beer, and the host left the upper parlor where his guests were assembled, and went down into the tap to fetch it. As he was going upstairs with the beer, and had almost reached the top, he heard the bell over the street door, and on asking what was wanted, he was answered in a strange voice by the inquiry whether Mr. Rupprecht was there. Without looking round, the host answered that he was, and the stranger requested him to desire Rupprecht to step down to him for a moment. The host delivered the message to his guest, who instantly rose and left the room. Scarcely a minute had elapsed, when the other guests were alarmed by hearing loud groans like those of a person in a fit of apoplexy. They all hastened downstairs, and found Rupprecht lying just within the door, covered with blood which was pouring out of a large wound on his head. About a foot and a half from his body lay his cap, cut evidently by a sharp instrument. . . . The physician and surgeon attached to the Criminal Court was sent for, and found a wound four inches long, which had penetrated the skull. . . .

The Hell Tavern stands in the end of a narrow dark alley, from which there is no outlet. The side on which is the door forms an angle with the opposite house, so deep that no light falls into it by night. Two stone steps lead up to the house door, of which only one wing opens, and is provided with a bell. Outside the door, on the left of these

steps, is a stone bench. The hall within is small, narrow, and a little more than six feet high; the wound could not therefore have been inflicted upon Rupprecht in the hall, as space and height were required to give force to the blow. It would moreover have been madness to attempt the deed in a passage which was lighted by an oil lamp, which, though dim, would have enabled the victim or a passer-by to recognize the murderer. In the hall, too, Rupprecht coming down the stairs would have met his enemy face to face, and must have seen him prepare for the attack, from which he might easily have escaped by running to the rooms above. Supposing the wound — which slanted downward, and had evidently been inflicted from behind — to have been given during Rupprecht's flight up the stairs, those who ran down on hearing his screams would have found the wounded man on the staircase, or at any rate close to the foot of it. But he was found just within the house door after being wounded in endeavoring to escape up the stairs. Again, the wound was on the left side of the head, and the dark corner we have before mentioned is on the left hand of any one leaving the tavern. The probability therefore is that Rupprecht received the wound on the very doorstep. In this case he had but to totter one step back to fall on the spot where he was found. . . . It would have been scarcely possible for one in Rupprecht's condition to retain sufficient strength to crawl up the steps from the street into the hall. On the other hand, it would have been impossible for the murderer, standing in the street, to have struck Rupprecht from behind, while he stood on the doorsteps. This difficulty is, however, completely removed by the stone bench on the left of the door, which we have already mentioned.

Thus all circumstances combine to make us conclude that the occur-

rence took place as follows: As soon as the murderer had requested the landlord to send Rupprecht down to him, he went into the dark corner on the left, mounted the stone bench near the doorway, and stood there in readiness to strike. Rupprecht went downstairs, expecting

to find some one who wanted to speak to him on business, and seeing no one in the passage, went outside the door and turned to look down the street after the man who had sent for him, when he was struck a well-aimed heavy blow from the stone bench behind him. . . .

**160. JOHN PAUL FORSTER'S CASE.** (ANSELM VON FEUERBACH. *Remarkable German Criminal Trials*. transl. Gordon. 1846. p. 1.)

Christopher Baumler, a worthy citizen of Nürnberg, lived in the Königsstrasse, a wide and much-frequented street, where he carried on the trade of a corn chandler, which there includes the right of selling brandy. He had lately lost his wife, and lived quite alone, with only one maidservant, Anna Catharina Schultz. He had the reputation of being rich.

Baumler was in the habit of opening his shop at five o'clock in the morning at latest. But on the 21st of September, 1820, to the surprise of his neighbors, it remained closed until past six. Curiosity and alarm drew together a number of people before the house. They rang repeatedly, but no one came to the door. At last some neighbors, with the sanction of the police, entered the first-floor windows by a ladder. Here they found drawers, chests, and closets burst open, and presenting every appearance of a robbery having been committed. They hastened downstairs into the shop, where they discovered in a corner close to the street door the bloody corpse of the maid; and in the parlor they found Baumler lying dead beside the stove.

The house stands on the left hand in going along the Königsstrasse from the Frauen Thor, not far from the church of Saint Laurence. Several houses, chiefly inns and shops, flank it on either side; on the right, an inn called the Golden Lion stands out several feet beyond it. Close to this projecting wall is the door of Baumler's house, which is

entered by one low step; the hall serves as a shop, and the walls are lined with shelves, etc. The length of this hall from the street door to the opposite end, where a door opens into a court, is about sixteen feet; on the left, a staircase leads to the floor above. The breadth is unequal, for on the right hand near the door there is a corner about four feet wide and three feet deep, which forms part of the shop. On one side is the wall of Baumler's parlor; on the other, the main wall of the house towards the street, where a large bow window, always closed with shutters at night, admits the light into the shop, and thence into the parlor through a window opening into this corner. About seven feet from the entrance to the shop is the door of the small parlor, which is cut off from the street on all sides and furnished with tables and benches for the convenience of the customers for brandy. The house door, as is usually the case in shops of this kind in Nürnberg, is formed of two wings joined together, one of which folds back upon the other, and is fastened by a simple contrivance to the wall. During the day a glass door is fixed in the half of the doorway thus left open, which in the daytime serves to light the shop, and in the evening to show passers-by that the host is ready to receive customers. The door of Baumler's shop, behind the wing of which a man could perfectly conceal himself from any one entering, opens towards the left, exactly opposite to the corner we

have already described, so that any one coming in would turn his face towards the corner; and in the event of being attacked by a person hidden behind the door, would naturally run towards it. A bell hangs over the entrance which rings whenever either the glass or the wooden door is opened.

As soon as the police were informed of the murder, a commission was appointed to visit Baumler's house. Immediately on entering the shop, to the right of the door in the corner, between two bins of meal and salt, the maidservant Schultz lay on her back, with her head shattered, and her feet, from which both her shoes had fallen, turned towards the door. Her face and clothes, and the floor, were covered with blood; and the two bins between which her head lay, as well as the wall, were sprinkled with it. As no other part of the shop showed any marks of blood, it was evident that she had been murdered in this corner. Not far from the body they picked up a small comb, and at a little distance from that a larger one, with several fragments of a second small one. In the very farthest corner of the parlor, between the stove and a small table, upon which stood a jug, they found the body of Baumler stretched on his back, with his head, which was resting on a small overturned stool, covered with wounds and blood. A pipe and several small coins lay under the body, where they had probably fallen when the murderer ransacked the pocket (which was turned inside out and stained with blood) for money or for keys. The floor, the stove, and the wall were covered with blood, the stool was saturated, and even the vaulted ceiling, which was nine or ten feet high, was sprinkled with it. These circumstances, especially the stool on which Baumler's head still rested, and the pipe which lay under his body, showed that the murderer must have sud-

denly attacked him unawares and felled him to the earth, as he sat drinking his beer and smoking his pipe on that very spot.

One drawer of the commode in the upper chamber was pulled out, the doors of two cupboards in the adjoining room were open, and everything lay scattered about the floor. Several other presses, however, had not been opened, and many things of value, such as clothes, silver ornaments, a gold repeater, etc., were left in them, and even in those which had been opened. The rooms on the second story were found in their usual state. On the table, in the parlor, stood a wineglass with some red brandy at the bottom, and a closed clasp knife stained with blood on the back and sides.

Two newly baked rolls were found near the entrance door. The baker Stierhof stated that Baumler's maid had fetched these rolls from his shop the evening before, at about a quarter to ten. His wife, who was examined the next day on this point, recognized the rolls as those bought by the unfortunate maidservant on the evening of the 20th of September, adding, "The evening before last, at nearly a quarter to ten, the maid came to my house and asked for two half-penny rolls, which I gave her. I did not recognize her till she was going away, when I said, 'It is you, is it?' She answered sulkily, 'Yes.' I asked if they still had guests with them; and she said, 'Yes, there are a few fellows there still.' I then looked out of the window for a while: there was a deathlike silence in the street, so much so that I remarked it to my people. At a quarter to ten exactly I closed the shop." This evidence afforded a strong presumption that some person or persons who were still in Baumler's shop at a quarter to ten had committed this murder. Furthermore it was certain that the murder of the maidservant could not have taken place earlier than a quarter to ten;

the two rolls which she had fetched about that time from the Baker Stierhof, and which were found on the floor near the entrance, showed that the murderer had attacked her as she entered the shop on her return from the baker's, that she dropped the rolls in her fright, was driven into the corner of the shop, and there murdered. There could be no doubt that Baumler was murdered before the maidservant, for he was found beside the stool on which he usually sat smoking his pipe by the stove. Had he been alive when the murderer attacked his maid, he would have been alarmed by the noise, and have gone out into the shop; at any rate he would not have remained quietly seated for the murderer to dispatch him at his leisure. It was also evident that Baumler must have been murdered during the maid's absence. Now the distance from Baumler's house to the baker's shop is at most a hundred steps; thus, even supposing that Schultz, angry at being sent out so late, went very slowly, the walk there and back, including the short conversation with the baker's wife, could not have occupied above five minutes, and during this interval the murder of Baumler must have been completed, and that of Schultz prepared. This was proved by the following circumstance: As long as the glass door was there, the murderer could

neither attack Schultz on her entrance nor murder her within the threshold, as he could not possibly hide himself behind the glass door, which would moreover have exposed him to the risk of observation from every passer-by, and even to the chance of a stray guest of Baumler's entering the shop and surprising him in the act. It was therefore necessary to take the glass door off its hinges, and to shut the street-door, before attacking Schultz on her return to the house, — and this he accordingly did. Baumler's house was not usually closed until eleven, but on the night of the murder a Chandler of the name of Rossel, who lived opposite, happened to look out at a quarter to ten, and saw, to his surprise, that Baumler's house was then closed, — no doubt by the murderer. It was a quarter to ten when Schultz was at the baker's shop, at the same hour Rossel saw Baumler's house shut: we may therefore infer that the murderer killed Baumler soon after his maid's departure, quickly unhinged the glass door, lay in wait for the maid behind the street door, opened it for her, and attacked her as she came in; the concurring evidence of two witnesses thus distinctly proves that the murder of Baumler and his maid must have taken place during the few minutes before and after a quarter to ten.

161. NEWTON'S CASE. (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 148.)

A woman, Newton, who was tried for the murder of her mother, had lived for nine or ten years as house-keeper to an elderly gentleman, who was paralyzed and helpless; the only other inmate being another female servant, who slept on a sofa in his bedroom to attend upon him. The deceased occasionally visited her daughter at her master's house, and sometimes stopped all night, sleeping on a sofa in the kitchen.

She came to see her daughter about eight o'clock one night in December, 1848; the other servant retired to bed about half past nine, leaving the prisoner and her mother in the kitchen, and she afterwards heard the prisoner close the door at the foot of the stairs, which was usually left open that they might hear their master, if he wanted assistance. The prisoner usually slept upstairs. About two o'clock in the morning

the other servant was aroused by the smell of fire, and a sense of suffocation, and found the bedroom full of smoke; upon which she ran downstairs, finding the door at the bottom of the stairs still closed. As she went downstairs she saw a light in the yard, and she found the kitchen full of smoke, and very wet, particularly near the fireplace, as also was the sofa, but there was very little fire in the grate. She then unfastened the front door, and ran out to fetch her master's nephew, who lived near, and who hastened to the house. He found the front door fastened, but was admitted by the prisoner at the back door. He at once hastened upstairs, and ascertained that his uncle was safe, and then came down into the kitchen, where he found the sofa was on fire, and threw some water upon it. He then went to let the servant girl, who had fetched him, in at the front door, which he found bolted, and not merely latched. He then again went upstairs with the servant to his uncle's room, and they raised him up in bed, and saw that he was all right. On returning to the kitchen, they found the place was very wet; a little fire was still smoldering on the sofa, which they at once extinguished. The pillows and entire back part of the sofa cover were burnt to the breadth of a person's shoulders.

The prisoner then came in from the back premises in her night-dress; she was described as not drunk, but not quite sober. She took a bottle of rum from the cupboard, and drank from it, and after that she soon became thoroughly intoxicated, and lay down on the sofa. The girl then went out of the kitchen towards the brewhouse, and found the deceased lying on her face on the steps of the brewhouse, apparently burnt to death. Her arms were crossed in front over her breast, or, according to one witness, across her face; on the

back of the head lay a piece of the sofa cover, and near the body was a cotton bag which had been used in the house indiscriminately as a bag or a pillow; it was besmeared with oil. Near the feet of the body were the remains of four pairs of sheets which had been in the kitchen the night before. They were almost entirely consumed by fire; what was left of them was wet. The prisoner's clothes were on a chair in the kitchen — the explanation being given that she was in the habit of undressing there. Holes had been burnt through them, and it was found that the prisoner's hands were scorched and blistered, and that she had burns on her arms and body corresponding with the burns in her clothes. It appeared from the state of the bedclothes in her room upstairs that she had not been in bed, but there was a mark as if some one had been lying upon the bed. A butter boat, which had been full of dripping, and a pint bottle, which had been nearly full of lamp oil, and left near the fire overnight, were both empty, and there were spots of grease and oil on the pillow case, sheets, and sofa. A stocking had been hung up to cover a crevice in the window shutter, through which any person outside might have seen into the kitchen. The door post of the kitchen leading into the yard was much burnt about three feet high from the ground; and there was a mark of burning on the door-post of the brewhouse. The surface of the deceased woman's body was completely charred, the tongue was livid and swollen, and one of the toes was much bruised, as if it had been trodden on. There was a small blister on the inner side of the right leg, far below where the great burning commenced, which contained straw-colored serum, but there was no other blister on any part of the body, nor any marks of redness around the blister, or at the parts where the injured and unin-

jured tissues joined. The nose, which had been a very prominent organ during life, was flattened down so as not to rise to more than the eighth of an inch above the level of the face, and as it never recovered its original appearance, it was stated that it must have been so flattened for some time before death. The lungs and brain were much congested, and a quantity of black blood was found in the right auricle of the heart.

From these facts the medical witnesses examined in support of the prosecution concluded, that the deceased had been first suffocated by pressing something over her mouth and nostrils so forcibly as to break and flatten the nose in the way described; but they had made no examination of the larynx and trachea, and other parts of the body. A physician who had heard the evidence but not seen the deceased, gave his opinion that the appearances described by the other witnesses were signs of death by suffocation; that the absence of vesication, and of the line of redness were certain signs that the body had been burnt after death; but he added that, as there were no marks of external injury, an examination should have been made of the parts of the body above mentioned, in order to arrive at a satisfactory conclusion. Another medical witness thought it possible that suffocation might have been produced by the flames preventing the access of air to the lungs, while others again thought it impossible that such could have been the case, as no screams had been heard in the night, and they were also of opinion that if alive, the deceased must have been in such intense agony that she could not, even if she had been strong enough to walk from the kitchen to the brewhouse, have refrained from screaming. One of these witnesses stated that he did not think it possible that the deceased, if alive, could have fallen in the posi-

tion in which she was found, as her first impulse would have been to stretch out her arms to prevent a fall; but, on the other hand, it was urged that it was not possible to judge of the acts of a person in the last agonies of death by the conduct of one in full life. Under the will of her grandfather the prisoner was entitled on the death of her mother to the sum of £200, and to the interest of the sum of £300 for her life. She had frequently cruelly beaten the old woman, threatened to shorten her days, bitterly reproaching her for keeping her out of her property by living so long, and declared that she should never be happy so long as she was above ground, and she had once attempted to choke her by forcing a handkerchief down her throat, but was prevented from doing so by the other servant. The magistrates had been frequently appealed to, but they could only remonstrate, as the old woman would not appear against her daughter.

The case set up on behalf of the prisoner was, that she was in bed and, perceiving a smell of fire, came downstairs, and finding the sofa on fire, fetched water and extinguished it, and that she knew nothing of her mother's death until she heard it from others. It appeared that the old woman was generally very chilly, and in the habit of getting near the fire; that on two former occasions she had burned portions of her dress; that on another she had burned the corner of the sofa cushion; that she used to smoke in bed, and light her pipe with lucifer matches, which she carried in a basket; and that on the night in question she had brought her pipe, which was found on the following morning in her basket. It was urged as the probable explanation of the position in which the body was found, that, finding herself on fire, she must have proceeded to the brewhouse, where she knew there was water, and leaned in her way



there against the doorpost, and that, feeling cold in the night, she had wrapped the sheets around her, and did not throw them off until she reached the yard. The prisoner, though accustomed to sleep upstairs, was in the habit of undressing in the kitchen, which was stated to be the reason why the stocking had been so placed as to prevent any person from seeing into the kitchen.

Mr. Justice PATTESON, in his

charge to the jury, characterized the evidence of the medical practitioners who had examined the body as extremely unsatisfactory in consequence of the incompleteness of their examination. The jury acquitted the prisoner; and indeed it would have been contrary to all principle to do otherwise, in the midst of so much uncertainty as to the *corpus delicti*.<sup>1</sup>

162. **ABRAHAM THORNTON'S CASE.** (W. WOODALL. *Reports of Celebrated Trials*. 1873. Vol. I, p. 1.)

On the evening of the 26th of May, 1817, the deceased, Mary Ashford, accompanied by a friend of hers, Hannah Cox, went to a dance at a public house called Tyburn, not far from Erdington, a village a few miles distant from Birmingham. The prisoner Thornton was at the dance; and about half past eleven, or from that to twelve, he and the deceased left the house, and went together along the highroad in the direction in which Mary Ashford resided. They were left together on the highroad about midnight. From that time until three o'clock in the morning nothing was seen of them; but a little before three, a man named Umpage, on his way home, came across the prisoner, whom he knew, and a woman, whom he could not recognize, but who was, beyond all doubt, the deceased, at a stile leading into Bell Lane. Near this stile was a harrowed field, through which it was proved Thornton and Mary Ashford had been in the course of the night, and in which footsteps, undoubtedly those of the deceased and Thornton, were afterwards traced.<sup>2</sup> Nothing was seen of Thornton after this for some time; but Mary Ashford was traced to her friend's, Hannah Cox's, house

in Erdington, alone, where she changed her clothes. She left Cox's at about fourteen minutes past four in the morning, and went up to Bell Lane; and was last seen alive going in the direction of the harrowed field where the footsteps were found, at about eighteen minutes past four. She had then some way to go to the spot where her body was afterwards found in a pit of water; and in all probability she could not reach the pit until half past four at the earliest. Her body was discovered in the pit about half past six.

The theory of the prosecution was, that Thornton waylaid Mary Ashford on her way home from Cox's, and assaulted her: that she fainted; and that he then threw her body into the pit. In support of this it was sought to prove, from the footmarks in the field, that Thornton had chased, and had ultimately overtaken the deceased, and then violated her, not far from the pit. There was undoubtedly the impress of a human figure on the grass near the pit, and blood was traced from it, without any footmarks, close up to the edge of the pit. It was inferred from this that Thornton had carried Mary Ashford in his arms, and had then

<sup>1</sup> *Reg. v. Newton*, Shrewsbury Spring Assizes, 1850. Two former juries, at the Assizes in the preceding year, had been unable to agree, and had been discharged — a circumstance unparalleled, it is believed, in English jurisprudence.

<sup>2</sup> [A diagram of the locality is given with No. 63, *ante*, p. 160. — Ed.]

thrown her into the water. Allowing the least possible time for the commission of the crime, the deceased having been last seen alive at about eighteen minutes past four, it occurred in all probability not until a quarter to five. At half past four, however, the prisoner was indisputably proved to have been seen at a distance from the pit, in a straight line, of one mile and a half; but by the nearest road, of two miles and a quarter.<sup>1</sup> He was calm and did not seem as if he had been running. On being apprehended, he admitted being with the deceased until four in the morning, and that he had been intimate with her, but, as he asserted, with her consent. . . .

The trial took place before Mr. Justice HOLROYD on the 8th of August, 1817, at Warwick. . . .

*Hannah Cox*, examined by Mr. Sergeant *Copley*, said: "I lived in the service of Mr. Machell, of Erdington, in the month of May last. I slept at my mother-in-law's, Mrs. Butler, on the morning of the 27th; her house is nearly opposite to my master's. I was acquainted with Mary Ashford. . . . She called on me at Mr. Machell's about ten o'clock, on her road to Birmingham market. She had a bundle with her, and said she was going to Birmingham market. In the bundle were a clean frock, a white spencer, and a pair of white stockings. The deceased was dressed in pink cotton frock or gown, a straw bonnet with straw-colored ribbons, a scarlet spencer, half-boots, and black stockings. I went with her to Mrs. Butler's to leave the bundle. The deceased then went to Birmingham, having first agreed that she and I should go together that night to Daniel Clarke's, at Tyburn House, to a dance. The deceased returned about six o'clock in the evening, and called on me at Machell's. I went with her to Mrs. Butler's,

where she put on the clean dress she had left there in the morning, and a new pair of shoes, which I bought for her at a shoemaker's at Erdington in the course of the day. The clothes she pulled off she made up into a bundle and left at Butler's. We set off for Tyburn between seven and eight o'clock. The dance was at a public house there. . . . Mary Ashford was at the room door when I was going; she told me she would not be long before she would follow me. . . . Were you called up again any time in the course of the morning?—Yes.—Who called you up?—Mary Ashford.—You got up and let her in to your mother's house?—Yes.—Do you know what time it was; did you look at the clock?—Yes. . . . Was the deceased in the same dress then as she had on overnight?—Yes. . . .—The deceased did not go into another room to change her dress, did she; she remained in the house all the time and you stayed with her?—Yes.—What did the deceased do with the clothes she took off?—She tied them up in a bundle along with some market things; she wrapped the boots in a handkerchief, and kept on her shoes." . . .

*William Lavell* was the first of the witnesses who spoke to the footmarks. . . . "I went along the footpath to see if I could discover any footsteps. . . . At about eight yards distance I discovered a woman's footsteps going from the footpath in the same way to my right. . . . I afterwards went with a woman's shoe in company with Bird. It was Mary Ashford's shoe. I compared that shoe with the woman's steps I had traced, and with those that turned to the right and with those where the man and woman appeared to be running, and where the doubling was, in every place. The shoe corresponded. We took both shoes. I have no doubt in my mind that the woman's

<sup>1</sup> [See the testimony set forth *ante*, No. 63.]

steps all along were made by those shoes." . . .

This part of the evidence goes to show that shoes with which the footsteps were compared were those in which Mary Ashford had been to the dance, and in which she had been walking with Thornton for three hours, over or in the neighborhood of this identical field. At Hannah Cox's, it will be remembered, she changed everything except her shoes. If she had also changed her shoes, the whole face of this evidence against Thornton might have assumed a very different aspect. It is curious to think what the effect would have been if Mary Ashford had put on the shoes which she had left at Hannah Cox's in the evening on her return from

Birmingham, and in which she had not been to the ball. In that case, if the footsteps in the field were made by her in the shoes which she had changed at Hannah Cox's in the morning after the ball, they would have been conclusive evidence against Thornton. As however they were not, but were made by the shoes which she wore at and after the ball up to half past three, all which time she was voluntarily in Thornton's company, the value of the footsteps as evidence is much weakened. It is singular and unfortunate that the only article of dress, the change of which could have thrown any light on the question of the deceased's death, were those, which by some fatality or other, were not changed.

## PART II: TESTIMONIAL EVIDENCE

### INTRODUCTION

163. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup>

The phrase "testimonial" evidence must not be understood as applicable exclusively to assertions made on the witness stand. Any assertion, taken as the basis of an inference to the existence of the matter asserted, is testimony, whether made in court or not (*ante*, No. 1). Thus, all the statements received under the exceptions to the hearsay rule are genuinely testimony. Assertions made on the witness stand are merely the commonest class of testimonial evidence. It follows that the considerations applicable to a witness are equally applicable in the use of extrajudicial assertions.

1. When a witness's statement is offered as the basis of an evidential inference to the truth of his statement, — for example, the statement of A that B struck X, — it is plain that at least three distinct elements are present; or, put in another way, that there are three stages to the process, in the absence of any one of which we cannot conceive of testimony. *First*, the witness must know something, *i.e.* must have observed the affray and received some impressions on the question whether B struck X; to this element may be given the generic term Perception. *Secondly*, the witness must have a recollection of these impressions, the result of his Perception; this may be termed Recollection, or Memory. *Thirdly*, he must communicate this recollection to the tribunal; that is, there must be Communication, or Narration, or Relation (for there is no single term entirely appropriate). Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, — Perception, Recollection, Communication. Whatever principles, therefore, govern the belief in testimonial assertions must have reference to some one or more of these elements.

Moreover, in the function fulfilled by each of the three elements or processes are to be found in general form the fundamental canons for assigning to each its probative value. Thus, the notion of Perception is that the external event has in some way or other impressed itself on the witness's senses, to be now reproduced to us in court. This impression of the witness, then (knowledge, perception, or whatever it be called), should adequately represent or correspond to the fact itself as it really existed or exists; and the practical object is to secure the probability of a fairly accu-

<sup>1</sup>[Adapted from the same author's *Treatise on Evidence*. . (1905. Vol. I, § 478.)]

rate perception on the part of the witness. Again, the function of Recollection is to recall or reproduce the original impressions of observation; and the fundamental basis of trust is that Recollection fairly corresponds with or reproduces the original Knowledge or Perception. Finally, the function of Narration (or, Communication) is to reproduce for the apprehension of the tribunal the Recollected results — themselves already reproduced from Observation; and the common aim in the varied problems under this head is to insure that the story as told shall represent with fair accuracy what the witness once observed and now recollects.

2. But this process of the individual witness's testimony is affected, not merely by his individual traits, but also by certain general traits, common to humanity, in which experience has enabled us to generalize. These generalizations affect traits common to large groups of individuals, or large classes of situations in which any individual may at times find himself. Hence the elements of trustworthiness in testimony may conveniently be studied under two separate heads:

I. Generic Human Traits affecting the Testimonial Process in general;

II. The Testimonial Process itself.

The principal generic traits may be taken up under the following heads:

1. Race; 2. Age; 3. Sex; 4. Mental Disease; 5. Moral Character; 6. Feeling, Emotion, and Bias; 7. Experience (acquired skill).

**TITLE I: GENERIC HUMAN TRAITS AFFECTING THE  
TRUSTWORTHINESS OF TESTIMONY**

**SUBTITLE A: RACE**

164. EDWARD WESTERMARCK. *Origin and Growth of Moral Ideas*. (1908. Vol. II, p. 72.) . . . Various uncivilized races are conspicuous for their great regard for truth; of some savages it is said that not even the most trying circumstances can induce them to tell a lie. Among others, again, falsehood is found to be a prevailing vice and the successful lie is a matter of popular admiration. . . .

"The genuine Wood-Wedda always speaks the truth; we never heard a lie from any of them; all their statements are short and true." A Veddah who had committed murder and was tried for it, instead of telling a lie in order to escape punishment, said simply nothing. Other instances of extreme truthfulness are provided by various uncivilized tribes in India. The Saoras of the province of Madras, "like most of the hill people, . . . are not inclined to lying. If one Saora kill another, he admits it at once and tells why he killed him." The highlander of Central India is described as "the most truthful of beings, and rarely denies either a money obligation or a crime really chargeable against him." A true Gond "will commit a murder, but he will not tell a lie." The Kandhs, says Macpherson, "are, I believe, inferior in veracity to no people in the world. . . . It is in all cases imperative to tell the truth, except when deception is necessary to save the life of a guest." . . . The Dyaks of Borneo are praised for their honesty and great regard for truth. Mr. Bock states that if they could not satisfactorily reply to his questions, they hesitated to answer at all, and that if he did not always get the whole truth, he always got at least nothing but the truth from them. Veracity is a characteristic of the Alfura of Halmahera and the Bataks of Sumatra, who only in cases of urgent necessity have recourse to a lie. The Javanese, says Crawfurd, "are honorably distinguished from all the civilized nations of Asia by a regard for truth." "In their intercourse with society," Raffles observes, "they display, in a high degree, the virtues of honesty, plain dealing, and candor. Their ingenuousness is such that, as the first Dutch authorities have acknowledged, prisoners brought to the bar on criminal charges, if really guilty, nine times out of ten confess, without disguise or equivocation, the full extent and exact circumstances of their offenses, and communicate, when required, more information on the matter at issue than all the rest of the evidence." . . . Castren states that the Zyrians, like the Finnish tribes generally, are trustworthy and honest, and that the Ostyaks have no other oaths but those of purgation.

Among them "witnesses never take the oath, but their words are unconditionally believed in, and everybody, with the exception of lunatics, is allowed to give evidence. Children may witness against their parents, brothers against brothers, a husband against his wife and a wife against her husband." The Aleuts were highly praised by Father Veniaminof for their truthfulness: "These people detest lying, and never spread false rumors. . . . They are very much offended if any one doubts their word." They "despise hypocrisy in every respect," and "do not flatter nor make empty promises, even in order to escape reproof."

The regard in which truth is held by the Eskimo seems to vary among different tribes. Armstrong blames the Western Eskimo for being much addicted to falsehood, and for seldom telling the truth, if there be anything to gain by a lie. . . . The Greenlanders are generally truthful towards each other, at least the men. But if he can help it, a Greenlandic will not tell a truth which he thinks may be unpleasant to the hearer, as he is anxious to stand on as good a footing as possible with his fellow men. . . . Of the Australian aborigines we are told that some tribes and families display on nearly all occasions honesty and truthfulness, whereas others "seem almost destitute of the better qualities." . . .

Very different from these accounts is Mr. Gason's statement concerning the Dieyerie in South Australia. "A more treacherous race," he says, "I do not believe exists. They imbibe treachery in infancy, and practice it until death, and have no sense of wrong in it. . . . They seem to take a delight in lying, especially if they think it will please you. Should you ask them any question, be prepared for a falsehood, as a matter of course. They not only lie to the white man, but to each other, and do not appear to see any wrong in it." . . . We are told by Polack that among the Maoris of New Zealand lying is universally practiced by all classes, and that an accomplished liar is accounted a man of consummate ability. But Diefenbach found that, if treated with honesty, they were always ready to reciprocate such treatment; and, according to another authority, they believed in an evil spirit who they said was "a liar and the father of lies." The broad statement made by von Jhering, that among the South Sea Islanders lying is regarded as a harmless and innocent play of the imagination, is certainly not correct. . . . Nowhere in the savage world is truth held in less estimation than among many of the African races. . . . Miss Kingsley's experience of West African natives is likewise that they "will say 'Yes' to any mortal thing, if they think you want them to." The Wakamba are described as great liars. . . . To the Wanika, says Mr. New, lying is "almost as the very breath of their nostrils, and all classes, young and old, male and female, indulge in it. A great deal of their lying is without cause or object; it is lying for lying's sake. You ask a man his name, his tribe, where he lives, or any other simple question of like nature, and the answer he gives you will, as a rule, be the very opposite to the truth; yet he has nothing to evade or gain by so doing. Lying seems to be more natural to him than speaking the truth. He lies when detection is evident, and laughs at it as though he thought it a good joke. He hears himself called 'mulongo' (liar) a score of times a day, but he notices it not, for there is no opprobrium in the term to him. To hide a fault he lies with the most barefaced audacity and blindest obstinacy. . . . When his object is gain,

he will invent falsehoods wholesale. . . . He boasts that 'ulongo' (lying) is his 'pesa' (piece, ha'pence), and holds bare truth to be the most unprofitable commodity in the world. But while he lies causelessly, objectlessly, recklessly, in self-defense or self-interest, he is not a malicious liar. He does not lie with express intent to do others harm; this he would consider immoral, and he has sufficient goodness of heart to avoid indulging therein. . . . I have often been struck with the manner in which he has controlled his tongue when the character and interest of others have been at stake." . . .

But in Africa, also, there are many people who have been described as regardful of truth and hostile to falsehood. Early travelers speak very highly of the sincerity of the Hottentots. . . . As regards the truthfulness of the African Arabs opinions vary. Parkyns asks, "Who is more trustworthy than the desert Arab?" According to Rohlfs and Chavanne, on the other hand, the Arabs of the Sahara are much addicted to lying; and of the Arabs of Egypt Mr. St. John observes: "There is no general appreciation of a man's word. . . . 'Liar' is a playful appellative scarcely reproachful; and 'I have told a lie' a confession that may be made without a blush." . . . In Japan, Burma, and Siam truth is more respected than in China. "In love of truth," says Professor Rein, "the Japanese, so far as my experience goes, are not inferior to us Europeans." The Burmese, though partial to much exaggeration, are generally truthful. And "the mendacity so characteristic of Orientals is not a national defect among the Siamese. Lying, no doubt, is often resorted to as a protection against injustice and oppression, but the chances are greatly in favor of truth when evidence is sought." Lying has been called the national vice of the Hindus. "It is not too much to assert that the mass of Bengalis have no notion of truth and falsehood." . . .

Not without reason did the Romans of the republican age contrast their own "fides" with the mendacity of the Greeks and the perfidy of the Phœnicians. . . . The ancient Scandinavians considered it disgraceful for a man to tell a lie, to break a promise, or to commit a treacherous act. . . . "Speak every man truth with his neighbor," was from early times regarded as one of the most imperative of Christian maxims. . . .

Yet from early times we meet within the Christian Church a much less rigorous doctrine, which soon came to exercise a more powerful influence on the practice and feelings of men than did St. Augustine's uncompromising love of truth. . . . This zeal, together with an indiscriminate devotion to the Church, led to those "pious frauds," those innumerable falsifications of documents, inventions of legends, and forgeries of every description, which made the Catholic Church a veritable seat of lying, and most seriously impaired the sense of truth in the minds of Christians. . . . An oath which was contrary to the good of the Church was declared not to be binding. The theory was laid down that, as faith was not to be kept with a tyrant, pirate, or robber, who kills the body, it was still less to be kept with an heretic, who kills the soul. Private protestations were thought sufficient to relieve men in conscience from being bound by a solemn treaty or from the duty of speaking the truth; and an equivocation, or play upon words in which one sense is taken by the speaker and another sense intended by him for the hearer, was in some cases held permissible. . . .



Adherence to truth and especially perfect fidelity to a promise were strongly insisted upon by the code of Chivalry. . . . The knightly duty of sincerity seems to have gone little beyond the formal fulfillment of an engagement. "The age of Chivalry was an age of chicane, and fraud, and trickery, which were not least conspicuous among the knightly classes." . . . In modern times, according to Mr. Pike, the Public Records testify a decrease of deception in England. Commercial honesty has improved, and those mean arts to which, during the reigns of the Tudors, even men in the highest positions frequently had recourse, have now, at any rate, descended to a lower grade of society.

At present, in the civilized countries of the West, opinion as to what the duty of sincerity implies varies not only in different individuals, but among different classes or groups of people, as also among different nations.

165. G. F. ARNOLD. *Psychology Applied to Legal Evidence*. (1906. p. 435.) . . . There is a general danger, to which the psychologist is always alive, of misinterpreting other minds, and this is intensified when we are trying to understand one of another race. Professor Sully describes it as follows: "There is a characteristic danger in reading the minds of others which arises from an excessive propensity to project our own modes of thinking and feeling into them. This danger increases with the remoteness of the mind we are observing from our own. To apprehend, *e.g.* the sentiments and convictions of an ancient Roman, of a Hindu, or of an uncivilized African, is a very delicate operation. It implies close attention to the differences as well as the similarities of external manifestation, also an effort of imagination by which, though starting from some remembered experiences of our own, we feel our way into a new set of circumstances, new experiences, and a new set of mental habits. Children, again, owing to their remoteness from adults, are proverbially liable to be misunderstood."<sup>1</sup> A similar warning is given by Professor James: "The truth is that we are doomed, by the fact that we are practical beings with very limited tastes to attend to, and special ideas to look after, to be absolutely blind and insensible to the inner feelings and to the whole inner significance of lives that are different from our own. Our opinion of the worth of such lives is absolutely wide of the mark, and unfit to be counted at all."<sup>2</sup> It may probably be safely asserted that the difficulties of understanding others arise mainly from want of sympathy with them, and it is not possible to have such sympathy without some experience of pleasures and pains similar to theirs, or without the exercise of an imagination which must be based in part on such experience. Only thus can a man know what causes such feelings in them. Now it is specially difficult to enter into the feelings of others, when their conditions of life (internal or external) are very different from our own. Difference of language (as between Greeks and Barbarians), of color (as with Negroes), of rank and of faith, have afforded long and stubborn resistance to the growth of sympathy in the human race. . . .

It follows from this that the highly civilized European must be extremely careful when judging what it is probable a less civilized man of another race said or did; for what is improbable to him, because it conflicts with his knowledge and experience, would not be so to a person endowed with less knowl-

<sup>1</sup> Sully, *Outlines of Psychology*, p. 6.

<sup>2</sup> W. James, *Human Immortality*, p. 125.

edge and different experience, and courses of action, which to the European are manifestly inferior to others, will be those pursued by the more savage race because they will be the only courses to occur to their minds. . . .

A defect of Eastern races which particularly strikes the European mind is their want of veracity. It has always seemed to us that to so great an extent does this prejudice some Europeans against them that it renders them blind to many good qualities which these nations possess, an unfortunate result which has done much to keep the two races apart, for to a mind which does not value this single virtue at so high a rate such wholesale condemnation naturally appears most unjust. Yet, as the late Mr. Lecky points out, there is nothing so intrinsically great about veracity, in the sense in which we now employ the term, and it is only the force of circumstances which has led the Englishman to prize it so highly. "That accuracy of statement or fidelity to engagements which is commonly meant when we speak of a truthful man, is usually the special virtue of an industrial nation, for although industrial enterprise affords great temptations to deception, yet mutual confidence, and therefore strict truthfulness, are in these occupations so transcendently important that they acquire in the minds of men a value they had never before possessed. Veracity becomes the first virtue in the moral type, and no character is regarded with any kind of approbation in which it is wanting. It is made more than any other the test distinguishing a good from a bad man. . . . The usual characteristic of nations where the industrial spirit is wanting (*e.g.* the Italians, Spaniards, or Irish) is a certain laxity or instability of character, a proneness to exaggeration, a want of truthfulness in little things, an infidelity to engagements from which an Englishman, educated in the habits of industrial life, readily infers a complete absence of moral principle. But a larger philosophy and a deeper experience dispel his error. He finds that where the industrial spirit has not penetrated, truthfulness rarely occupies in the popular mind the same prominent position in the catalogue of virtues. It is not reckoned among the fundamentals of morality; and it is possible and even common to find in these nations — what would be scarcely possible in an industrial society — men who are habitually dishonest and untruthful in small things, and whose lives are nevertheless influenced by a deep religious feeling, and adorned by the consistent practice of some of the most difficult and painful virtues. Trust in Providence, content and resignation in extreme poverty and suffering, the most genuine amiability and the most sincere readiness to assist their brethren, an adherence to their religious opinions which no persecutions and no bribes can shake, a capacity for heroic, transcendent, and prolonged self-sacrifice, may be found in some nations in men who are habitual liars and habitual cheats."<sup>1</sup>

We have reproduced this somewhat lengthy quotation because so much of it appears to us to apply to Eastern races, especially to the Burmese people, and because it not only appears to explain the want of veracity among them, but also at the same time to correctly estimate the whole character of such a people.

166. F. W. COLEGROVE. *Memory, an Inductive Study*. (1900. p. 246.) The Indians who sent returns represent 25 different tribes, and may be con-

<sup>1</sup> E. H. Lecky, *History of European Morals*, Vol. I, pp. 137 *et seq.*

sidered fairly representative. Some of the tribes are in a low state of civilization, but many came from families of wealth and culture. Many of these memories may be termed crystalized racial experiences, and the question arises whether the memory tone is not modified by atavistic tendencies. As will be seen later, their memories for pleasant and unpleasant occurrences savor of racial experiences. The curves for the first three memories of both males and females average higher than those of the whites.

Comparing the Indian males with the white males of the same period, the Indians show a higher percentage of memories for hearing, taste, mother and playmates, crying and grief, corporal punishment, trees, quarrels, and almost double for domestic fowls and animals. They have a higher percentage of tactile memories, and a smaller percentage for dress and persons not relatives. The following memories are wholly or chiefly Indian: fishing, snakes, squirrels, negroes, hunting (bow and arrows), lakes and streams, and tobacco.

Comparing Indian females with white females of the same age, the Indians have a larger percentage of auditory, gustatory, and motor memories, also for father, mother, playmates, fear, and dolls; much greater for crying and grief, and double the percentage for domestic fowls and animals. They have a smaller percentage of memories for persons not related, dresses and other clothing, fewer typographical and logical memories, and less for sickness and accident to self and others, and for the activity of others. The following memories belong wholly or chiefly to the Indians: lakes, rivers, wolves, coons, owls, fishing, skating, and negroes.

The curves for the age of the negroes at the time of the first three memories show a higher average than those for the whites. The negroes do not seem to differentiate the memories from the memory complex until late in life. This may be due to the poverty of the mental experience in early life. The memory tone is monotonous. Further evidence of this is a strong tendency to remember by comparison. Such an event occurred "in Garfield's" or "in Harrison's administration," or "after I went to school." But the best-educated negroes, as would be expected, have sharply defined and well differentiated early experiences. Their memories, too, have less of the grotesque character. The story of hardships, wrong, and suffering is deeply imprinted on many memories. . . .

The pleasant and unpleasant memories of the male whites rise and fall together until the age of 21. At 22, in the case of the males, the curve for unpleasant memories is the higher, after which the pleasant memories are in the ascendancy. After the age of 30, unpleasant memories are little recalled by the males. The unpleasant memories play the important rôle in the case of the Indian and negro males. One can hardly fail to see in it a suggestion of persecution and slavery. The Indian females show a slight tendency toward remembering unpleasant experiences best, and share the sorrowful experiences of their brothers. On the other hand, in the case of the negro females, unpleasant experiences play a very minor part indeed. With them a dress of striking color appears easily to efface grief.

167. M. D. CHALMERS. *Petty Perjury*. (1895. *Law Quarterly Review*. Vol. XI, p. 219.) . . . Though most of the perjury committed in county courts and police courts is of a petty nature, still in the aggregate it constitutes a serious impediment to the administration of justice. . . . Few people,

I think, realize the extent to which perjury is prevalent among the lower classes in England. I happen to have administered justice in three different countries, namely, England, Gibraltar, and India, so perhaps I have some basis of comparison. In Gibraltar there was a mixed population of Spaniards, Maltese, and Barbary Jews, but there was nothing to complain of in the way of perjury. In India, no doubt, there was a good deal of lying, but many of the lies were of a stereotyped form (like fictitious averments in pleading), and I certainly think it is harder to get at the truth in an English county court than it was in a northwest cutcherry. In the High Court a higher grade of witnesses is reached, and perjury is comparatively rare. Moreover, a witness who will freely commit a perjury in a money matter will hesitate to do so in a criminal cause. Wales has not a high reputation for truth-telling, but if I may judge from a single circuit, the Welshmen are no worse than their neighbors. With one exception, I was struck with the careful honesty of the witnesses all round the circuit. . . . Some time ago I took a note of a hundred consecutive cases for less than £20 tried before me at Birmingham. I found there was hard cross-swearing in sixty-three. Of course there is much hard swearing which is not perjury. . . . My county-court experience is mainly confined to Birmingham, but I have no reason to believe, and I do not believe, that Birmingham is worse than other large urban courts. If that be so, after making all allowance for hard swearing which is not perjury, there remains a terrible residuum of willful and corrupt perjury, which urgently calls for a remedy, if the administration of justice is not to be reduced to a farce.

168. MINNIE MOORE-WILLSON. *The Seminoles of Florida*. (1910. p. 93.)  
 . . . *The Seminole's Unwritten Verdict of the White Race*.

"Es-ta-had-kee, ho-lo-wa-gus, lox-ee-o-jus"  
 (White man no good, lie too much.)

In some mysterious way, the Seminole's conception of the Decalogue neither to lie, nor steal, nor cheat, is the foundation stone upon which he builds his character, principle, and honor; for it is taught to the race, from the cradle to the grave, to the swinging papoose on its mother's shoulders, all through life, till the Great Spirit calls to the Happy Hunting Grounds. Let the reader stop and consider that here is a community of hundreds, living in open palmetto camps. No locks, no doors, no courts, and no officers to keep the law; a people, who for generations have lived, pure in morals, with no thieving, no trespassing, and no profanity (for the Seminole has no oath in his language). . . . With the Seminole's power to condense into a single phrase, he crystallizes his verdict of the white man into the above forcible expression. In pathetic but terse language, it tells of generations of wrong treatment at the hands of the white brother; sharp practices and broken treaties and misrepresentations are all included in the general summing up. From his oral lexicon, he has chosen these few words, which reveal the throbbing inner soul of these red children of the forests. . . . With a stoicism born of generations of training, the Seminole shows no ill will, no resentment, and the harshest criticism he ever makes against his white conquerors and victorious brothers is this phrase, "Es-ta-had-kee, ho-lo-wag-us, lox-ee-o-jus." And whether in vindication of some offense, or given as a simple opinion, his pent-up feelings find expression in this one forcible epithet, and

seems to be the missile he hurls at the white man. The average American, with his standard of morals calloused by dealings in the business and social world, smiles at the Seminole's verdict of his character, and with indifferent shrug jocularly repeats it as being only — the opinion of an Indian.

169. **SHELP v. UNITED STATES.** (1897. FEDERAL CIRCUIT COURT OF APPEALS. 81 Fed. 694.) . . .

HAWLEY, District Judge. This appeal is taken from a judgment of the District Court of Alaska, upon the conviction of the plaintiffs in error (hereinafter designated as "defendants") of the crime of unlawfully selling intoxicating liquor. . . . The next error assigned is that the Court erred in its charge to the jury. In order to fully understand the parts of the charge objected to, it is essential to state briefly the general character of the testimony at the trial.

One Indian witness, on behalf of the government, testified as follows: "My name is Dennis. I live at Chilkoot. . . . I know these defendants. . . . Their boat was anchored off the shore. The younger man (meaning the defendant Cleveland) waved his hat to me; picked up a keg; then drank out of a tin cup. When I came to their boat, they gave me whisky to drink, and told me to tell the other people at the village that they had plenty of whisky. I went and told at the village, and 12 of us came down in a canoe, and got whisky from the white men. I got two bottles and paid four (\$4) for it." Several other Indians testified substantially to the same effect. The defendants testified that they resided at Douglas; that on the 12th of August, 1894, they started on a prospecting expedition in a sloop; that they went to Bear Creek, on Douglas Island; that they left there, and arrived at Funter Bay, on Admiralty Island, August 16th, and left on the 17th, and arrived at Bartlett Bay on the 18th; left there on the 19th, and arrived at Hoonah Sound on the 20th; and stayed there, prospecting

around the sound, for 8 or 10 days. The defendant Shelp, in the course of his testimony, said: "I was never at Chilkoot in my life. I never saw, to my knowledge, any of the Indians who testified in this case. We had no whisky on board of our sloop; neither sold nor gave away any whisky to Indians."

It is also necessary to consider what was said by defendants' counsel in the argument to the jury, for it is evident that some of the sentences objected to in the charge were given by the Court in reply thereto. In discussing the weight to be given to the evidence by the jury, one of the defendants' attorneys said: "That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian people, and who had little or no appreciation of our religious ideas, from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury, — that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury." The Court, after referring to the remarks of counsel, charged the jury as follows: "(1) It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such

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Have been in the United States 23 years. Came from China with my brother and sister-in-law (brother's wife, presumably), and lived at San Francisco, and remained there ten years, at 503 Dupont street," and while there the defendants were born, and are the sons of the witness. It is not to conjecture whether or not they are the children of the brother who came over with him; whether or not the sister-in-law who came over at that time is the mother. States that at the end of the ten years he returned to China, and his brother, sister-in-law, and the defendants remained with him. Witness remained in China one year, then returned to the United States, landed at San Francisco, where he remained five years, when he came on to New York, where he remained ten days, and then went to Brooklyn, where he remained eight years, and then returned again to China, and remained one year. States that he saw the defendants there daily during that year. The witness then returned to Brooklyn, and has resided at 457 Central avenue, Brooklyn. Says the boys, Ho Fong Sing and Ho Lee Duck, identifying the defendants in court, are the same persons who were born in Dupont street, San Francisco, California, and the same he saw in China, as stated. On cross-examination, says he lived at Ho Uk with his father and this brother before he first came to the United States, and attended school two years. The brother married Wong She, who lived at Wong Uk, two thirds of a mile from his father's home, but witness does not know whether she had any brothers or sisters. In China he knew Ho Sew, Ho Lew, and Ho Fat, aged 14, 12, and 13 years, respectively, but remembers no other persons he knew in China. He gives the day, hour, and minutes of his leaving home, arrival in Hong Kong (except the day and minute), and arrival in San Francisco (ex-

cept minutes). He then says he and this brother (alleged father of defendants) ran a store at Dupont street those ten years, and that he (the witness) had \$300 in the firm, which he borrowed from a friend, Ho Kong, who came with him from China to the United States. He had failed to recall the existence of this financial friend and backer of his childhood when asked to give the name of persons he knew in China. He names the firm of Hop Lung, on Dupont street, but forgets the address, and cannot remember the name of any other firm or the location of any firm in Dupont street, except his own. Says he seldom went out, and does not know or remember the streets running parallel with, or those crossing, Dupont street, although he was doing business in the store No. 503 Dupont street, buying and selling goods and cooking, all the time while he grew from 13 to 23 years of age. Does not remember the particulars of his arrival in New York and Brooklyn. He does not state, and no one asked, the ages of the defendants, or as to any of the circumstances of their birth or life in San Francisco.

All this evidence amounts to is that the defendants enter the United States from Canada and are arrested. A Chinese person from Brooklyn, whose general character is not impeached or questioned, claims to be their uncle, and says they were born in Dupont street, San Francisco, California, at some time during the ten years following the coming of their parents to the United States, and went with their parents to China, where they were seen by this uncle every day for a year on a visit he made to his native land eight years later. This witness exhibited such a vivid, special, and remarkable memory as to some things, and such an absolutely blank memory as to others he would naturally observe and remember, that the commissioner doubted his truth and

person. Such a rule would make most witnesses in a court of justice interested witnesses, and, if interest alone justifies the court in refusing credence to the testimony of a witness, then many in every trial would be more or less discredited by reason of mere national kinship, and the court or jury, as the case might be, would be at liberty to refuse to be bound by their testimony when testifying in favor of a party of their own nationality. There is no rule of law that justifies the assumption that a Chinese person is more interested in his countrymen than is a person of some other nationality in his. A Yankee may testify for a Yankee, but he is not therefore interested. An Irishman may testify for an Irishman, an Englishman for an Englishman, a German for a German; but such witnesses are not, in the eye of the law, interested. No discredit can legally attach to the testimony of a person because he gives his evidence in behalf of a party who belongs to his own nationality. A Chinese witness in one of these cases, if engaged in securing the entrance of Chinese persons into the United States, is open to suspicion; and if he is engaged in aiding the entrance of such a person, and gives evidence in that behalf, he is interested, and such fact tends to legitimately discredit his testimony. We are all brothers in the family of Adam, — all brothers in the national family to which by birth or adoption we belong, — but these ties of race or color do not make us interested witnesses when we testify in court, within the rule that permits interest to be used as a discrediting circumstance. If it affirmatively appears that a witness has a bias in favor of persons of his own nationality, in whose behalf he is testifying, or against the other party to the litigation, or a bias in favor of persons of his own nationality generally, or against those of another nationality, such fact may be used to discredit his testimony. Such

facts may be considered by the court and jury, but we cannot assume or presume the existence of such a bias either in favor of persons of the same nationality, or against persons of another nationality. The one assumption is as unjust and ill-founded as the other.

It is quite true, however, that the testimony of foreigners and of others who are brought from a distance to the place of trial requires to be scrutinized with more than common caution. The tribunal before which they speak knows little of them, and they care little for it, and may have no respect for the laws of the country in which they are giving evidence. They have little to fear from having their falsehoods exposed, as there is little danger of conviction for perjury, and they lose nothing in reputation among their fellows. In our courts a witness who does not understand or who cannot speak our language, but who speaks through an interpreter, if at all, has the time and opportunity to prepare his answers to each question with care, and hence the force of a cross-examination is broken, if not destroyed.

So, too, it is common knowledge that enslaved peoples develop an inordinate propensity for lying, and this is characteristic of most oriental nations. This comes largely from their being subject to the caprice and exactions of their masters or superiors, and, having no sense of moral responsibility to them, they come to regard lying to them as no sin, and an habitual disregard of the truth is thus engendered. . . . Hence in all these Chinese exclusion cases the testimony of Chinese witnesses, unknown and coming from a distance, — especially that of foreigners, — may be regarded as more or less weak; and, when contradicted or really impeached in any of the modes suggested and recognized by our law, the commissioner is justified in regarding such testimony, standing alone, as insufficient to convince



the judicial mind. This conclusion must not be reached arbitrarily or capriciously or from prejudice, but from conviction that the case is not made out; and in such cases the appellate court or judge is not justified in reversing the finding of the tribunal which had the opportunity of observing the witness, and noting his manner and sincerity or

want of sincerity in giving testimony. . . .

A full and careful examination and consideration of all of the evidence in each of the cases now before the court fails to disclose any ground of reversal in either case, and hence the judgments of deportation must be affirmed.

**171. THE GENERAL RUCKER.** (1888. FEDERAL DISTRICT COURT, TENNESSEE. 35 Fed. 152.)

. . . In Admiralty. Libel in personam demanding \$2500 damages for personal injuries to the libelant, caused by a blow on the head with a monkey-wrench in the hand of the mate while both were engaged in loading machinery from a barge alongside of the steamboat *General Rucker*, of which the defendant was the owner. The facts are stated in the opinion of the Court.

*J. S. Duval* and *J. M. Greer*, for libelant. *Poston & Poston*, for defendant.

HAMMOND, J. — The disputed issue of fact in this case must be decided for the libelant, unless it is to be taken as a rule of evidence that the testimony of a white man shall prevail, "per fas et nefas," over that of a negro; which can never be tolerated in any intelligent and impartial tribunal for the trial of such issues, whether by judge or jury, either avowedly or covertly, by the invention of some pretense to disguise the operation of pure prejudice on that subject. In what was said about this matter at the bar, the learned counsel for the defendant justly and somewhat indignantly repudiated any reliance upon such a prejudice, but insisted that the difference between witnesses in intelligence, moral stamina, and like elements of substantial character entering into the problem of decision, should turn the scale in any event, whether that difference arises from race distinctions or other causes; and there can be no doubt of the

justice of that rule, as he states it. But, like all other considerations of that kind, in the application of the principle, there must be a careful scrutiny into all the circumstances, so that there shall be no unjust exaggeration of it into one of mere aversion against the testimony of the witness on account of his race.

The mate swears positively that he did not strike the libelant at all, and, if they were both white or both black, the burden being on the libelant, he would necessarily fail, if that were all the proof, and each were equally with the other entitled to credit. But the corroborating circumstances certainly proved are with the libelant. First, his wounded skull, exhibited immediately after the occurrence, with a persistent statement that the wound was made in the manner he now states it to have been, corroborates his story. There is not the faintest suggestion in the proof to account for that wound in any other way except the reluctant and very evasive answers of the mate, on cross-examination, that he might have struck him with the stick which he admits he threw at the gang of roustabouts at work on the vessel. But another one of them it was he struck on that occasion, and he was arrested at the time on the affidavit of that other. The counsel here suggests that the wound may have been made by contact with the sides of the vessel or barge as the libelant fell into the river between them, or by some con-

tact like that in falling. Certainly, it may have been, but nothing then occurring in relation to that circumstance suggests that as a cause of the wound. The libelant's witnesses swear that he then and there vociferously accused the mate of striking him with the monkey-wrench, and knocking him into the river, and that the mate suppressed his complaints by compelling him to return to work, with threats of shooting him. The mate denies this, as he does the striking, and his witnesses did not hear it, some of them saying they saw no wounds or blood on the face; but two of his witnesses, most favorably situated to see what occurred, did see the wound and blood. One of these, Pat Sheridan, heard no remark about the wound, being evidently attentive to his duty as engineer of the "nigger engine," with which the machinery was being lifted from the barge to the vessel, and possibly too far away to hear everything that was said; but the other, Bradford, another mate, whom all agree was right at hand, not only saw the wound and blood on the face, but also heard libelant accuse the mate of striking him and knocking him into the river. He says the mate denied it, and that he remarked that libelant might have got the hurt in falling, but that he continued to accuse the mate of having struck him, which corroborates the libelant's witnesses on that point. . . .

Again, the conduct of the libelant, and others who were struck, of going to the magistrate that night and swearing out warrants for the mate's arrest, corroborates libelant. Of course it is possible that this negro man of inferior intelligence conceived the idea, as did the other two, of taking advantage of the circumstance that in falling he had cut his head, to wholly fabricate a story of being beaten, and of all three going before a justice of the peace, and each falsely complaining of an assault and beating by this mate;

also that he would set up such a charge in order to bring this suit for damages. But that theory of accounting for their conduct is improbable; for it was well said by the learned counsel of libelant that these simple-minded negroes are scarcely equal to such a scheme as that. Under the explanation given by Capt. Sims, the defendant, for settling those prosecutions and paying the costs, that circumstance cannot be taken as corroborative of libelant's testimony; but the mere fact of an immediate accusation before the officers of the law is, considering the simplicity of the negro character, taken in connection with his then bleeding wound, and the complaints of the others of a beating at the same time, strongly suggestive of the fact that this mate was pursuing the usual method — to which they are nearly all addicted, and which they dislike to give up — of enforcing obedience to his orders by physical force. Under these circumstances it is more probable that he struck this man than that he did not, notwithstanding that he denies doing it and that he is a white man and the other a negro.

But, besides this, we have the positive testimony of libelant's witnesses that they saw the blow struck, and the story they tell is reasonable enough, after making allowance for their exaggerations of the enormity of the mate's conduct. Their belief that the mate intentionally knocked libelant into the river is probably not at all true, and they no doubt magnify the force of the blow, and all their impressions of the occurrences are crude and distorted, perhaps; and yet out of it all the real facts are easily discernible. It is fairly to be inferred that, substantially, the facts are that the mates were engaged in driving the hands to the speedy work necessary to enable the boat to leave that evening, and trying to keep them up to the mark of efficiency necessary to accomplish that purpose; and that, in reply to

libelant's suggestion that they were green hands at the business, he tapped him on the head with the monkey-wrench, or some like instrument, severely enough to make an ugly wound, which turned out to be not very serious, and that the libelant, in his haste to get away and escape further blows, or to get about his work, fell between the vessel and the barge from which the machinery was being transferred and into the river, from which danger the mate promptly rescued him, and saved his life.

Turning now to the defendant's proof, I find nothing in it necessarily overcoming the circumstances tending to establish the above conclusion of fact. Of course, there is the denial of the mate; but that has already been treated, and the other proof must prevail against it. Nothing in the proof of the other witnesses establishes his denial or necessarily tends to support it. Every one of them testifies, to be sure, that he did not see the blow, and some of them think they would have seen it if there had been one struck; but it is manifest from the nature of the act and the situation of each, as described by himself, that the blow could have been struck and not one of them have seen it. It is a kind of negative testimony of not much value. . . . The libelant says that the other mate, the witness Bradford, stood by and saw the blow, and no doubt he was close enough to have seen it; but that witness was himself engaged in the business of hurrying up the work by superintending it, and, notwithstanding his proximity, may not have seen the blow. He is very positive none was struck; but he did not belong to the "gang" of workmen and was not, like them, at that moment subjected to the immediate supervision of the mate and brought into direct contact with him. . . .

Now, there can be no question whatever that if we rigidly confine the libelant to the minutiae of his

story and that of the witnesses, and demand that every detail of it shall be precisely consistent with the ascertained fact before any corroboration shall be established by those facts, it would fail. So would the story of the mate and his witnesses fail under such a process. But it is an unreasonable requirement, and the law of evidence does not demand such consistency of detail in the relation of occurrences of that nature. The truth is that no two witnesses on such occasions quite agree as to the details of an occurrence, and no single witness can tell with absolute precision what took place and describe accurately all the details. The most that any trier of the issue can do is to extract from the consistencies and the inconsistencies of statements the truth as nearly as it may be. That the blow was struck in this case will always remain, argumentatively, perhaps, a matter of doubt; but for the practical purposes of judicial judgment it must be taken as an established fact.

Perhaps I should refer to the attack on the libelant for his false statement that he remained at home six weeks, when the proof shows that in less than ten days he worked a week in Memphis. If this be material, it may be said that it is doubtful if negroes of this class can ever be accurate as to time and its relation to events. It is notorious that the most intelligent witnesses find difficulty in estimating time, and generally say, "four or five weeks," and "five or six days," etc., in measuring it; but negroes seem to be most unreliable in this respect, almost always. The libelant doubtless thought to exaggerate his sufferings by making the time longer, but it is hardly fair, under the circumstances already stated, to disbelieve him on that account as to the blow. Moreover, he may well reply "tu quoque"; for this mate swore positively that he paid the libelant that night before he left the boat, while the truth

is that he escaped from the boat with the other negroes, and went to the magistrate's office, and returned next day for his pay, slipping on board to avoid the mate, whom he was evidently afraid to meet. It is not quite satisfactory to argue that the one statement is material and the other immaterial to the issue. The mate's statement, if true, would have been quite as strong as a corroborating circum-

stance of his story as the libelant's would have been a material aggravation of his damages.

So much attention to a dispute about a mere matter of fact is necessary, under the circumstances, to avoid any misunderstanding or misrepresentation as to the grounds of this judgment. . . . The libelant will be allowed \$100 damages, and his costs of suit. So ordered.

#### SUB-TITLE B: AGE

172. ROBERT LOUIS STEVENSON. *Virginibus Puerisque*. Essay on *Child's Play*. The regret we have for our childhood is not wholly justifiable: so much a man may lay down without fear of public ribaldry; for although we shake our heads over the change, we are not unconscious of the manifold advantages of our new state. What we lose in generous impulse, we more than gain in the habit of generously watching others; and the capacity to enjoy Shakespeare may balance a lost aptitude for playing at soldiers. Terror is gone out of our lives, moreover; we no longer see the devil in the bed-curtains nor lie awake to listen to the wind. We go to school no more; and if we have only exchanged one drudgery for another (which is by no means sure), we are set free forever from the daily fear of chastisement.

And yet a great change has overtaken us; and although we do not enjoy ourselves less, at least we take our pleasure differently. We need pickles nowadays to make Wednesday's cold mutton please our Friday's appetite; and I can remember the time when to call it red venison, and tell myself a hunter's story, would have made it more palatable than the best of sauces. To the grown person, cold mutton is cold mutton all the world over; not all the mythology ever invented by man will make it better or worse to him; the broad fact, the clamant reality, of the mutton carries away before it such seductive figments. But for the child it is still possible to weave an enchantment over eatables; and if he has but read of a dish in a story book, it will be heavenly manna to him for a week. . . . Children may be pure spirits, if they will, and take their enjoyment in a world of moonshine. Sensation does not count for so much in our first years as afterwards; something of the swaddling numbness of infancy clings about us; we see and touch and hear through a sort of golden mist. Children, for instance, are able enough to see, but they have no great faculty for looking; they do not use their eyes for the pleasure of using them, but for by-ends of their own; and the things I call to mind seeing most vividly were not beautiful in themselves, but merely interesting or enviable to me as I thought they might be turned to practical account in play. Nor is the sense of touch so clean and poignant in children as it is in a man. If you will turn over your old memories, I think the sensations of this sort you remember will be somewhat vague, and

come to not much more than a blunt, general sense of heat on summer days, or a blunt, general sense of well-being in bed. . . . As for taste, when we bear in mind the excesses of unmitigated sugar which delight a youthful palate, it is surely no very cynical asperity to think taste a character of the maturer growth. Smell and hearing are perhaps more developed; I remember many scents, many voices, and a great deal of spring singing in the woods. But hearing is capable of vast improvement as a means of pleasure; and there is all the world between gaping wonderment at the jargon of birds, and the emotion with which a man listens to articulate music.

At the same time, and step by step, with this increase in the definition and intensity of what we feel which accompanies our growing age, another change takes place in the sphere of intellect, by which all things are transformed and seen through theories and associations as through colored windows. We make to ourselves day by day, out of history, and gossip, and economical speculations, and God knows what, a medium in which we walk and through which we look abroad. We study shop windows with other eyes than in our childhood, never to wonder, not always to admire, but to make and modify our little incongruous theories about life. . . . According to my contention, this is a flight to which children cannot rise. . . . We grown people can tell ourselves a story, give and take strokes until the bucklers ring, ride far and fast, marry, fall, and die; all the while sitting quietly by the fire or lying prone in bed. This is exactly what a child cannot do, or does not do, at least, when he can find anything else. He works all with lay figures and stage properties. When his story comes to the fighting, he must rise, get something by way of a sword and have a set-to with a piece of furniture, until he is out of breath. When he comes to ride with the king's pardon, he must bestride a chair, which he will so hurry and belabor and on which he will furiously demean himself, that the messenger will arrive, if not bloody with spurring, at least fiery red with haste. If his romance involves an accident upon a cliff, he must clamor in person about the chest of drawers and fall bodily upon the carpet, before his imagination is satisfied. Lead soldiers, dolls, all toys, in short, are in the same category and answer the same end. Nothing can stagger a child's faith; he accepts the clumsiest substitutes and can swallow the most staring incongruities. The chair he has just been besieging as a castle, or valiantly cutting to the ground as a dragon, is taken away for the accommodation of a morning visitor, and he is nothing abashed; he can skirmish by the hour with a stationary coal scuttle; in the midst of the enchanted pleasance, he can see, without sensible shock, the gardener soberly digging potatoes for the day's dinner. He can make abstraction of whatever does not fit into his fable; and he puts his eyes into his pocket, just as we hold our noses in an unsavory lane. . . .

In the child's world of dim sensation, play is all in all. "Making believe" is the gist of his whole life, and he cannot so much as take a walk except in character. I could not learn my alphabet without some suitable "mise-en-scène," and had to act a business man in an office before I could sit down to my book. Will you kindly question your memory, and find out how much you did, work or pleasure, in good faith and soberness, and for how much you had to cheat yourself with some invention? I remember, as though it were yesterday, the expansion of spirit, the dignity and self-reliance, that came with a pair of mustachios in burnt cork, even when there was none to see.

Children are even too content to forego what we call the realities, and prefer the shadow to the substance. When they might be speaking intelligibly together, they chatter senseless gibberish by the hour, and are quite happy because they are making believe to speak French. I have said already how even the imperious appetite of hunger suffers itself to be gulled and led by the nose with the fag end of an old song. . . . When my cousin and I took our porridge of a morning, we had a device to enliven the course of the meal. He ate his with sugar, and explained it to be a country continually buried under snow. I took mine with milk, and explained it to be a country suffering gradual inundation. You can imagine us exchanging bulletins; how there was an island still unsubmerged, here a valley not yet covered with snow; what inventions were made; how his population lived in chains on perches and traveled on stilts, and how mine was always in boats; how the interest grew furious, as the last corner of safe ground was cut off on all sides and grew smaller every moment; and how, in fine, the food was of altogether secondary importance, and might even have been nauseous, so long as we seasoned it with these dreams. . . .

One thing, at least, comes very clearly out of these considerations: that whatever we are to expect at the hands of children, it should not be any peddling exactitude about matters of fact. They walk in a vain show, and among mists and rainbows; they are passionate after dreams and unconcerned about realities; speech is a difficult art not wholly learned; and there is nothing in their own tastes or purposes to teach them what we mean by abstract truthfulness. When a bad writer is inexact, even if he can look back on half a century of years, we charge him with incompetence and not with dishonesty. And why not extend the same allowance to imperfect speakers? Let a stockbroker be dead stupid about poetry, or a poet inexact in the details of business, and we excuse them heartily from blame. But show us a miserable, unbreeched, human entity, whose whole profession it is to take a tub for a fortified town, and a shaving brush for the deadly stiletto, and who passes three fourths of his time in a dream and the rest in open self-deception, and we expect him to be as nice upon a matter of fact as a scientific expert bearing evidence. Upon my heart, I think it less than decent. You do not consider how little the child sees, or how swift he is to weave what he has seen into bewildering fiction; and that he cares no more for what you call truth, than you for a gingerbread dragon.

I am reminded, as I write, that the child is very inquiring as to the precise truth of stories. But indeed this is a very different matter, and one bound up with the subject of play, and the precise amount of playfulness, or playability, to be looked for in the world. Many such burning questions must arise in the course of nursery education. Among the fauna of this planet, which already embraces the pretty soldier and the terrifying Irish beggarman, is, or is not, the child to expect a Bluebeard or a Cormoran? Is he, or is he not, to look out for magicians, kindly and potent? May he, or may he not, reasonably hope to be cast away upon a desert island, or turned to such diminutive proportions that he can live on equal terms with his lead soldiery, and go a cruise in his own toy schooner? Surely all these are practical questions to a neophyte entering upon life with a view to play. Precision upon such a point, the child can understand. But if you merely ask him of his past behavior, as to who threw such a stone, for instance,

or struck such and such a match; or whether he had looked into a parcel or gone by a forbidden path, — why, he can see no moment in the inquiry, and it is ten to one he has already half forgotten and half bemused himself with subsequent imaginings.

173. HANS GROSS. *Criminal Psychology* (transl. Kallen, 1911. §§ 79–82, pp. 368–374, in part); and *Criminal Investigation* (transl. Adam, 1907. p. 91.) . . . Of course we cannot fix absolutely the age at which witnesses are more or less worthy of credit; we must in addition and even to a greater extent take into account all the other elements which go to make up a man, his natural qualities and intellectual culture. But still certain broad rules may be laid down as to age. The conditions of the child's bringing-up, the things he learned to know, are what we must first of all learn. If the question in hand can fit into the notion the child possesses, he will answer better and more, though quite unendowed, than if a very clever child who is foreign to the notions of the defined situation. I should take intelligence only to be of next importance in such cases, and advise giving up separating clever from stupid children in favor of separating practical and unpractical children. The latter makes an essential difference. Both the children of talent and stupid children may be practical or unpractical. . . . The practical child will see, observe, properly understand, and reproduce a group of things that the unpractical child has not even observed. Of course, it is well, also, to have the child talented, but I repeat: the least clever practical child is worth more as witness than the most clever unpractical child. What the term "practical" stands for is difficult to say, but everybody knows it, and everybody who has cared about children at all, has seen that there are practical children.

In one sense the best witnesses are children of 7 to 10 years of age. Love and hatred, ambition and hypocrisy, considerations of religion and rank, of social position and fortune, are as yet unknown to them; it is impossible that preconceived opinions, nervous irritation, or long experience, should lead them to form erroneous impressions; the mind of the child is but a mirror that reflects accurately and clearly what is found before it. These are great advantages, accompanied by certain corresponding drawbacks. The greatest is that we cannot place ourselves at the point of view of the child; it uses indeed the same words as we do, but these words convey to it very different ideas. Further, the child perceives things differently from grown-up people. The conception of magnitude — great or small, of pace — fast or slow, of beauty and ugliness, of distance — near or far, are quite different in the child's brain from in ours; still more so when facts are in question. Facts to us perfectly indifferent delight or terrify the child, and what for us is magnificent or touching does not affect it in the least. We are ignorant of the impression produced on the child's mind. There is yet another difficulty; the horizon of the child being much narrower than ours, a large number of our perceptions are outside the frame within which alone the child can perceive. We know, within certain limits, the extent of this frame; we should not, for instance, question a child as to how a complicated piece of roguery was committed, or how adulterous relations have developed; we know it is ignorant of such things. But in many directions we do not know the exact point where its faculty of observation commences

or stops. At times we cannot explain how it does not understand something or other, while at other times we are astonished to see it find its bearings easily among matters thought to be well beyond its intelligence.

We are, as a rule, too distrustful of the capacity of a child. We have rarely found too much expected of it, while we have often discovered that it knew and noted much more than any one imagined. The same experience occurs to us in daily life. How many times do not people speak in its presence of things a child is not supposed to understand, only to discover later that it has not only understood very well, but has combined the information with other things heard before or after. Again it must not be forgotten that a child is peculiarly exposed to external influences, whether designed or accidental. Any one, knowing that a child is to appear as a witness in a court of justice, if he is interested in his statements, and has the chance of influencing it himself, will almost certainly exert that influence. The child, as yet devoid of principles, places great faith in the words of grown-up people; so if a grown-up person brings influences to bear on it, especially some time after the occurrence, the child will imagine it has really seen what it has been led to believe. This result is obtained with certainty if the man proceeds slowly and by degrees, leading the child to the desired goal by repeated simple questions, as "Is it not so?" "It was not so, was it not thus?" The result is the same, when the influence is undesigned. An important event happens; it is naturally much talked of, all sorts of hypotheses are started, there is gossip of what others have seen or might in certain circumstances have seen. If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its young mind, and ultimately it believes it has itself seen what the others have related. One must therefore be always careful in questioning children, but their statements, if judiciously obtained, generally supply material of great value.

In passing from the child to the succeeding age, it becomes necessary to distinguish sex; for just as sex differentiates in external appearance the youth from the girl, so are they differentiated in their methods of perception. An intelligent boy is undoubtedly the best observer to be found. The world begins to take him by storm with its thousand matters of interest; what the school and his daily life furnish cannot satisfy his overflowing and generous heart. He lays hold of everything new, striking, strange, all his senses are on the stretch to assimilate it as far as possible. No one notices a change in the house, no one discovers the bird's nest, no one observes anything out of the way in the fields; but nothing of that sort escapes the boy, everything which emerges above the monotonous level of daily life gives him a good opportunity for exercising his wits, for extending his knowledge, and for attracting the attention of his elders, to whom he communicates his discoveries. The spirit of the youth not having as yet been led astray by the necessities of life, its storms and battles, its factions and quarrels, he can freely abandon himself to everything which appears out of the way; his life has not yet been disturbed by education though he often observes more clearly and accurately than any adult. . . . We say again that an intelligent boy is, as a rule, the best witness in the world.

It is a different affair with a young girl of the same age. Her natural qualities and her education prevent her acquiring the necessary knowledge



and the breadth of view which the boy soon achieves, and these are the conditions absolutely indispensable for accurate observation. The girl remains longer in the narrow family circle, at her mother's apron strings. . . . The girl has no training of the boy's sort; she goes out less, she has little to do with workmen, artisans, or tradesmen, who are in many ways the schoolmasters of the boy anxious to learn; she sees nothing of human life, and when anything extraordinary happens she is incapable, one might almost suggest, of seizing it with her senses, that is to say, of observing accurately. If besides there be danger, noise, fear, all which attract the boy and serve to excite his curiosity, she gets out of the way in alarm, and either sees nothing or sees it indistinctly from a distance. A young girl may even in certain circumstances be a dangerous witness, when she is interested in the matter or is herself perchance the center. In such a case strong exaggerations and even pure inventions are to be feared. Natural gifts, imagination, dreaming, romantic exaltation, such are the natural degrees by which the girl, too young yet to have had any interesting experiences of her own, arrives at last at "Byronism." Now Byronism is a sort of ennui or weariness of life, always urging one to seek for change; and what happier variety could there be than a criminal matter in which the little lady finds herself mixed up. It is interesting enough in itself to appear in the witness box, to make a deposition and to intervene in the destiny of another; but how much more noteworthy is it when an important matter is in question, when the attention of every one is turned upon the witness, when all the world is breathless to learn what she has been asked, what she has replied, and how the case is going to turn. Thus an insignificant theft is easily magnified into a robbery with violence; the witness, out of a miserable swindler, manufactures a pale and interesting young man; a coarse word becomes a blow; an insignificant event develops into a romantic abduction; stupid chaff turns up as a great conspiracy. . . . But, to be just, we must recognize on the other hand that no one notices and knows certain things more cleverly than a young girl. If her imagination does not carry her away, she can furnish information more valuable than any grown-up person. . . . No one discovers more rapidly than a sprightly young girl approaching maturity the little carryings-on and intrigues of her neighbors. . . . Connected with this is the trick young girls have of spying on certain people. An interesting beauty or a young man acquaintance have no more vigilant watcher of all their goings on than their neighbor — a little girl of twelve to fourteen. No one knows better than she who they are, what they do, what company they keep, when they go out, and how they dress. She even notes the moral traits of those coming under her supervision, — their joy, their grief, their disappointments, their hopes, and all their experiences. If one desires information on such subjects, the best witnesses are schoolgirls — always supposing that they are willing to tell the truth.

From youth we pass to adults, who though in the flower of their existence, are far from furnishing the best witnesses. The adult is in general the worst of all observers. Finding himself in the happiest epoch of his life, full of hope and ideals, interested only in himself and his desires, the young man finds nothing important but himself. . . . The typical representative of this age is the young lady, to whom the disappearance of the

world would be a matter of no moment compared with the momentous matter of a ball; or the student, to whom his club or society is the most serious thing under the sun. All this of course changes with time; but youth with its plenitude of force is the personification of that robust egoism which takes possession of the world and in all its diversions sees only itself. Any one who has critically watched himself and watched others knows all this; whoever has had the opportunity of questioning young people about important facts happening in their neighborhood is at once irritated and delighted at the sublime indifference exhibited. But if perchance the young man has observed, his deposition will be true and trustworthy; he has preserved his good principles, not yet scattered by the storms of life.

In middle age, man employs all the forces with which he has been endowed by nature; his good and bad qualities alike have reached their fullest development; and what the middle-aged man and woman want to perceive, they can perceive and describe. Their career, the goal of their labors is fixed; their likes and their dislikes are formed, and that decisively; the middle-aged man thus has a clearly defined position in all circumstances; when it is a question of testimony as to justice or injustice he advances with a firm and a decided step. True, this is the case only with the man of sound moral principles. For there is no period of life in which man is assailed more violently by his passions, malevolence, egoism, self-seeking, discord, than when he mounts to the highest plane of his life, when he is the most active but also the most unreasonable. These passions never exert their influence on him more strongly than at this age; their omnipotence makes him an unconscious liar; and there is no witness more difficult to tackle, or more dangerous, than the man in full possession of all his faculties, both good and bad. . . .

The old man comes last; he is either sweet and conciliatory, or sour and cynical, according to his luck in life. His senses and faculties of observation are weakened; but experience tells him by a sort of insight what his eyes do not catch, and frequently his opinion may be summed up in the words, "To understand is to forgive." In fact, the old man has become a child again; accurate perception of external objects is wanting, but also his passions are dulled. He sees simply and without cunning, the difference between the sexes is again accentuated, the old man and the old woman see and understand things like children, and the suggestions of another in favor of this or that regain their power, just as when they were young.

Senile individuals require especial treatment as witnesses. . . . Accurate observation will reveal only two types of senility. There is the embittered type; and there is the character expressed in the phrase, "to understand all is to forgive all." Senility rarely succeeds in presenting facts objectively. Everything it tells is bound up with its judgment, and its judgment is either negative or positive. The judgment's nature depends less on the old man's emotional character than on his experience in life. If he is one of the embittered, he will probably so describe a possibly harmful, but not bad, event as to be able to complain of the wickedness of the world, which brought it about, that at one time such and such an evil happened to him. The excusing senile will begin with "Good God, it wasn't so bad. The people were young and merry, and so one of them —." That the same event is presented in a fundamentally different light by each is obvious. For-

tunately the senile is easily seen through and his first words show how he looks at things. He makes difficulties mainly by introducing memories which always color and modify the evidence. The familiar fact that very old men remember things long past better than immediate occurrences, is to be explained by the situation that the ancient brain retains only that which it has frequently experienced.

174. G. STANLEY HALL. *Children's Lies*. (American Journal of Psychology, 1891. Vol. III, p. 59.) These returns [from a systematic inquiry] now represent nearly three hundred city children of both sexes, mostly from twelve to fourteen years of age. . . . A general statement of them, according to the groups into which they naturally fall, will be serviceable, it is hoped, to thoughtful parents and teachers as well as to psychologists.

I. No children were found destitute of high ideals of truthfulness. Perhaps the lowest moral development is represented by about a dozen children who regarded every deviation from the most painfully literal truth as alike heinous, with no perspective or degrees of difference between white and black fibbing and the most barefaced intended or unintended lies. This mental state, though in a few cases probably priggish and affected, became in others so neurotic that to every statement, even to yes and no, "I think" or "perhaps" was added mentally, whispered, or in two cases aloud, and nothing could prompt a positive, unqualified assertion. This condition (not unknown among adults in certain morbid states of conscience) we will designate as pseudophobia, and place it among the many other morbid fears that prey upon unformed or unpoised minds. One boy told of "spells" of saying over hundreds of times when alone the word "not," in the vague hope it might somehow be interpolated into the divine record of his many wrong stories, past and future, to disinfect them and neutralize his guilt. Another had a long period of fear that like Ananias and Sapphira he might some moment drop down dead for a chance and perhaps unconscious lie. . . . This moral superstition, which seemed mostly due to mixing ethical and religious teaching in unpedagogic ways or proportions in home or Sunday school, is happily rare, generally fugitive, is not germane to the nature of childhood, and is likely to rectify itself. Where it persists, it begets a quibbling, word-splitting tendency, a logolatry, or a casuistic habit, resulting sometimes in very systematic palliatives, tricks, and evasions, which may become distinctly morbid. . . .

II. Strongly contrasted with this state, and far more common, is that in which lies are justified as means to noble ends. Children all admire burly boys who by false confessions take upon themselves the penalties for the sins of weaker playmates, or even girls who are conscious of being favorites with teacher or parent, or of superior powers of blandishment, and who claim to be the authors of the misdeeds of their more disfavored mates. . . . A teacher who told her class of thirteen-year-old children the tale of the French girl in the days of the Commune, who, when on her way to execution on a petty charge, met her betrothed and responded to his agonized appeals, "Sir, I do not know you," and passed on to death alone, because she feared recognition might involve him in her doom, was saddened because she found it so hard to make her pupils name as a lie what was so eclipsed by heroism and love. Children have a wholesome

instinct for viewing moral situations as wholes, but yet are not insensitive to that eager and sometimes tragic interest which has always for men invested those situations in both life and literature where duties seem to conflict. The normal child feels the heroism of the unaccountable instinct of self-sacrifice far earlier and more keenly than it can appreciate the sublimity of truth. . . .

III. With most children, as with savages, truthfulness is greatly affected by personal likes and dislikes. In many cases they could hardly be brought to see wrong in lies a parent or some kind friend had wished them to tell. Often suspected lies were long persisted in, until they were asked if they would have said that to their mothers, when they at once weakened. . . . The girls in our returns were more addicted to this class of lies than boys. Boys keep up joint or comploted lies, which girls rarely do, who "tell on" others because they are "sure to be found out," or "some one else will tell"; while boys can be more readily brought to confess small thefts, and are surer to own up if caught, than girls. . . . All children find it harder to cheat in their lessons with a teacher they like. . . . To simulate or dissimulate to the priest, or above all, to God, was repeatedly referred to as worst of all. . . . Truth for our friends and lies for our enemies is a practical, though not distinctly conscious rule, widely current with children, as with uncivilized and, indeed, even with civilized races. . . .

IV. The greatest number of lies in our collections are prompted by some of the more familiar manifestations of selfishness. Every game, especially every exciting one, has its own temptation to cheat; and long records of miscounts in tallies, moving balls in croquet, crying out "no play" or "no fair" at critical moments to divert impending defeat, false claims made to umpires, and scores of others, show how unscrupulous the all-constraining passion to excel often renders even young children. . . . School life is responsible for very many, if not most, of the deliberate lies of this class. . . . Children copy school work, and monitors get others to do theirs as pay for not reporting them, while if a boy is reported, he tells of as much disorder as possible on the part of others, to show that the monitor did not do his duty. . . . The long list of headaches, nosebleeds, stomach-aches, etc. feigned to get out of going to school, of false excuses for absence and tardiness, the teacher, especially, if disliked, being so often exceptionally fair game for all the arts of deception, — all this seems generally prevalent. This class of lies ease children over so many hard places in life and are convenient covers for weakness and even vice. . . .

V. Much childish play owes its charm to partial self-deception. Children imagine or make believe they are animals, making their noises and imitating their activities; that they are soldiers, and imagine panoramas of warlike events; that they are hunters in extreme peril from wild beasts; Indians, artisans, and tradesmen of many kinds; doctors, preachers, angels, ogres. They play school, court, meeting, congress. If hit with wooden daggers in the game of war, they stand aside and play they are dead. . . . They baptize cats, bury dolls, have puppet shows with so many pin admission, all with elaborate details. They dress up and mimic other, often older, people, ride on the horse cars and imagine them fine carriages, get up doll hospitals and play surgeon or Florence Nightingale. The more severe the discipline of the play-teacher and the more savage the play-mother, the

better the fun. . . . It seems almost the rule that imaginative children are more likely to be dull in school work, and that those who excel in it are more likely to have fewer or less vivid mental images of their own. . . . One early manifestation of the shadowy falsity to fact of the idealizing temperament is often seen in children of three or four, who suddenly assert that they saw a pig with five ears, a dog as big as a horse, or, if older, apples on a cherry tree, and other Munchausen wonders, which really means at once but little more than that they have that thought or have made that mental combination independently of experience. They come to love to tell semiplausible stories, and perhaps, when the astonishment is over, to confess. . . . We might almost say of children at least, somewhat as Froschamer argues of mental activity, and even of universe itself, that all their life is imagination. . . .

VI. A less common class of what we may call pathological lies was illustrated by about a score of cases in our returns. The love of showing off and seeming big, to attract attention or to win admiration, sometimes leads children to assume false characters, *e.g.* on going to a new town or school, kept up with difficulty by many false pretenses awhile, but likely to become transparent and collapse, and getting the masker generally disliked. A few children, especially girls, are honeycombed with morbid self-consciousness and affectation, and seem to have no natural character of their own, but to be always acting a part and attracting attention; boys preferring fooling, and humbugging by tricks or lies, sometimes of almost preternatural acuteness and cleverness.

VII. Finally, children have many palliatives for lies that wound the conscience. . . . An acted lie is far less frequently felt than a spoken one; so to nod is less sinful than to say yes; to point the wrong way, when asked where some one is gone, is less guilty than to say wrongly. Pantomimed lies are, in short, for the most part easily gotten away with. It is very common for children to deny in the strongest and most solemn way wrongs they are accused of, and when, at length, evidence is overwhelming, to explain or to think, "My hand or foot did it, not I." The distinction is not unnatural in children whose teachers or parents so often snap or whip the particular member which has committed the offense. In short, hardly any of the sinuosities lately asserted, whether rightly or wrongly, of the earlier Jesuit confessionals, and all the elaborated pharmacopœia of placebos they are said to have used to ease consciences outraged by falsehood, seemed reproduced in the spontaneous endeavors of children to mitigate the poignancy of this sense of guilt.

In fine, some forms of the habit of lying are so prevalent among young children that all illustrations of it, like the above, seem trite and commonplace. Thoroughgoing truthfulness comes hard and late, and school life is so full of temptation to falsehood that an honest child is its rarest, as well as its noblest, work. The chief practical point is for the teacher to distinguish the different forms of the disease and apply the remedies best for each. So far from being a simple perversity, it is so exceedingly complex, and born of such diverse and even opposite tendencies that a course of treatment that would cure one form would sometimes directly aggravate another.

175. AMOS C. MILLER. *Examination of Witnesses*. (Illinois Law Review. Vol. II, 260.) . . . *Cross-examining Children*. This is a matter of great delicacy. I have seen distinguished, able, and skillful trial lawyers make the fatal mistake of being unnecessarily severe in cross-examining children. They were probably unconscious of their attitude. But the effect was to excite sympathy for the child and resentment toward the lawyer, with the quite natural result that the jury believed the child. My own belief, from personal observation, is that children are very unreliable witnesses. They are impressionable, their imaginations are active, and their memories are short. They can easily be trained to believe they saw or heard what they did not see or hear. They are very hard to corner. I know of no other way to handle them than by kindness, patience, and persistence. Sometimes by these means it will be shown that they are uncertain on many points, or that they have been talked to by some other witness, or that certain things that they have testified to they know only by hearsay, or perhaps on some collateral matter they can be led to testify directly contrary to what every one knows is the truth. If some of the opposing witnesses are children, *don't fail to ask that the witnesses be excluded from the court room during the opening statements and the taking of testimony*.

176. GUY M. WHIPPLE. *Manual of Mental and Physical Tests*. [Printed *post*, as No. 290.]

177. THE DISBELIEVED CHILD'S CASE. [Printed *post*, as No. 356.]

178. LAURENCE BRADDON'S TRIAL. [Printed *post*, as No. 391.]

#### SUB-TITLE C: SEX

179. HANS GROSS. *Criminal Psychology*. (1911. transl. Kallen, § 63, p. 300.) One of the most difficult tasks of the criminalist who is engaged in psychological investigation is the judgment of woman. Woman is not only somatically and psychically rather different from man; man never is able wholly and completely to put himself in her place. . . . To the nature of woman, we men totally lack avenues of approach. We can find no parallel between women and ourselves, and the greatest mistakes in criminal law were made where the conclusions would have been correct if the woman had been a man. We have always estimated the deeds and statements of women by the same standards as those of men, and we have always been wrong. . . . We proceed wrongly in the valuation of woman. We cannot attain proper knowledge of her because we men were never women, and women can never explain themselves to us because they were never men. . . .

(a) *Intelligence*. Feminine intelligence properly deserves a separate section. Intelligence is a function that has in both sexes some basis and purpose, and proceeds according to the same rules; but the meaning of intelligence must be abandoned if we are to suppose it so rigid and so diffi-

cult to hold, that the age-long differences between man and woman could have had no influence on it.

(1) *Conception*. In sense perception there is no significant difference between the two sexes; although in conceptual power we find differences very distinct. It may be generally said, as the daily life shows, that women conceive differently from men. Whatever a dozen men may agree on conceptually, will be differently thought of by any one woman. In the apprehension of situations, the perception of attitudes, the judgment of people in certain relations, in all that is called tact, *i.e.* in all that involves some abstraction or clarification of confused and twisted material, and finally, in all that involves human volitions, women are superior, and more reliable individually, than ten men together. But the manner in which the woman obtains her conception is less valuable, being the manner of pure instinct. . . . The process is mainly unconscious, and is hence of less value only, if I may say so, as requiring less thought. In consequence, there is not only not a decrease in the utility of feminine testimony; also its reliability is very great. There may be hundreds of errors in the dialectical procedure of a man, while there is much more certainty in the instinctive conception and the direct reproduction of a woman. Hence, her statements are more reliable. . . .

We need not call the source of this instinct God's restitution for feminine deficiency in other matters; we can show that it is due to natural selection, and that the position and task of woman requires her to observe her environment very closely. This need sharpened the inner sense until it became unconscious conception. Feminine interest in the environment is what gives female intuition a swiftness and certainty unattainable in the meditations of the profoundest philosophers. The swiftness of the intuition, which excludes all reflection, and which merely solves problems, is the important thing. . . . Woman does not reason and infer, and if things miss her intuition, they do not exist for her.

Objectivity is another property that women lack. They tend always to think in personalities, and they conceive objects in terms of personal sympathies. Tell a woman about a case so that her interest will be excited without your naming the individuals save as A and B, and it will be impossible to get her to take a stand or to make a judgment. Who are the people, what are they, how old are they, etc.? These questions must be answered first. Hence the divergent feminine conceptions of a case before and after the names are discovered. The personalizing tendency results in some extraordinary things. Suppose a woman is describing a brawl between two persons, or two groups. If the sides were equally matched in strength and weapons, and if the witness in question did not know any of the fighters before, she will nevertheless redistribute sun and wind in her description if one of the brawlers happens accidentally to have interested her, or has behaved in a "knightly" fashion, though under other circumstances he might have earned only her dislike. (In such cases the fairy tale about telling "mere facts" recurs, and I have to repeat that *nobody* tells mere facts — that judgment and inference always enter into statements and that women use them more than men.) . . . The same is true in purely individual cases. In the eyes of woman the same crime committed by one man is black as hell; committed by another, it is in all respects excusable. . . . Of

course women are not alone in taking such attitudes ; but they are never so clear, so typical, nor so determined as when taken by women.

(2) *Judgment.* Avenarius tells of an English couple who were speaking about angels' wings. It was the man's opinion that this angelic possession was doubtful ; the woman's, that the angels lacked wings because they couldn't have any. Many a woman witness has reminded me of this story, and I have been able to explain by use of it many an event. Woman says "because" when she knows of no reason ; "because" when her own arguments bore her ; "because" when she is confused ; when she does not understand the evidence of her opponent, and particularly when she desires something. Unfortunately, she hides this attitude under many words, and one often wishes for the simple assertion of the English woman, "because." In consequence, when we want to learn their ratio sciendi from women, we get into difficulties. They offer us a collection of frequently astonishing and important things, but when we ask for the source of this collection we get "because" in variations, from a shrug of the shoulders to a flood of words. The inexperienced judge may be deceived by the positiveness of such expressions and believe that such certainty must be based on something which the witness cannot utter through lack of skill. If, now, the judge is going to help the "unaided" witness with "of course you mean because," or "perhaps because," etc., the witness, if she is not a fool, will say "yes." Thus we get apparently well-founded assertions which are really founded on nothing more than "because."

Cases dealing with divisions, distinctions, and analysis rarely contain ungrounded assertions by women. Women are well able to analyze and explain data, and what one is capable of and understands, one succeeds in justifying. Their difficulty is in synthetic work, in progressive movements and there they simply assert. The few women witnesses for the defense often become the most dangerous for the defenders.

But here, also, women find a limit, perhaps because, like all weaklings, they are afraid to draw the ultimate conclusions. As Leroux says in *De l'Humanité*, "If criminals were left to women, they would kill them all in the first burst of anger, and if one waited until this burst had subsided, they would release them all." The killing points to the easy excitability, the passionateness, and the instinctive sense of justice in women which demands immediate revenge for evil deeds. The liberation points to the fact that women are afraid of every energetic deduction of ultimate consequences, i.e. they have no knowledge of real justice. "Men look for reasons, women judge by love ; women can love and hate, but they cannot be just without loving, nor can they ever learn to value justice." So says Schiller, and how frequently do we not hear the woman's question whether the accused's fate is going to depend on her evidence. If we say yes, there is, as a rule, a restriction of testimony, a titillation and twisting of consequences, and this circumstance must always be remembered. If you want to get truth from a woman, you must know the proper time to begin and, what is more important, when to stop. As the old proverb says, and it is one to take to heart, "Women are wise when they act unconsciously, fools when they reflect."

(3) *Quarrels with Women.* This little matter is intended only for very young and inexperienced criminal justices. There is nothing more excit-



ing or instructive than a quarrel with clever and trained women concerning worthy subjects; but this does not happen in court; and 90 per cent of our woman witnesses are not to be quarreled with. . . . Women have an obstinacy, and it is no easy matter to be passive against it. But in the interest of justice, the part of the wise man is not to lose any time by making an exhibition of himself through verbal quarrels with women witnesses. . . .

(b) *Honesty*. We shall speak here only of the honesty of the sort of women the courts have most to do with, and in this regard there is little to give us joy. Not to be honest, and to lie, are two different things; the latter is positive, the former negative; the dishonest person does not tell the truth, the liar tells the untruth. It is dishonest to suppress a portion of the truth, to lead others into mistakes, to fail to justify appearances, and to make use of appearances. The dishonest person may not have said a single untrue word, and still may have introduced many more difficulties, confusions, and deceptions than the liar. He is for this reason more dangerous than the latter. Also, because his conduct is more difficult to uncover, and because he is more difficult to conquer than the liar. Dishonesty is, however, a specially feminine characteristic; in men it occurs only when they are effeminate. Real manliness and dishonesty are concepts which cannot be united. Hence, the popular proverb says, "Women always tell the truth, but not the whole truth."

And this is more accurate than the charge of many writers, that women lie. I do not believe that the criminal courts can verify the latter accusation. I do not mean that women never lie — they lie enough — but they do not lie more than men do, and none of us would attribute lying to women as a sex trait. To do so, would be to confuse dishonesty with lying. . . .

Balzac asks, "Have you ever observed a lie in the attitude and manner of woman? Deceit is as easy to them as falling snow in heaven." But this is true only if he means dishonesty. It is not true that it is easy for women really to lie. . . .

But even her simplest affirmation or denial is not honest. Her "no" is not definite; *e.g.* her "no" to a man's demands. Still further, when a man affirms or denies, and there is some limitation to his assertion, he either announces it expressly or the more trained ear recognizes its presence in the failure to conclude, in a hesitation of the tone. But the woman says "yes" and "no," even when only a small portion of one or the other asserts a truth behind which she can hide herself. . . .

So Schopenhauer agrees: "Nature has given women only one means of protection and defense — hypocrisy; this is congenital with them, and the use of it is as natural as the animal's use of its claws. Women feel they have a certain degree of justification for their hypocrisy."

With this hypocrisy we have, as lawyers, to wage a constant battle. Quite apart from the various ills and diseases which women assume before the judge, everything else is pretended; innocence, love of children, spouses, and parents; pain at loss and despair at reproaches; a breaking heart at separation; and piety, — in short, whatever may be useful. This subjects the examining justice to the dangers and difficulties of being either too harsh, or being fooled. He can save himself much trouble by remembering that in this simulation there is much dishonesty and few lies. . . .

(d) *Emotional Disposition, and Related Subjects.* Madame de Krüdener writes in a letter to Bernardin de St. Pierre: "Je voulais être sentie." These laconic words of this wise pietist give us an insight into the significance of emotional life of woman. Man wants to be understood, woman to be felt. With this emotion she spoils much that man might do because of his sense of justice. Indeed, a number of qualities which the woman uses to make herself noted are bound up with her emotional life, more or less. Compassion, self-sacrifice, religion, superstition, — all these depend on the highly developed, almost diseased formation of her emotional life. Feminine charity, feminine activity as a nurse, feminine petitions for the pardon of criminals, infinite other samples of women's kindly dispositions, must convince us that these activities are an integral part of their emotional life, and that women perform them only, perhaps, in a kind of dark perception of their own helplessness.

Spencer says that the feminine mind shows a definite lack with regard to the sense of justice. . . . These assertions show that women are deficient in justice, but do not show why. The deficiency is to be explained only in the superabundance of emotional life. This superabundance clarifies a number of facts of their daily routine. . . . The rich emotion restores a thousand times what may be missing in justice, and perhaps in many cases hits better upon what is absolutely right than the bare masculine sense of justice. We are, of course, frequently mistaken by relying on the testimony of women, but only when we assume that our rigorously judicial sentence is the only correct one, and when we do not know how women judge. Hence, we interpret women's testimonies with difficulty and rarely with correctness; we forget that almost every feminine statement contains in itself much more judgment than the testimony of men; we fail to examine how much real judgment it contains; and finally, we weigh this judgment in other scales than those used by the woman. We do best, therefore, when we take the testimony of man and woman together in order to find the right average. This is not easy, for we are unable to enter properly into the emotional life of woman, and cannot therefore discount that tendency of hers to drag the objective truth in some biased direction. . . . She fights with all her strength on the side that seems to her to be oppressed and innocently persecuted, irrespective of whether it is the side of the accused or of his enemy. In consequence, we must first of all, when judging her statements, determine the direction in which her emotion impels her, and this cannot be done with a mere knowledge of human nature. Nothing will do except a careful study of the specific feminine witness at the time she gives her evidence. . . .

When we summarize all we know about woman, we may say briefly: Woman is neither better nor worse, neither more nor less valuable than man, but she is different from him. Inasmuch as nature has created every object correctly for its purpose, woman has also been so created. The reason of her existence is different from that of man's; hence, her nature is different.

180. ARTHUR C. TRAIN. *The Prisoner at the Bar.* (1908. 2d ed. p. 279.) Roughly speaking, women exhibit about the same idiosyncrasies and limitations in the witness chair as the opposite sex, and at first thought one

would be apt to say that it would be fruitless and absurd to attempt to predicate any general principles in regard to their testimony, but a careful study of female witnesses as a whole will result in the inevitable conclusion that their evidence has virtues and limitations peculiar to itself.

Whatever difference does exist in character between the testimony of men and women has its root in the generally recognized diversity in the mental processes of the two sexes. Men, it is commonly declared, rely upon their powers of reason; women upon their intuition. Not that the former is frequently any more accurate than the latter. But our courts of law (at least those in English-speaking countries) are devised and organized, perhaps unfortunately, on the principle that testimony not apparently deduced by the syllogistic method from the observation of relevant fact is valueless, and hence woman at the very outset is placed at a disadvantage and her usefulness as a probative force sadly crippled.

The good old lady who takes the witness chair and swears that she *knows* the prisoner took her purse has perhaps quite as good a basis for her opinion and her testimony (even though she cannot give a single reason for her belief and becomes hopelessly confused on cross-examination) as the man who reaches the same conclusion ostensibly by virtue of having seen the defendant near by, observed his hand reaching for the purse, and then perceived him take to his heels. She has never been taught to reason and has really never found it necessary, having wandered through life by inference or, more frankly, by guesswork, until she is no longer able to point out the simplest stages of her most ordinary mental processes.

As the reader is already aware, the value of all honestly given testimony depends, first, upon the witness's original capacity to observe the facts; second, upon his ability to remember what he has seen and not to confuse knowledge with *imagination, belief, or custom*, and, lastly, upon his power to express what he has, in fact, seen and remembers.

Women do not differ from men in their original capacity to observe, which is a quality developed by the training and environment of the individual. It is in the second class of the witness's limitations that women as a whole are more likely to trip than men, for they are prone to swear to circumstances as facts, of *their own knowledge*, simply because they confuse what they have really observed with what they believe did occur or should have occurred, or with what they are convinced did happen simply because it was accustomed to happen in the past.

Perhaps the best illustration of the female habit of swearing that facts occurred because they *usually* occurred, was exhibited in the Twitchell murder trial in Philadelphia, cited in Wellman's "*Art of Cross-examination*." The defendant had killed his wife with a blackjack, and having dragged her body into the back yard, carefully unbolted the gate leading to the adjacent alley and, retiring to the house, went to bed. His purpose was to create the impression that she had been murdered by some one from outside the premises. To carry out the suggestion, he bent a poker and left it lying near the body smeared with blood. In the morning the servant girl found her mistress and ran shrieking into the street.

At the trial she swore positively that she was first obliged to *unbolt the door* in order to get out. Nothing could shake her testimony, and she thus unconsciously negated the entire value of the defendant's adroit precau-

tions. He was justly convicted, although upon absolutely erroneous testimony. . . .

Though the conclusions to which women frequently jump may usually be shown by careful interrogation to be founded upon observation of actual fact, their habit of stating inferences often leads them to claim knowledge of the impossible — “wiser in [their] own conceit than seven men that can render a reason.”

In a very recent case where a clever thief had been convicted of looting various apartments in New York City of over eighty thousand dollars' worth of jewelry, the female owners were summoned to identify their property. The writer believes that in every instance these ladies were absolutely ingenuous and intended to tell the absolute truth. Each and every one positively identified various of the loose stones found in the possession of the prisoner as her own. This was the case even when the diamonds, emeralds, and pearls had no distinguishing marks at all. It was a human impossibility actually to identify any such objects, and yet these eminently respectable and intelligent gentlewomen swore positively that they could recognize their jewels. They drew the inference merely that as the prisoner had stolen similar jewels from them these must be the actual ones which they had lost, an inference very likely correct, but valueless in a tribunal of justice.

Where their inferences are questioned, women, as a rule, are much more ready to “swear their testimony through” than men. They are so accustomed to act upon inference that, finding themselves unable to substantiate their assertion by any sufficient reason, they become irritated, “show fight,” and seek refuge in prevarication. Had they not, during their entire lives, been accustomed to mental short cuts, they would be spared the humiliation of seeing their evidence “stricken from the record.”

One of the ladies referred to testified as follows:

“Can you identify that diamond?”

“*I am quite sure that it is mine.*”

“How do you know?”

“*It looks exactly like it.*”

“But may it not be a similar one and not your own?”

“*No; it is mine.*”

“But how? It has no marks.”

“*I don't care. I know it is mine. I SWEAR IT IS!*”

The good lady supposed that, unless she swore to the fact, she might lose her jewel, which was, of course, not the case at all, as the sworn testimony founded upon nothing but inference left her in no better position than she was in before.

The writer regrets to say that observation would lead him to believe that women as a rule have somewhat less regard for the spirit of their oaths than men, and that they are more ready, if it be necessary, to commit perjury. This may arise from the fact that women are fully aware that their sex protects them from the same severity of cross-examination to which men would be subjected under similar circumstances. It is to-day fatal to a lawyer's case if he be not invariably gentle and courteous with a female witness, and this is true even if she be a veritable Sapphira.

In spite of these limitations, which, of course, affect the testimony of

almost every person, irrespective of sex, women, with the possible exception of children, make the most remarkable witnesses to be found in the courts. They are almost invariably quick and positive in their answers, keenly alive to the dramatic possibilities of the situation, and with an unerring instinct for a trap or compromising admission.

A woman will inevitably couple with a categorical answer to a question, if in truth she can be induced to give one at all, a statement of damaging character to her opponent. For example:

"Do you know the defendant?"

"Yes, — to my cost!"

Or:

"How old are you?"

"Twenty-three, — old enough to have known better than to trust him."

Forced to make an admission which would seem to hurt her position, the explanation, instead of being left for the redirect examination of her own counsel, is instantly added to her answer then and there.

"Do you admit that you were on Forty-second Street at midnight?"

"Yes. *But it was in response to a message sent by the defendant through his cousin.*"

What is commonly known as "silent cross-examination" is generally the most effective. The jury realize the difficulties of the situation for the lawyer, and are not unlikely to sympathize with him, unless he makes bold to attack the witness, when they quickly change their attitude.

One question, and that as to the witness's means of livelihood, is often sufficient.

"How do you support yourself?"

"I am a lady of leisure!" replies the witness (arrayed in flamboyant colors) snappishly.

"That will do, thank you," remarks the lawyer with a smile. "You may step down."

The writer remembers being nicely hoisted by his own petard on a similar occasion:

"What do you do for a living?" he asked.

The witness, a rather deceptively arrayed woman, turned upon him with a glance of contempt:

"I am a respectable married woman, with seven children," she retorted.

"*I do nothing for a living except* cook, wash, scrub, make beds, clean windows, mend my children's clothes, mind the baby, teach the four oldest their lessons, take care of my husband, and try to get enough sleep to be up by five in the morning. I guess if some lawyers worked as hard as I do, they would have sense enough not to ask impertinent questions."

There is no witness in the world more difficult to cope with than a shrewd old woman who apes stupidity, only to reiterate the gist of her testimony in such incisive fashion as to leave it indelibly imprinted on the minds of the jury. The lawyer is bound by every law of decency, policy, and manners to treat the aged dame with the utmost consideration. He must allow her to ramble on discursively in defiance of every rule of law and evidence in answer to the simplest question; must receive imperturbably the opinions and speculations upon every subject of both herself and (through her) of her neighbors; only to find when he thinks she must be exhausted by her

own volubility, that she is ready, at the slightest opportunity, to break away again into a tangle of guesswork and hearsay, interwoven with conclusions and ejaculation. Woe be unto him if he has not sense enough to waive her off the stand! He might as well try to harness a Valkyrie as to restrain a pugnacious old Irishwoman who is intent on getting the whole business before the jury in her own way.

In the recent case of Gustav Dinser, convicted of murder, a vigorous old lady took the stand and testified forcibly against the accused. She was as "smart as paint," as the saying goes, and resolutely refused to answer any questions put to her by counsel for the defense. Instead, she would raise her voice and make a savage onslaught upon the prisoner, rehearsing his brutal treatment of the deceased on previous occasions, and getting in the most damaging testimony.

"Do you say, Mrs. —," the lawyer would inquire deferentially, "that you heard the sound of *three* blows?"

"Oh, thim blows!" the old lady would cry — "thim turrible blows! I could hear the villain as he laid thim on! I could hear the poor, pitiful groans av her, and she so sufferin'! 'Twas awful! Howly Saints, 'twould make yer blood run cowl!"

"Stop! stop!" exclaimed the lawyer.

"Ah, stop is it? Ye can't stop me till Oi've had me say to tell the whole truth. I says to me daughter Ellen, says I: 'Th' horrid baste is afther murtherin' the poor thing,' says I; 'run out an' git an officer!'"

"I object to all this!" shouts the lawyer.

"Ah, ye objec', do ye?" retorts the old lady. "Shure an' ye'd have been after objectin' if ye'd heard thim turrible blows that kilt her — the poor, sufferin', swate crayer! I hope he gits all that's comin' to him — bad cess to him for a bloody-thirsty divil!"

The lawyer ignominiously abandoned the attack.

To recapitulate, the quickness and positiveness of women make them ordinarily better witnesses than men; they are vastly more difficult to cross-examine; their sex protects them from many of the most effective weapons of the lawyer, with the result that they are the more ready to yield to prevarication; and, even where the possibility of complete and unrestricted cross-examination is afforded, their tendency to inaccurately inferential reasoning, and their elusiveness in dodging from one conclusion to another, render the opportunity of little value.

In general, however, women's testimony differs little in quality from that of men, all testimony being subject to the same three great limitations irrespective of the sex of the witness, and the conclusions set forth above are merely the result of an effort on the part of the writer to comment somewhat upon those small differences which, under close scrutiny, may fairly be said to exist. These differences are quite as noticeable at the breakfast table as in the court room; and are no more patent to the advocate than to the ordinary male animal whose forehead habitually reddens when he hears the unanswerable reason which, in default of all others, explains and glorifies the mental action of his wife, sister, or mother: "Just because!"

181. CHARLES C. MOORE. *A Treatise on Facts, or the Weight and Value of Evidence*. (1908. Vol. II, §§ 914-920). . . . *Observation of Women*. We have seen that attention is essential to accuracy of observation. Experimental researches upon voluntary attention show, says Ribot, that attention generally requires more time in women than in men. But he remarks in another place, that "the janitor's wife will spontaneously lend her whole attention to the gossip of her neighbors," and that "a woman will take in, in the twinkling of an eye, the complete toilet of a rival," thus giving them credit for celerity of attention commensurate with intensity of interest, — which is about as much as can be conceded to anybody. Dr. Gross, an authority of very high rank, says "a woman is more patient, more attentive, more cunning, and more reflecting than a man." Professor James says "women in general train their peripheral visual attention more than men," that is to say, their attention to objects lying in the marginal portions of the field of vision. . . .

*Memory of Women*. There is little or no ground for contending that a woman is sui generis in respect of her faculty of memory. Some things naturally engage a woman's special attention and interest which would be regarded with comparative indifference by a man. But very many men are likewise inattentive to things which have a strong attraction for other men. Professor Thorndike declares that "many a woman of generally feeble memory can remember every dress she has owned since she was ten years old." Methodical inquiries by Professor Colegrove have led him to conclude that in the general average for the whole life women have a slightly higher percentage of visual, auditory, gustatory, and tactile memories than men. . . .

*Veracity of Women*. Schopenhauer declared that women, being the weaker sex and dependent therefore upon craft and not upon strength, have an instinctive capacity for cunning and an ineradicable tendency to say what is not true; and that it is as natural for them to make use of dissimulation on every occasion as it is for beasts to employ their means of defense when they are attacked. But it was remarked by Chancellor Zabriskie of New Jersey as not unnatural that weak and ignorant men should resort to falsehood as a protection against adversaries of superior knowledge and sagacity. Schopenhauer also said that a perjury in a court of justice is more often committed by women than by men, and that it may, indeed, be generally questioned whether women ought to be sworn at all. Like the unenlightened observers of the epileptic and the insane in former days, he ascribed women's actual shortcomings, physical and intellectual, to fundamental and innate characteristics. . . . Spencer, who found his data in England, advances reasons for believing that the physical and mental infirmities of women are the outcome of environment and heredity, not of fundamental differences based on sex. Darwin expressed the same opinion, which he placed upon a strictly scientific basis. Mascardus said: "Feminis plerumque omnino non creditur, et id dumtaxat, quod sunt feminæ, quæ ut plurimum solent esse fraudulentæ, fallaces, et dolosæ."

Believe a woman or an epitaph;

Or any other thing that's false.

BYRON, "English Bards and Scotch Reviewers."

*Have Women Peculiar Traits that affect Their Testimony?* They have, if we are to believe the striking utterances of Mr. Justice Wayne, of the United States Supreme Court, who said: "The distinguished Sherlock says, without any satirical intention or meaning to say that women are inferior to men, 'Whilst she trusts her instinct she is scarcely ever deceived, and she is generally lost when she begins to reason.' And I need not tell my brethren, as evidence rests upon our faith in human testimony as sanctioned by experience, that the conclusion of the great divine is that of the law, and that the testimony of women is weighed with caution and allowances for them differently from that of men." Mr. Train says: "Women in the witness chair . . . are prone to swear to circumstances as facts, of their own knowledge, simply because they confuse what they have really observed with what they believe did occur or should have occurred, or with what they are convinced did happen simply because it was accustomed to happen in the past."

If the foregoing observations in pais, so to speak, of Sherlock, Mr. Justice Wayne, and Mr. Train are sound, we ought to find some confirmation of them among the immense number of reported opinions of judges of courts of first instance in the last hundred years. The author of this work has read all of the reported opinions of Sir John Nicholl, Dr. Lushington, Sir William Scott (Lord Stowell), and others who sat as the sole triers of facts in the old English ecclesiastical courts; every opinion in all of the New Jersey Equity and Law reports, the former especially enriched by the utterances of Chancellors Zabriskie, Williamson, Magie, and McGill, and of Vice Chancellors Van Fleet and Pitney, on the weight of testimony in cases decided by them in the exercise of the "one-man power"; nearly all the opinions ever delivered by a federal judge, particularly in chancery cases; and tens of thousands of other opinions by United States, Canadian, and English judges. With his attention alert to notice any judicial expression derogatory to the testimony of any class of witnesses, the author certifies that he has not seen a single allusion to constitutional limitations of women as trustworthy witnesses, and most of the judges above named were much in the habit of philosophizing on the characteristics of witnesses of various sorts and conditions — children, youths, aged persons, negroes, orientals, sailors, etc. The "distinguished Sherlock," whose specious statement was indorsed by Justice Wayne — and whose laudation of the female instinct is flatly contradicted by judicial experience in at least one important particular — lived in a period when male witnesses' "inferences," devoured by male juries and judges, were sending witches to a dreadful doom. Judges nowadays, as well as the professional psychologists, are fully aware that all human beings are prone to do exactly what Mr. Train, as above quoted, attributes especially to women, namely, to substitute inference for recollection. This vice and kindred aberrations are not peculiar to women, according to a great number of reported cases.

182. G. M. WHIPPLE. *Manual of Mental and Physical Tests*. [Printed post, as No. 290.]

183. GEORGE CANT'S CASE. [Printed post, as No. 364.]



- 184. **THE PERREAUS' CASE.** [Printed *post*, as No. 361.]
- 185. **THOMAS HOAG'S CASE.** [Printed *post*, as No. 363.]
- 186. **MRS. MORRIS' CASE.** [Printed *post*, as No. 287.]
- 187. **CHICAGO & ALTON R. CO. v. GIBBONS.** [Printed *post*, as No. 365.]
- 188. **LAURENCE BRADDON'S TRIAL.** [Printed *post*, as No. 391.]
- 189. **HILLMON v. INSURANCE CO.** [Printed *post*, as No. 389.]
- 190. **THROCKMORTON v. HOLT.** [Printed *post*, as No. 390.]

#### . SUB-TITLE D: MENTAL DISEASE

191. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. pp. 283, 296, 318.) . . . The importance of insanity in law is manifold: it raises the question whether a criminal is to be held responsible or not for some lawless act, whether a witness is competent to give evidence, whether a party is qualified to contract, whether a partnership or agency is terminated, and other similar points. . . . At the outset some general features of insanity will be noted. The effect of mental disease is in general to substitute for the complex balanced system of psychical forces which we have in health, a comparatively simple state of things in which certain tendencies grow abnormally strong and predominant through the suppression of others. More particularly, the higher and later acquired forms of psychosis, regulative processes of ideation, and self-control generally, tend to be dissolved, leaving the earlier and more instinctive tendencies uncontrolled. Thus through the weakening of the regulative volitional factor the patient is unable to control his ideas, and his intelligence is wrecked: or he becomes a prey to unregulated emotion, as where overweening conceit, timidity, or animosity becomes predominant, and helps to maintain corresponding mental illusions. We draw attention to the fact, for reasons that will appear later, that stress is here laid on the weakening of the volitional factor, and this feature again appears as the explanation of the crowd of associations of ideas which run riot in the insane mind. "If there is any single criterion of mental derangement," says Wundt, "it is this — that logical thought and the voluntary activity of the constructive imagination give way to the incoherent play of multifarious associations." He attributes the purposeless vacillation of the insane and the manner in which they express their thoughts to a lack of voluntary control over the unruly associations, and says that it is in this very mobility of association that the germ of decay is to be looked for. . . .

Let us now briefly gather up the results of this discussion. There are no such things as cognitive faculties existing apart from the emotions and the will, nor can our cognitive processes be separated off from our emo-

tional and volitional ones, except for the purposes of study and exposition. These mental states are interconnected and occur together in one total state of consciousness, and states of consciousness are bound together by the existence of the organism. All ultimately depend on that, but the emotional states do so more directly than the intellectual ones, and it is our emotions which have the preponderating influence in the whole psychological complex which represents the mind at any time. They guide the intellect and direct it, and the latter cannot make decisions in opposition to them on purely intellectual grounds. It follows from this that the emotions and the will cannot be affected without also affecting our cognition, and delusions, illusions, etc., and what are generally known as derangements of the intellect can be traced to, and, in fact, explained as, the products of perversion of the emotions and affection of the organic sensations. . . . As, for the reasons already given, the close interconnection of the cognitive, emotional, and volitional processes is established, if the affection of any one of them is proved it ought to be presumed that the others are also affected until those who assert in the contrary prove their view to be correct. . . .

To the popular mind, fixed ideas and delusions are very frequently signs of madness, but neither are necessarily so. Delusions are false opinions about a matter of fact and sometimes do and sometimes do not involve false perceptions of sensible things. In the case of the insane they are apt to affect certain typical forms hard to explain: in many instances they are theories which the patients invent to account for their abnormal bodily sensations; in other cases they are due to hallucinations of hearing and sight. . . . Fixed ideas always coincide with an advanced stage of mental disease though they often are not a form of insanity in the legal sense. They may be merely a diseased excrescence which does not suppose a total transformation of the individual. There are practically three classes of them, viz.: (1) simple fixed ideas of a purely intellectual nature; (2) fixed ideas accompanied by emotions, such as terror and agony, the insanity of doubt; and (3) fixed ideas of an impulsive form. These last manifest themselves in violent or criminal acts, such as suicide and homicide and are the only kind that should be held to indicate irresponsibility in law. They are, in fact, in such cases the irresistible tendencies already alluded to.<sup>1</sup> Speaking of fixed ideas in general, Ribot says that they are a symptom of degeneration and the persons who have them are not therefore insane. . . . He also shows how the mechanism of the fixed idea resembles that of ordinary attention: there is no difference of kind, but only of degree. The fixed idea has a greater intensity and a longer duration, but if a state of spontaneous attention were similarly strengthened and rendered permanent, the whole array of irrational conceptions that form the retinue and present a fictitious appearance of insanity would of necessity be added to it as the mere result of the logical mechanism of the mind. At the same time the fixed idea presupposes a considerable weakening of the will, that is, of the power to react. When a man possessed by a fixed idea is merely a witness who has to give evidence, his evidence will be accepted on other points than that to which the fixed idea relates. At least this is the case of the monomaniac, concerning whom it has been

<sup>1</sup> Ribot on *Attention*, pp. 78-79.

so laid down, and who is termed in the law decisions "partially insane." This agrees with the view of Ribot already quoted that a fixed idea is often only a diseased excrescence which does not suppose a total transformation of the individual. . . .

There remain for consideration lucid intervals in insanity, and idiocy. "The idiot," it is said [by a law writer], "can never become rational; but a lunatic may entirely recover or have lucid intervals; . . . thus a lunatic during a lucid interval may be examined." . . . [This statement is correct enough as to the lunatic.] There is no permanently existing diseased self which appears and disappears at intervals, and thus may infect the intervening period during which the subject is apparently sound; but the preponderating state of consciousness at each moment constitutes to the individual and to others his personality. . . . But that the idiot can never become rational is perhaps too sweeping a statement: it ignores the fact that there are degrees of the state. "Idiocy has various degrees from complete nullity of intelligence to simple weak-mindedness, according to the point at which arrest of development has taken place." At the same time it is true that when the idiot is one whose brain does not contain the whole cerebral mass you cannot create it (though in the case of the young where it has been due to some malformation which has prevented the brain from developing, removal of the cause will lead to improvement). To educate imbeciles and idiots is extremely difficult, because they are bereft of the faculty of attention; the system is to make use of those senses which fulfill their function in order to develop those which do not, and after a long course of training "it becomes possible to raise the idiot more or less near to the level of ordinary perceptual consciousness." It has sometimes been remarked that persons of this type are particularly trustworthy as messengers and in carrying out instructions, if you can once get into their heads what it is they are required to do: this is due to their narrow range of interests and the resulting absence of distracting considerations. For the same reason they sometimes show unusual powers of memory; they recall remarkable series of objects contiguous in time and space because there are no other divergent lines of association to compete with those which are formed by the mere sequence of external impressions. To systematically distrust the idiot as a witness would therefore be an error: within the limits of his observation he may be expected to be particularly correct in his account of occurrences.

There is said to be a presumption in law that insanity which has been once established will continue, and that the burden of proof of a subsequent lucid interval lies on the party who asserts it. This is based on another general presumption that things generally remain the same, including persons, personal relations, states of things, individual's opinions and states of mind. It is not supposed that such a presumption really weighs very much, but we cannot refrain from remarking that the value of it is simply nil: it is mere prejudice, and, as Mr. Bradley says, "the general disposition to believe that what has been is, or that what is usually is always, cannot seriously be offered as a conclusive argument." . . . The fact appears to be that no general presumption can be drawn concerning the continuance or non-continuance of insanity: it is possible to draw presumptions from the symptoms of certain kinds, because these indicate that the madness is

an incipient stage of a form that never disappears but continues to progress. As, however, some forms are only periodic and in others recovery is usually certain, unless other causes supervene, to presume here that the insanity will continue is mere error.

192. CHARLES MERCIER. *Sanity and Insanity*. (1895. p.382.) Different cases of mania differ from one another, however, in other respects besides the violence of the maniacal manifestations. The variety in the manifestations is almost infinite. It is a very common supposition among the laity that every madman entertains a delusion, and the existence of a delusion is regarded as the essence, the criterion, and the test of insanity. It will be apparent, to every reader who has got thus far, that this is by no means the case. In point of fact, the lunatics who entertain delusions are in a minority, and not a very large minority, of the whole number. In dementia, which is unquestionable insanity — unquestionable failure of the process of adjustment of self to surroundings — there is commonly no delusion. There is merely a weakening, degradation, and narrowing of mind, so that the patient becomes incompetent to manage himself and his affairs, simply because he is no longer able to appreciate and understand his affairs, or to estimate truly his own wants. In that modification of dementia which we call mania, there may be no delusion. . . . The lunatic is still able to get about, to run, to walk, to play cricket, to ply his trade; but the more elaborate nervous arrangements, which actuate the higher phases of his conduct, being disordered, he cannot effect these higher phases of conduct normally. It does not necessarily follow that his mind is distorted and his conduct biased by delusion. There may be simply mental enfeeblement, that is to say, the higher processes of his mind are bemuddled. When he attempts to think out an elaborate course of conduct, he falls into a state of confusion. When he attempts to carry out an elaborate course, he gets astray, he does things wrong, he makes mistakes, he fails to appreciate the force, and to estimate the comparative value of circumstances, and his acts are wrongly directed, confused, and muddled; but throughout it all, there is none of that definite distortion of mind that we call delusion. We cannot lay a finger upon any one point and say, "This is a delusive belief; that is a delusive idea." We can only find a general state of mist and fog and bemuddlement. We find vague expressions of confusion, but no definite, sharp-cut, fixed belief, that we can call a delusion.

Consider such an utterance as the following, taken from a letter that I received this morning: "Knowing the only chance to escape from such awful nuisance for ages of delusions besides all ladies' honor concerned for upon that marriage of Lamb had depended triumph of faith crave happiness just had been heartless way preventing such deluded ladies to have such picture in their reach all cry shame were such revealed the scores in Bible which shall bring that marriage seen Messiah's Kingdom teach woman's heart that divine love." It is insane enough; but it exhibits no definite delusion. It is a farrago of incoherent nonsense. The erroneous ideas that are prevalent with regard to the mental operations of the insane depend largely, of course, upon ignorance, but largely also upon want of the dramatic faculty — want of the capacity to take upon one's self, as it were, another person's individuality, and realize vicariously their mental condi-

tion. The person who wrote the passage given above does not entertain any delusion. The lower strata of his highest nerve regions are in good order. So long as he is dealing with concrete facts he is not only sane, but clever. He is a capable artisan, a skillful fly-fisher, a good shot, a brilliant billiard player, and a good chess player. For all these concrete employments his mind works well and clearly. But when he tries to deal with abstractions; when he tries to bring into operation the highest faculties of his mind; the highest strata of his brain; he falls at once into confusion. The truth is that the highest strata of his brain are seriously and permanently damaged, and that, although he can set to work the fragmentary remains of them, they can no more turn out a complete and coherent piece of work, than can a blunted chisel cut a clean groove in wood, or a damaged loom weave a fair piece of cloth. With the damaged chisel you may cut a groove — of a kind; and from the damaged loom you may get cloth — of a sort; and from the damaged nerve centers you may get conduct — of some description. . . .

The characters of the delusions that are entertained by insane people are almost infinitely various, there being only one class of circumstances to which they never refer, viz. circumstances unconnected with the deluded person. Insanity being disorder of the adjustment of self to surroundings, it is evident that delusion which is a part of insanity must implicate self. There are an almost infinite variety of delusions, but we never find a delusion which refers wholly to outside circumstances, and has no reference to self. A man will entertain the belief that he is Emperor of China, but he will never entertain the belief that another person is Emperor of China, except he believe that the person so exalted gains by his exaltation a power of interfering in some way with the deluded person himself. Maclean, who was tried for high treason in 1882, had a delusion that almost everybody was dressed in blue, but he also believed that they dressed in this color in order to annoy him.

Delusions fall naturally into three classes: Delusions of self; delusions of the relation of self to surroundings; and delusions of the relation of surroundings to self. The first class we have already dealt with; the remaining classes, which depend on alterations of the other moiety of the nervous circulation, have also been dealt with in part. . . . All the delusions of self and of the relation of self to surroundings have this feature in common — that the conduct to which they prompt is very rarely directly hurtful to others. They often prompt to direct injury to self, and to suicide, but only rarely to injury to others. In the third class of delusions the alteration is in the relation in which circumstances are believed to stand to self. The difference between the delusions of this class and those of the last is very distinct. In the delusions of the class just considered, the alteration is in the way that the self acts, has acted, or may act on his surroundings. The delusions of the present class are concerned with the way in which circumstances act on self. The peculiarity of these delusions is, that the action of circumstances, to which the delusion refers, is almost always considered to be unfavorable. Persons with delusions of this character are the objects of fancied machinations and conspiracies. Their wives and children are endeavoring to injure them; people are laughing at them, talking, whispering, thinking about them. People are thinking their thoughts, controlling their thoughts,

putting vile ideas into their minds ; speaking to them, or acting on them, or influencing their minds from great distances, in occult ways, by mesmerism, by electricity, by telephones, by wires, through the gas, the water, the air, the sunlight. People are in a conspiracy against them. Spirits are influencing them, working upon them, playing upon them. People follow them about, point at them, and whisper about them. Or they are tormented by spirits. Horrible suggestions and promptings are made to them. They hear voices or see writing reviling them, or commanding or suggesting to them to do this or that. They are persecuted ; the police are after them, they are to be tried, hanged, burnt, boiled in oil, roasted alive, starved, disemboweled. They have been robbed, swindled, cheated. Their wives are unfaithful ; their children, relatives, friends, acquaintances — the whole world is in one vast conspiracy to do them harm.

Delusions of this third class differ from those of the two preceding classes in the fact they that are very prone to prompt to conduct that is dangerous to others. From the belief that one is being injured, to the attempt to retaliate upon the injurer, is but a very short step ; and as the injurious agency is readily shifted in imagination from one person to another, the ill deeds may be ascribed to any one whomsoever. Oftenest they are ascribed to relatives, friends, or acquaintances — to people who have a direct relation of proximity to the patient. Not seldom the injurious agency is ascribed to some prominent personage — to the Queen, the Prime Minister, to a judge, or a local magnate. Occasionally the attempt at retaliation is made against an entire stranger, one who is unknown to, and has never been seen before by, the insane person. Lunatics who entertain delusions of this character are never safe to be at large. The commission of some deed of violence by them is a matter simply of time, and sooner or later they are sure to become dangerous.

It is not merely by direct retaliation that such persons become dangerous. It is common for them to commit some deed of violence on a person in prominent position, for the purpose of drawing attention to their grievances, with the vague idea that, once attention is drawn to them, they will be remedied. Such persons have commonly wearied out the patience of their friends by their continual complaints, which, at first combated and reasoned against, are at last regarded with indifference, and passed by as a matter of course. This kind of demeanor towards a person who is subject to delusions of this character does not answer. To him his grievances are very real, and his sufferings very painful. When he finds that his complaints are habitually disregarded and ignored, he will seek some method of prominently bringing them before the public eye and compelling attention to them. Commonly he has carried his complaints before some public official. He has invoked the assistance of the police against his persecutors ; if a soldier, he has demanded redress from the commander in chief. He has applied to minister after minister, official after official, and all his complaints have been disregarded. . . . It was on this motive that the Queen was shot at by Maclean ; that the Master of the Rolls was shot at by Dodswell ; that President Carnot was shot at by Perrin ; and many other instances will present themselves to the memory of my readers. . . .

The character of the delusions that an insane person entertains depends in part upon the area and nature of the nervous strata which have been

removed, or rather upon the character of those which remain. . . . The general features of the delusion being thus determined, its individuality will be settled, in part by nature of the person in whom it occurs, his history and experience; and in part by impressions made upon him by passing events. Thus a person who is naturally suspicious will have his suspicions morbidly exaggerated; a person who is naturally vain of the impressions he makes on the opposite sex will believe that he is persecuted by their attentions: a person who is naturally religious will believe himself the direct depositary of the commands of the Deity. . . . The impressions made by passing events will frequently give color to a delusion. In the case of a man who believes that this or that eminent person exercises influence for good or evil over him, the particular person to whom the influence will be ascribed is the one who is at the moment most prominently before the world. A series of political speeches reported in the papers will lead to the ascription of the influence to the leading political orators. . . . The description of a new invention in the newspapers will determine delusions to the telephone, the microphone, the phonograph, the electric light machine, and so forth.

Important as delusions undoubtedly are, as manifestations of insanity, let me, however, again impress upon the reader that the existence of a delusion is by no means of universal or regular occurrence, but that on the contrary, in the majority of cases of insanity no definite delusion exists. In the majority of cases the condition of the mind is one of enfeeblement or of confusion; and this condition of enfeeblement or confusion may extend throughout all the mental operations, or may affect only a restricted and elevated portion of them. It may be conspicuously prominent at all times, or it may at some times be imperceptible, at others elicitable, and at others manifest. While it is easy, upon evidence, to come to the conclusion that a person is insane, it is extremely fallacious and dangerous, from the absence of such evidence, to conclude that a person is sane. If there has arisen, within any recent period, *prima facie* reason to think that a person is insane, no prudent man will venture, upon a single interview, to pronounce positively that that opinion was not justified by the facts.

193. HANS GROSS. *Criminal Investigation*. (transl. Adam, 1907, p. 171.) . . . Certain people afflicted with mental troubles are very fond of writing: especially when misanthropic they are prone to substitute letters or petitions for personal interviews. Moreover, people suffering from the monomania of persecution are particularly fond of appearing before the courts, believing they are safest there. We have all had experience of habitués among this latter class of unfortunate madmen who come from time to time to seek news of their suit, legacy, fortune, etc. It sometimes happens that these persons will on no account appear before the court for fear of being shut up, deceived, or even executed; they prefer to make their accusations in writing. Such accusations of imaginary crimes come before every court and cause most disagreeable confusion, when, led astray by apparently perfectly reasonable explanations, cases are rashly taken up against the parties accused. . . .

But all that an insane person may say or write is not always devoid of truth or inaccurate, and *every accusation, even coming from a person notoriously mad, is worthy of examination*. It only too often happens that

people profit by the circumstances of an individual's madness to say "all the same, no one will believe that madman." If this be so, the unfortunate lunatic is at the mercy of the whole world and exposed to the exploitation, teasing, and bad treatment of ill-conditioned and ill-minded people, especially when they find out that their victim's repeated complaints have not been believed. It is therefore the duty of the Investigating Officer to verify the accuracy of all the statements of a lunatic; on every occasion he should make sure that there is really no truth in the case, even where the evil complained of has been found on previous occasions to be false. We remember a case in which a crazy old peasant had made innumerable representations to the authorities in which he declared that "his enemy" had made, before his house or on his way, pits, traps, and similar contrivances, by which he would be killed or injured. Many of these representations were furnished with clear sketches of the asserted pitfalls, etc. These representations became known to the people of the neighborhood and on one occasion the village boys played a practical joke and really made a pit before his front door and filled it with manure. The unfortunate man fell right into it and was nearly drowned. . . .

It is often necessary to cite lunatics as witnesses; they should never be sent away merely on the ground that they are demented, for they can sometimes render considerable assistance. It has been frequently remarked that madmen, especially certain varieties of madmen, are excellent observers. They are not nearly so adverse to telling the truth as many people who rejoice in all their faculties, for they do not allow themselves to be guided by considerations of propriety. They have also more opportunities for observation, for things are done and said in the presence of a lunatic which would not be done or said before others. But it is self-evident that the statements of a madman must be well weighed before being utilized as evidence in a case.

194. **REGINA v. HILL.** (1851. 5 Cox Cr. 259, 2 Den. & P. 254.)

. . . This prisoner was tried before COLERIDGE, J., assisted by CRESSWELL, J., at the February sittings of the Central Criminal Court, 1851, for the manslaughter of Moses James Barnes. He was convicted; but a question was reserved for the opinion of this court, as to the propriety of having admitted a witness of the name of Richard Donelly, on the part of the prosecution. The deceased and the witness were both lunatic patients in a Mr. Armstrong's Asylum, at Camberwell, at the time of the supposed injury, and they were, at that time, placed in a ward called the Infirmary. It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was

assisted by three of the patients, of whom the witness Donelly was one. It was opened for the prosecution, that the witness Donelly was to be called, and, therefore, on both sides, some evidence was gone into in the course of the case, before he was called, in order to found and to meet the objection to his competency.

*Muncaster*, who had been an attendant in charge of the infirmary ward before the prisoner, stated: "Donelly labors under the delusion that he has a number of spirits about him which are continually talking to him; that is his only delusion; he has never been free from it, to my knowledge, since I have known him."

*Joseph Stuart Burton*, the medical



superintendent, stated the same; but added, "I believe him to be quite capable of giving an account of any transaction that happened before his eyes. I have always found him so; it is solely with reference to the delusion about spirits, that I attribute to him being a lunatic: when I have had conversation with him on ordinary subjects, I have found him perfectly rational, but for this delusion; I have seen nothing in his conduct or demeanor in answering questions, otherwise than the demeanor of a sane man."

*James Hill*, a doctor in medicine, who had been formerly a medical superintendent at the same Asylum, stated: "The memory of an insane man is not necessarily affected; it frequently is, but frequently is not. I have seen Dr. Haslam's work. I do not agree in all cases with his remark that 'memory appears to be perfectly defective in cases of insanity,'—certainly not; it may probably be so in the generality of cases. Madness is commonly accompanied by a great deal of excitability of the brain, but in some cases it is not; it is very often accompanied by physical irritation of the brain; it is one of the most common causes of madness, either primarily or secondarily. In certain cases of acute madness, the ideas in the mind of a madman succeed each other more rapidly than in the mind of a sane man, and in a more confused manner, that is, where there is actual irritation of the brain; it is quite possible for a man to entertain a delusion on one subject without its affecting his mind generally on other subjects; in most cases where a delusion prevails, and the man is mad, the rest of his mind is affected to some extent. I agree with Dr. Pritchard in his observation, that 'In monomania, the mind is unsound, but unsound in one point only.' There is no doubt, however, that all the mental faculties are more or less affected; but the affection is more

strongly manifested in some than in others. It is difficult to ascertain, without strict inquiry, the extent of a madman's delusions; they have sometimes the power of concealing their delusions, even from their medical attendants, especially after having been frequently conversed with about the delusions, and knowing that they are the cause of their detention,—but it is unfrequent. It is a doubtful point whether what they say is not for a particular purpose,—for instance, to obtain liberty. If a madman has an object to answer, he is sometimes capable of concealing his delusions; I have known it, but not as a general rule: they are probably capable of a good deal of dissimulation,—many are, I know; but many do not exhibit that tendency. It is common for a certain class of madmen to exhibit a great deal of cunning. Donnelly labored under a delusion with respect to spirits; he is in the strict sense of the word, a lunatic, inasmuch as he labors under a delusion; he is not excitable by any means. I have known instances of lunatics concealing their delusions, but in all these cases there is no evident and apparent motive. I have known decided lunatics, not monomaniacs, in what are called lucid intervals, capable of going about and managing their own affairs; in ordinary cases there is no particular difference between a monomaniac, apart from his particular delusion, and an insane person in a lucid interval; during the lucid interval of the insane person, he is well; but a monomaniac is a monomaniac all the time. In the instance of a monomaniac, you produce the insanity the moment you touch the particular chord. It is possible that you might revive insanity in a madman during a lucid interval by touching on the same subject, if it is but recent. I always found Donnelly perfectly rational except on the subject of his particular delusion."

*Donelly* was then called and before being sworn, was examined by the prisoner's counsel. He said, "I am fully aware that I have a spirit, and twenty thousand of them; they are not all mine; I must inquire — I can where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears; I don't know how many there are. The flesh creates spirits by the palpitation of the nerves and the 'rheumatics'; all are now in my body and round my head; they speak to me incessantly, — particularly at night. That spirits are immortal I am taught by my religion from my childhood, no matter how faith goes: all live after my death, those that belong to me and those which do not; Satan lives after my death, so does the Living God." After more of this kind, he added, "They speak to me constantly; they are now speaking to me; they are not separate from me; they are round me, speaking to me now; but I can't be a spirit, for I am flesh and blood; they can go in and out through walls and places which I cannot. I go to the grave, they live hereafter, — unless, indeed, I've a gift different from my father and mother that I don't know. After death my spirit will ascend to Heaven or remain in Purgatory. I can prove Purgatory. I am a Roman Catholic; I attended Moorfields, Chelsea

Chapel, and many other chapels round London. I believe Purgatory; I was taught that in my childhood and infancy. I know what it is to take an oath; my Catechism taught me from my infancy when it is lawful to swear; it is when God's honor, our own or our neighbor's good require it. When man swears, he does it in justifying his neighbor on a Prayer Book or obligation. My ability evades while I am speaking, for the spirit ascends to my head. When I swear, I appeal to the Almighty; it is perjury the breaking a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity."

He was then sworn and gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday;" whereupon he was asked, "Is what you have told us what the spirits told you, or what you recollect without the spirit?" and he said, "No; the spirits assist me in speaking of the date; I thought it was Monday, and they told me it was Christmas Eve — Tuesday; but I was an eyewitness, an ocular witness to the fall to the ground."

**195. COLONEL KING'S CASE** (G. O. Waitt, *Three Years with Counterfeiters, Smugglers, and Boodle Carriers*. 1876. p. 174.)

The following exciting incidents took place late in the year 1869, and were the occasion of very serious alarm; promising for a few days to develop one of the most important and revolting conspiracies ever plotted on this side of the Atlantic, and causing the most intense excitement in certain circles, for the nonce. The plot had apparently for its object (through the efforts of leading restless spirits secretly associated

together) the absolute repudiation of the National debt, and the utter overthrow of the Republican Government! . . .

An ex-Confederate officer, who had served with creditable valor in the late rebellion — on the wrong side, however — by name and title "Colonel Hauston King, of the Kentucky Artillery," appeared one day in December, 1869, in the city of Washington, before U. S. Commis-

sioner James Blackburn, and confidentially made oath to the following extraordinary and astounding declarations, to wit: "I, Huston King, being duly sworn, do depose and say that I am a resident of Elliot County, Kentucky, and by occupation Clerk of the Circuit Court of said County. I was Colonel of Artillery in the Confederate Army, and in the month of December, 1865, went from New Orleans to New York, by steamer, and upon this passage, met with Harlow J. Phelps, merchant of New Orleans. Phelps represented that he was bound to New York, to be present at the secret organization of a repudiating party, looking to the repudiation of the national debt. Upon arriving in New York, Phelps and myself met some two hundred men from all sections of the country, south and north; and this party was organized, and commenced operations. H. J. Sneed, of St. Louis, was chosen President, and A. H. Sinclair, of New York, Secretary. The initiation fee was \$150, and the total capital to be raised was \$500,000; and this amount was raised in four days. This money was to be used to obtain the genuine U. S. Government plates for printing legal tender notes. The plates were so obtained, and \$60,000,000 were represented to me as having been printed from these plates. I have received \$500 of this issue already, myself, and about \$20,000,000 of this sum has been put upon the country. With this fund, the genuine plates have been secured, for making legal tender notes, bonds, and national bank notes. Of these we issued the full amount of the national debt of the country. Only about four millions have as yet been put in circulation. The plates are partly in Canada, Montreal, and part are in New York. There was a reorganization of this party on the 1st and 2d of November, in 1869, in New York City, at which I was present, when Frank P. Blair,

of Missouri, was chosen President, with power to appoint a Secretary. The original stockholders numbered four hundred. The number, now, greatly exceeds this. I am the Agent for the 9th Congressional District of Kentucky. I have perfected branch organizations in every County in said District. . . . I give this information voluntarily, and solely for the benefit of the Government. (Signed) Huston King." This affidavit was duly subscribed and sworn to before Judge Blackburn, and attested by three witnesses in his presence, according to law. This precise and curiously explicit document had found its way into the hands of a Western Revenue Detective by the name of Hogeland, and he deemed it of sufficient consequence to go about the unraveling of the mystery which seemed to surround the strange proceedings, with the most earnest application, as in duty bound. . . .

Colonel King's excellent military reputation in Kentucky was assured by authority, and he had actually been recommended for promotion by such Confederate notables as Generals Robt. E. Lee and Stonewall Jackson; the evidences of which he produced in the handwriting of those distinguished secesh officials. He was backed by a very able and consistent lawyer, too, who came all the way from Greenup Co., Kentucky, personally to indorse the Colonel, in the strongest terms that language could frame. Some time previously, the Government at Washington had had an intimation that certain legal tender and bond plates had been taken from the Department, surreptitiously, and \$1000 counterfeit 7.30 notes had found their way back into the Treasury — where they were promptly condemned. This fact, taken in connection with the seemingly frank and well-supported statements of the repentant and gallant Colonel, gave color alike to the genuineness of his good faith

and the accuracy of his accounts relating to this conspiracy. The Greenupsbury lawyer, Mr. L. J. Filton, who accompanied Colonel King, was quite as earnest (perhaps more so) as was the Colonel himself; and he did not fail, not only in the most anxious terms to indorse him, but to express his own personal alarm at the threatening prospect, repeatedly, to the authorities. . . .

The Western Detective (Hogeland) who undertook to "work up" this case, was confident that he had "a big thing" on hand, and he threw himself with unwonted energy and seriousness into this job. . . . But first it was necessary to lay the outrageous particulars of the conception of this destructive scheme before the Washington authorities. And so the three earnest men repaired direct to the Treasury Department, to unbosom themselves, as we have already stated. Judge Wm. A. Richardson, of Massachusetts, chanced to be Acting Secretary of the Treasury at this hour. This gentleman is a shrewd, intelligent, sound-minded, level-headed lawyer, whose long experience on the judicial bench has afforded him ample opportunity to become a rare good judge of human nature, in a great variety of phases; and he is not easily moved or thrown out of bias by ordinary tales of wonder. He patiently listened to the mysterious tale of horrors which his three earnest visitors had to communicate, and then civilly but promptly referred the gentlemen (whose eyes stuck out of their heads in wonder at the Judge's coolness and indifference) to Solicitor Banfield, of the Treasury Department. Here the three men "told o'er their wondrous story" once again; and the polite but incredulous Attorney for this Department of Government closed an eye, looked cautiously at the countenances of his excited visitors, and intimating that he did not see any occasion for hurrying in this business — quietly turned the

trio over to the Chief of the Secret Service, Col. Whitley, at New York City. . . .

Chief Whitley is not readily excited, and very rarely goes off into tantrums. . . . "There are two hundred men in buckram, you say, concerned in this foul scheme, Colonel?" asked the Chief. "Oh, more than that — quite twice that number, sir," said King. "And these two hundred men and more, have kept this infernal plot a profound secret for so many months, too?" added the Chief, doubtingly. "Ah, Colonel, remember the terrible series of shocking oaths they took never to divulge the secret of the clan. . . . You see, Chief," continued King, "I'm a doomed man, if I am suspected by these wretches. A thousand daggers would be aimed at my heart, within the hour of the discovery that I had 'peached' upon them. For God's sake, move cautiously. . . . I now intend at once to call upon half a hundred of the leading wretches in this city; and will report to you, to-morrow, the exact status of affairs, to enable you to act promptly, and add to your already well-earned crown of professional laurels the brightest leaf that will ever find a place in the wreath!" . . .

Colonel Whitley felt it incumbent on him to insist upon his accepting the use of a carriage, at the Chief's expense, in which to make these numerous calls he now contemplated. This offer of Col. Whitley was thankfully accepted; and half an hour afterwards, Colonel King was driven away in a nice hack, to wait upon the half a hundred leading conspirators (more or less) who resided in an around New York. . . . The Chief took the trifling precaution (in this last arrangement) to place upon the carriage box one of his own trusty Detectives, Mr. Wm. W. Applegate, in the capacity of driver of the vehicle. This operative was appropriately disguised for the occasion, and a more

accomplished whip never drew rein over a spunky pair o' cattle.

At evening, the Detective returned to report, and recounted to his Chief the fact that he had driven Colonel King all over Gotham, from City Hall to the Croton Aqueduct, and thence to Greenwood Cemetery and back; but ne'er a call had he made upon any *one* (not to speak of "half a hundred") of the conspirators he had prated so loudly about in the morning! "I am not surprised," said the Chief, quietly. "I never took any stock in this tale of horror." "It is a very singular affair, nevertheless," suggested his Assistant, respectfully. "This man is backed by almost incontrovertible proof of his sincerity. The lawyer, the Western Treasury Agent, the documents, the by-laws of the clan, the reputation of Colonel King himself," etc. "I see it all. And this is my judgment," concluded Colonel Whitley, "formed at my first interview with these three men, and still unchanged. This King is either the cursedest liar that ever drew breath, or he is the craziest devil out of Bedlam!" . . .

Shortly afterwards Colonel King himself came in, to inform the Chief, in answer to his query as to whether he had found his associates of the "Circle," that "he had seen about a hundred of them, during his ride that day. And not one of them dreamed that he had sold them out to the U. S. Government." King then sat down and deliberately wrote a score of letters to friends in Kentucky (imaginary friends, perhaps) informing them of the course he "had seen fit to take, for his country's good," concluding these epistles with the assurance that he had been rewarded by the Government with a gift of a million of dollars for the disclosures he had made, and that he would divide this plunder with them, on his return home, which would occur very shortly, etc. By means of this performance, Col. Whitley, who

watched him, obtained a knowledge of the style of King's handwriting. . . .

"This thing will keep," said Whitley to his aids. "Have an eye on this man. He'll shortly reach the end of his tether."

Within two days, the ever attentive and anxious attorney, Filtson, rushed suddenly into the Chief's presence, in a frenzied state of excitement. "Just as I feared, Colonel!" he said, spasmodically. "Poor fellow. King's gone up! A martyr to his loyalty. It's just like him. The 'Knights' are after him! Our affair is exploded, and poor King is doomed. They'll clean him out, sure, and his well-intentioned and loyal efforts to serve his country will send him up the spout, alas! See, Colonel! They've been thrusting these threatening letters under the door of his hotel room all day long. He dare not quit his apartment. He is a goner, sure!" In the adjoining room at Col. Whitley's headquarters, sat the Chief's Assistant, the jolly, portly Nettleship, who was quietly smoking his Habana, and looking over some of the "important" documents connected with this singular case, when Whitley summoned him. They started off directly for King's hotel, and soon afterwards discovered that gentleman, in a frightful mental condition, within his own apartment. "What's the trouble with you, now?" inquired the Chief, as he entered, flanked by the facetious Nettleship. "Gone up," screamed King. "It's all over! The thing is out — the Knights have discovered my attempt to tell their story — and I'm a dead man, ere the sun shines on this blessed earth again. I can't escape them. They're here, there, everywhere. And I'm a goner! Look," he continued. "Read these letters, shoved beneath my door, here, by the score. Read, Colonel!" and the terribly excited man exhibited a handful of missives emblazoned with daggers, crossbones, death's-heads, coffins,

chains, and other mystic signs of the horrid Order of the "K. G. C." which really looked (at first sight) as if the entire "Union Greenback Brotherhood of Repudiators and Scalliwags" had simultaneously started for him, without a compunction; that he would very shortly "be slaughtered and quartered, and that his poor quivering, lifeless remains would then be scattered to the winds," in due accordance with the terms of the penalty prescribed in one of the gentlest of the Society's secret oaths!

The Chief glanced at the letters, at once recognized the handwriting of the missives, and then approached Colonel King, calmly, and placed his hand upon the ex-Confederate Colonel's forehead; where he just then discovered a long red scar, running from the upper edge of the frontal towards the parietal bone of the skull. "What's this, Colonel?" inquired the Chief, placing his finger upon the spot. "How'd you come by that scar?" "That's where a bullet from one of your Yank's rifles grazed my cranium, during the war," responded King, placing his own forefinger dubiously upon his head, and turning back the hair, carefully. "I see," said Whitley, "He's a lunatic. I said from the first, that he was either an infernal liar, or as mad as a March hare. It's so." "I reckon you're right, Colonel," replied his Assistant, gazing into King's troubled face. "Now," continued the Chief, sharply to the Confederate Colonel, "what do you mean by all this bosh? These letters here are every one of them in your own handwriting!

I know it. Do you take us all for idiots? You're crazy. And the sooner you're taken due care of, the better for yourself and your friends."

The Confederate lunatic — for such he really was — immediately "came down," and admitted the soft impeachment regarding the writing of the letters. He argued the matter of the existing plot, however, right sturdily, and was again backed by the eloquent Greenup lawyer. But it was too late, now, to push this thing further with Colonel Whitley. The Chief directly summoned Dr. Hammond, of Bellevue Hospital. The wild man from the West was duly examined, professionally, and the doctor unhesitatingly pronounced him insane — which proved to be the fact, although the lawyer and the Western Detective Hogeland had been so thoroughly blinded, through all his erratic course of conduct — from the very start — and had never once imagined that they had been toting round the country, and zealously sustaining an actual madman, amidst this singular but plausible freak of distorted fancy. King remained in New York some time under medical treatment. Lawyer Filtson put away, in deep chagrin, for his "old Kentucky home," content with having expended several hundred good round dollars of his own, in the attempt to gain a few thousand more, probably for his "disinterested services" in the enterprise he so foolishly embarked in, and so credulously followed up to the point of its explosion by the Chief of the Secret Service.

## SUB-TITLE E: MORAL CHARACTER

196. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> In determining the credit to be given to a witness, one question is, What kind of moral character bears most strongly on his trustworthiness? His *veracity*, or, as more commonly and more loosely put, his *character for truth*, must be, and is universally conceded to be, the immediate basis of inference. The chief topic of controversy here has been whether *bad moral character* in general, or some other *specific bad quality* in particular, is admissible.

The argument that bad moral character discredits a witness is, in brief, that it necessarily involves an impairment of the truth-telling capacity; that to show general moral degeneration is to show an inevitable degeneration in veracity; and that the former is often more easily betrayed to observation than is the latter. The following passages illustrate the various phrasings of the argument:

*Bushnell's Trial*. (1656. 5 How. St. Tr. 633, 701): *Bushnell*, arguing against a witness whose many infamies he had related: "But may some say 'that all this, however true, makes him no more than a thief or a robber of both God and man, or a plunderer, or a parricide, a profaner, or a drunkard, or the like; but now this doth not wholly disenable his testimony; but could I make it appear that he had formerly foresworn himself, then I had something to the purpose.' To this I shall answer . . . that we cannot prove it that those who bore false witness against Naboth did ever bear false witness against any before, but this it was that rendered them suspicious (and with just judges should have been cause enough to abhor them), because they were sons of Belial, wicked, mischievous lawless men, men of so much known infamy that they would not stick at anything which was put upon them, be it either to speak or to do, but in the general were ready for any wicked employment."

MARCY, Sen., in *Bakeman v. Rose*. (1837. 18 Wend. 146, 151): "That the credibility of a witness should be sought through his general moral character I have no doubt. . . . If the inquiry be confined to the general reputation of the witness in point of truth among his neighbors, it will happen in some cases that a witness whose general moral character is deservedly infamous is allowed to impress his testimony on the jury with unqualified weight, simply because mendacity may have been relatively too insignificant an item, in the catalogue of his vices, to have attracted the attention or elicited the remark of his acquaintance. Or it may happen that, though generally of so depraved or corrupt a life that no one would doubt the facility with which he might be suborned to swear falsely, yet from caution or calculation he may have observed that general veracity in his common intercourse, or from natural taciturnity a 'willful stillness entertained,' which would render his reputation impregnable to this form of inquiry. . . . One of the great benefits of jury trial was supposed to exist in the circumstance that the jury, being from the vicinage of the parties and the witnesses, were better able to judge of their relative honesty and credibility. It would seem, therefore, in accordance with this principle, that under the modern forms of impaneling juries, which do not in many cases afford to jurors the means of judging, from personal knowledge of the character of witnesses, the measure of credit to be given to them, that as liberal a course for supplying this deficiency of knowledge should be allowed as would be compatible with the rights of the witnesses."

The arguments made in answer to this are chiefly two: (1) that, as a matter of human nature, a bad general disposition does *not* necessarily or commonly involve a lack of veracity, and that therefore the former is of little or no help probatively; (2) that the estimate of an ordinary witness as to an-

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. § 922.)]

other's bad general character is apt to be formed loosely from uncertain data and to rest in large part on personal prejudice and on mere differences of opinion on points of belief or conduct, — a chance of error which is relatively small in the specific inquiry as to the other's notorious untruthfulness.

The following passages represent the various aspects of the argument :

BOYLE, C. J., in *Noel v. Dickey*. (1814. 3 Bibb 269) : "It is an observation not less true than trite, that no one is entirely virtuous or entirely vicious. Such, indeed, is in general the preponderance of the virtue or vice of individuals as to entitle them to the general character of good or of bad ; but we cannot, merely from knowing what the general character is, say with certainty what vice or virtue enters into its composition. If, therefore, we would form a correct judgment of a man with regard to any particular vice or virtue, it is necessary we should be informed of his character in that particular respect. . . . A person, therefore, whose general character is bad, may notwithstanding possess such a degree of veracity as to entitle him to credit upon oath ; and whether he does so or not can only be ascertained by inquiry into his character for truth."

GREENE, J., in *Carter v. Cavanaugh*. (1848. 1 Greene Ia. 173) : "The method of questioning as to general character alone appears to us not only vague, but subject to great abuse and injustice. Clannish witnesses, whose intercourse and business are always limited to a particular class of kindred spirits, who may constitute a majority of the neighborhood, often entertain peculiar and contracted views of general character, when applied to those who may not agree with them in social, religious, or political tenets. And thus, by a decided majority of one neighborhood, a man might be represented as possessing an excellent general character ; while in an adjoining neighborhood, where he is equally well known, he might be described as a man of great moral turpitude. . . . The requisites of a good character, and the components of a bad one, are so variously viewed by different and even adjacent communities that they never can become a safe and uniform test of veracity, without confining the inquiry particularly to character for truth. In some communities an ultra-Mason, in others a proscriptive anti-Mason, in this neighborhood an abolitionist, in the adjoining one an anti-abolitionist, would be regarded and styled a bad character ; and thus, in many communities, he who plays cards, or engages in horse racing, or frequents groceries, or works on the Sabbath day, is looked upon and called a bad character ; and yet such men — either the advocates of unpopular sentiments, or those addicted to objectionable habits — may have a most commendable regard for veracity. . . . Thus, by opening this boundless field of inquiry as to 'bad character,' in its multitudinous phases, the most truth-abiding man might often be impeached."

The question also arises whether some other specific vice or group of vices is as significant as bad general character in indicating a degeneration of the truth-telling capacity. The opinion usually reached, is that no specific quality other than that of veracity should be considered :

TRACY, Sen., in *Bakeman v. Rose*. (1837. 18 Wend. 146) : "It has been pressed upon us with earnestness and eloquence that the condition of a public prostitute, being the most debased and demoralized state of human being that can be imagined, necessarily presupposes the absence of all moral principle, and especially that of regard for truth ; and it is therefore contended that a common reputation of public prostitution necessarily includes a common reputation for falsehood. . . . If Courts had the power [to change rules of evidence], it might not be a very discreet exercise of it to attempt to gauge crimes and graduate a standard of vices and immoralities. Loathsome, deplorable, and even detestable as is a condition of public prostitution, it is not the only vice of a great kindred ; theft, forgery, swindling, drunkenness, gambling, adultery, are also well allied ; and if we undertake to determine that the reputation of one vice necessarily includes the reputation of another,



it would be difficult to say when or where we could stop. But . . . [after noting the rule of the Roman and other laws] the common law in this respect certainly is founded on juster notions of human nature; for while it so far recognizes the affinity of vice as not to regard the testimony of a witness of bad moral character as above all exception, it rejects the conclusion that a person guilty of one immoral habit is necessarily disposed to practice all others. And seeing that the absolute exclusion of an immoral witness may operate more to the prejudice than to the advancement of justice, it recognizes that dictate of common sense which no theory can refute, that the natural love of truth, when combined with the fear of temporal punishment, is some restraint, even upon the most depraved, against the commission of a gratuitous falsehood."

197. CHARLES C. MOORE. *A Treatise on Facts, or the Weight and Value of Evidence*. (1908. Vol. II, § 1026.) To enable the trier of facts to comprehend just what sort of a person he is called upon to believe, much latitude of inquiry into the personal history of witnesses is allowed upon cross-examination. The credibility of a witness must be greatly distrusted when he refuses to divulge his business or his whereabouts during several years of his life, or where the history which he gives of his residences, employments, movements, acquaintances, etc., makes it impossible to know anything about him; especially if, the witness's antecedents being seriously questioned on cross-examination, no attempt is made to rehabilitate him on redirect examination.

*Particular Defects in Moral Character.* On the one hand, we have a judicial statement that "vicious habits, of whatever kind, sear the conscience and prepare those who practice them for the easy utterance of falsehood"; and that, for example, "a continued habit of intemperance has this effect." On the other hand, we have the following: "All experience shows that the general characters of many men are bad, in the common acceptance of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad who has some one cardinal vice, although in other respects he may be irreproachable." Chief Justice Nelson of New York said it requires but a casual observation of human nature in its various phases to be sensible of the truth that particular vices and weaknesses may cast a cloud over the moral character of a man whose veracity could be vindicated by the concurrent testimony of all his neighbors and acquaintances. A witness not "fit to be tolerated in any decent community," or with "such a hardened callousness of moral perception as almost justifies the belief of aberration of mind"; a man having no local habitation and often found in the city jail, or one who "seems not to have been a steady worker at anything, other than frequenting saloons and passing his time in such pursuits as are usually followed there," would probably be regarded as tainted in credibility. . . .

*Unchastity and Veracity.* In estimating the relative value of the oath of a man somewhat addicted to unchastity, and on the other side that of a woman likewise frail, although not a prostitute, Judge Deady remarked that "as the world goes and is, the sin of incontinence in a man is compatible with the virtue of veracity, while in the case of a woman, common opinion is otherwise," and he declared it to be a "fact founded on common experience that incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman." But, in a case in

Michigan, the court thought that the testimony of a woman against a lawyer with whom she had had illicit relations was "no more open to criticism on this account than the man's, who was in the same moral complications, and equally interested in the result."

*Prostitutes.* The experience of courts warns them to scan with caution and view with suspicion the testimony of an abandoned woman. We must bear in mind that persons of her low life and character are moved by causes that would not affect people of good morals and tender sensibilities. The conduct of people of this class is often incomprehensible when tested by the standard applied to the generality of mankind. Causes that we would regard as trifling and insufficient are by the low and brutal regarded as most weighty; and their notions of just retribution are often, to the ordinary judgment, the most fantastic, distorted, and extreme. It is improbable that she will tell the exact truth where there is the slightest motive for testifying falsely. Dr. Lushington said that prostitutes "would probably be as willing to bring their evidence to market as they were ready to offer their persons to sale." Judges themselves uniformly refuse to act upon their uncorroborated testimony.

198. WM. C. ROBINSON. *Forensic Oratory; a Manual for Advocates.* (1893. p. 211.) *Bad Character.* The credibility of a witness is scarcely less affected by the opinion which the jury may entertain concerning his personal character, than by their knowledge of the accuracy of his intellectual operations or his truthfulness. In every community there are many individuals whose statements upon any subject are accepted and believed, without an inquiry as to their powers of expression, memory, or perception, simply on the faith engendered by their known integrity and wisdom; and few are the communities in which there are not some whom nobody believes, except when they confess themselves most miserable sinners. This natural tendency to regard the word of the industrious, law-abiding citizen as true, and to doubt the veracity of the idle, dissolute, and shiftless, affects the jury in the court room equally with persons in ordinary life; and hence to expose the adverse witness to them as a man of evil inclinations, immoral habits, and disreputable associations is to arouse against him suspicions of unreliability which diminish, and sometimes remove, whatever good impressions his testimony may have made. The law of evidence indeed places limitations to this species of investigation, in order to prevent the raising of side issues, and to protect a witness of present upright character from an unnecessary publication of his ancient faults. . . .

The real point of inquiry, however, is the reliability of the witness as he now stands in court giving his testimony, not whether he could have been relied on years ago if he had then been offered as a witness; for it is as certain that the liar may become a truthful man as that the truthful man may become a liar, although the latter process is more easy than the former, and what the witness was is thus of slight significance upon the question as to what he is. If the cross-examiner confines himself to this point, he will find material sufficient for all legitimate uses in the present employments, pleasures, and companionships of the witness; and these can be exhibited to the jury, if not by direct inquiries, by general interrogatories into whose answers these facts will be interwoven by the witness.

199. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. p. 112.) It is by no means unnecessary to say that if a convict comes into the witness box, it is idle to attack his credit through his character. Every young advocate thinks there is such an opening here, and the temptation is doubtless great. But you do not need to attack when the fortress has surrendered. The man stands before you confessedly as bad as bad can be; and to carry him through all the scenes of his profligacy and crimes would be but gratuitous cruelty, and would have no effect with the jury except in creating some amount of sympathy on his behalf. They know well enough how to discount the evidence of so abandoned a man; but they know, too (and that is the point for you to remember), that the most detestable villain is yet capable of telling the truth. I have known a convict defeat a cross-examining counsel to such an extent, that he aroused sympathy for himself, and prejudice against the learned gentleman.

It is the weakest remnant of a very old style of advocacy to ask the jury, "Would you believe such a villain on his oath?" The answer is, of course they would, as against another villain, not upon his oath, and against whom he is circumstantially testifying, *unless* you can break down his *evidence*; you will not do that by hammering away at his character.

The jury may not like the man any more than you do, but they may like your client less; and between two villains, the one in the witness box, and the other in the dock, as a rule they will lean towards the former — he at all events is *for the Crown* — at present. . . .

There cannot be a greater mistake than to suppose that a man who is suffering punishment for a crime, and who comes into the box to give evidence, will not be believed because of his character. You will generally find that he is regarded with sympathy to begin with. The jury will weigh his evidence scrupulously; and their attention will be naturally drawn towards the *probabilities* of his story. If you cannot touch these, you will make little effect by constantly referring to his misdeeds.

It is when his motives lead him to the *falsification of facts*, and the falsification is apparent or *highly probable*, that you can dispose of his testimony. Then will you be able to take character, motive, false or exaggerated statements, contradictions, and probabilities, and throw them into the scale against the apparently truthful portions of his testimony. Or if you even go so far as to show *improbabilities in his story*, he will need much corroboration to make it acceptable to the jury. They will treat him as they would a knave in the market whom they should detect with one or two bad coins among a handful of apparently good ones. They would have no dealings with him, not because there were no good pieces, but because suspicion attached to all.

I repeat, It is testimony, and not character, you must deal with in this witness.

200. DAY *v.* DAY. (G. L. Craik. *English Causes Célèbres*. 1844. p. 198.)

Ejectment for title to estates; from one Ann Stokes, through an agent. Ann Stokes testified to the sale of her bastard infant to this agent. She was cross-examined as to her character as follows:

Huntingdon, 1797. Thomas Day, the possessor, was said not to be the real son and heir of his father, but a foundling bought by the mother

Mr. *Garrow*. . . . Q. Do you know a person of the name of Whitehouse? A. Yes.

Q. What was the nature of your acquaintance with him? A. I had no acquaintance with him at all; when his wife died I washed for him.

Q. That might or not lead to a considerable degree of intimacy? . . . Did the circumstance of your washing for the widower lead to any particular intimacy? A. It might.

Q. I don't ask how much you did for pay or gratis. Did it lead to any particular intimacy? A. I will not swear anything at all about it.

Q. You have sworn it once, and my learned friend has taken it down, that you had no particular intimacy with Whitehouse. Upon your oath do you mean to swear that again? A. What I did for him he always paid me for.

Q. Upon your oath, do you mean to swear that again? . . . A. What I did for him he always paid me for.

Q. Upon your oath, had you any particular intimacy with Whitehouse? A. I told you what I did he paid me for.

Q. Then you were not more intimate with him than with all other men in Birmingham; do you mean to swear that? A. No, Sir, I don't mean to swear that.

Q. Were you then particularly intimate? A. We are not intimate. . .

Q. Having took a little breathing time, we will come back again to our old acquaintance, Mr. Whitehouse. Will you be so good as to inform us, what the nature of your connection with him was? A. What I did for him he paid me for; that was all that passed.

Q. That you swear positively? A. Yes.

Q. Was that all that passed? A. Yes; that was sufficient.

Q. Do you mean to swear that

you had no other connection with him than that of a washerwoman? A. No, Sir; I won't swear that; I did not come to swear that.

Mr. *Erskine*.—I certainly think this is not proper.

Mr. *Garrow*.—I cannot go more regular; it is the constant practice of my learned friend; it is the constant answer given and received; as it goes to a verdict. If she had been living in one instance in a state of adultery, and the other in a state of fornication, I admit the witness would say, she is not bound to accuse herself. But we are upon the credit due to this woman, upon a most important story, and I would borrow what my learned friend very often states to juries—if you find a witness falsified in part, how can you tell where the falsehood ends and truth begins? She has now made it necessary, for the purpose of trying her credit, that I ask those questions, because she has said, over and over again, that there has been no other intercourse between her and that man of whom I have been speaking, than that of washing for him. In the name of God I would ask, what would become of the security of public justice, if, when I come prepared to prove the contrary, perhaps, upon her own oath—I would ask, what would become of the security of public justice, if she may be now secured, or if she be permitted to secure her credit and conscience, by avoiding giving such evidence, and denies it in the manner she has? No man alive, who has experience—no man alive, with the intellects of a baboon (to make use of an expression of my learned friend), would doubt but she cuts up her credit root and branch; she may give it any way she pleases, and it is matter of indifference to me; but the ends of justice must be satisfied.

*Court*.—This is to answer a criminal charge, which I don't think is proper evidence.

201. **THOMAS HARDY'S CASE.** (1794. *HOWELL'S State Trials*. XXIV, 710).

[Indictment for Treason by a conspiracy to subvert the government by force: the witness here examined was supposed by the defense to be a paid informer who joined the society to obtain proof of its criminal conduct.]

*Edward Gosling* sworn. Examined by Mr. *Garrow*.

Have you been for any time a member of the London Corresponding Society? — I became a member on the 15th of April.

What April do you speak of? — April, 1794.

Did you become a member in consequence of any communication between you and any magistrate of the country? — I had not been directed to become a member, in consequence of the recommendation of any magistrate; I had been unexpectedly proposed by Whittam, and a magistrate had told me, if another person had proposed me, I should become a member. . . .

Who was the person that first introduced you to the society? — John Hillier.

Did you make application to him first, or he to you? — I first went to Hillier, to make some inquiries respecting a person who was a member of that society.

What led you to go to Hillier to make that inquiry? — From seeing publications of that nature, and I was informed that the person respecting whom I was directed to make the inquiry was a member of the Corresponding Society.

Publications of what nature? — From seeing publications in Hillier's shop window, which appeared to me to be of a seditious nature.

What business did Hillier carry on? — He sold pamphlets.

From that you thought it likely he was a member of the society, likely to give you information, there being some man you wanted to inquire about? — Yes.

When did you first make your application to Hillier? — I believe towards the end of March, or the beginning of April.

For what purpose did you become a member of the Corresponding Society? — On the 14th of April when I first became a member, I was unexpectedly proposed; on the day following I informed Mr. Wickham that I had done so.

What passed between you and the magistrate is not evidence, but in consequence of what passed between you and him, why did you attend the meeting? — To discover whether they had any serious intentions of arming.

You have stated that you communicated something upon the subject, to Mr. Wickham? — Yes.

Was it with his approbation that you attended the meeting for the purpose you have now stated? — It was.

Did you from time to time communicate to Mr. Wickham such facts as came to your knowledge? — I did.

And went there for the express purpose of procuring information, and giving it? — I did. . . .

*Edward Gosling*, cross-examined by Mr. *Erskine*.

What is your Christian name? — Edward.

Edward Gosling? — Yes.

Are your father and mother living? — Yes.

What are you by employment or trade? — At present I am employed by Mr. Wickham. . . . I was employed before this business by Mr. Colquhoun, in writing.

What sort of writing? — Both in his private business and on his public business.

Mr. Colquhoun is an attorney, is he? — No, a magistrate in Worship-street.

When did you begin writing for him? — About September last, but that was only occasionally.

What way of life had you been in before that? — Before that I kept a broker's shop.

Were you a dealer in naval stores; I am not asking any question you can object to, were you a dealer in naval stores? — I never in my life, upon my oath, to my knowledge, bought a store that ever was the property of his majesty, if that is what you mean.

I should have no right to ask that question. — I know the reason for which it was put; and it is a question which, if I was not conscious of my innocence, I had no right to answer, but as I knew I could safely do it, I thought it proper to answer.

Then, perhaps, you have never said to anybody the direct contrary of what you are saying now to me? — I did say the direct contrary; I was asked by Mr. Worship, when I went to buy a print, what I was? and what my address was? As I conceived he would not let me have the print if I told him I was with a magistrate, I told him I dealt in naval stores.

Did you ever say to anybody that you dealt in naval stores, and that you should think no more of cheating the king than of guillotining him? — Never to my knowledge; I will swear positively, I never mentioned the word guillotining the king.

Did you never say to anybody, upon your oath, that you lived by smuggling, and cheating the king in his stores? — Never upon my oath.

Have you always gone by the name of Gosling? — I have not . . . and am willing to explain why I went by another name; as I find every advantage is wished to be taken of me, I trust the mercy of the Court will not suffer any improper question to be put to me.

Lord Chief Justice EYRE. — As to any question which tends to accuse you of any crime, not immediately connected with this matter, I will protect you; but at the same time

keep your temper, attend to the question, and give a direct answer.

Mr. *Erskine*. — I have treated you with civility, I am sure. Did you ever go by the name of Douglas? — I did.

When did you first assume the name of Douglas? — I believe as much as ten years since.

How long did you continue the name of Douglas? — I would wish to relate the circumstances under which I took that name.

Lord Chief Justice EYRE. — You had better answer the question. — I carried on the business of a hair-dresser in that name, for I believe pretty near seven years. . . .

Had you any particular reason for changing your name? — I will state my reason; my father had a shop of business in the city; his business was chiefly in the wig and shaving way; for improvement I wished to go to the west end of the town. I went and worked with a man, whose name was Penton, in Bloomsbury, for improvement; it was, perhaps, from false pride I did not choose it to be known that I was working as a journeyman, when my father kept four or five men; and as for taking the name of Douglas, I took it from a play bill.

I have no objection to a decent pride; you took a very good name. It struck you in a moment to take the name of Douglas from a play-bill? — That was the reason that struck me at that time, and I had no thought of continuing under that name.

Pray how long did you play this part of Douglas? — I continued near seven years in that name. . . .

Let me ask an explanation of something, which I confess I did not understand; how came you to say to Mr. Worship that you dealt in naval stores? — Because I thought that would preclude all inquiry; because I did not choose to give him my address; because I thought if he found I was with Mr. Wickham,

he would refuse then to let me have what I wanted.

Mr. *Attorney-General*. — Do you mean Worship, the engraver? — Yes; I saw he suspected I was not friendly to their cause.

Mr. *Erskine*. — Who is Mr. Worship? — A secretary of a division of the Corresponding Society.

Did you never make use of the expressions that I asked you to before, that you cared no more for cheating the king than the expression I stated before? — Never in my life. . . .

Do you know a Mrs. Coleman? — I do not.

Look across to the jury. — I do not know a Mrs. Coleman, now.

Did you ever know a Mrs. Coleman? — I did.

Had you any dealings of any sort with her? — Certainly, she rented a shop of me.

Had you no dealings of any other sort? I am not putting a question of any immoral nature? — Certainly, I had business; she rented a shop of me.

Is that all? — She died at my house, and I buried her.

Did she leave any will? — Yes.

Whom did she leave her property to? — Her property was partly left to one Burroughs, and partly to one James Leech.

Who made the will? — I wrote it.

Do you know Mrs. Biffin? — I do not.

You were very ill used about that business, in which you had done nothing but that which was right? —

*Gosling*. — How ill used?

I mean you got into some dispute and trouble about it? — None at all, I was in no trouble about it.

There was no complaint made against you of any sort? — There was no just cause of complaint.

I do not ask whether there was any just cause of complaint, but was there any complaint made against you by anybody upon the subject? —

*Gosling*. — I cannot say I recollect the particular circumstances

that might pass; there was a brother by a former husband who came up out of the country.

Do not understand me to be doing so improper a thing as to be imputing any crime to you, and to ask you to reveal it; far from it. I only ask whether anybody was wicked enough to make any complaint of your conduct in that case? — I do not know that there was any complaint.

Will you swear there was none — upon your oath, was there no complaint made against you upon the subject of this will? — I cannot tell what complaint may have been made.

Upon your oath, was there not a complaint made against you, to your knowledge, for fabricating this will? — Never, that I know of.

Will you swear that? — I will swear I never heard any such thing.

. . . Who was that James Leech to whom this woman left this money? — A son of my wife's.

Who was Burroughs, who was that other person? — A cousin of hers, or some such thing.

What connection had you with the woman? — I had no connection, any farther than rendering her every service in my power, during a long illness, in which I was at considerable expense.

How long had she lodged at your house? — I cannot tell exactly.

A year? — I cannot tell.

Will you swear that she lived six months with you? — I do not know the time.

Was it two months? — It was longer than that.

Three months? — Longer than that.

Four months? — I cannot state to a month.

Was the will made by an attorney? — It was not.

By yourself? — Yes.

Am I to take you that you mean to swear now, that no complaint was made against you as having

forged that will? — I swear, that to the best of my knowledge or recollection, I never heard such a thing.

Will you swear positively, you never have been charged with it; a man that is charged with a capital felony cannot forget it? — I do not recollect that ever I was.

Good God! Do you mean to swear that you do not remember whether you were charged with a capital felony or not? — I do not know that I ever was.

Will you swear positively that no such charge was brought against you? — I can swear no farther than that to the best of my knowledge, it never was.

Lord Chief Justice EYRE. — A charge brought when and where? — it may be a fact within his knowledge, or it may not.

Mr. *Erskine*. — I am asking you whether there was not a complaint made, that you were charged in your own presence, with having done it? — Never, to my knowledge.

Am I to understand that there was not a complaint made in your presence against you, for having forged that will? — I do not recollect that any person ever did.

Will not you go to the length of swearing that nobody ever did so? — I can only speak to the best of my recollection and knowledge.

Mr. *Garrow*. — I submit to your lordship that is the only answer a witness can make to such a question.

Lord Chief Justice EYRE. — There is no occasion for your interrupting the examination; probably it is an answer; but he may be pressed to see whether he can answer farther or not.

Mr. *Erskine*. — Whether anybody ever charged you with it in your presence? — I never recollect that any person ever did.

Do you know a Mr. Cox? — Yes; I know Mr. Cox, a cheesemonger.

How long have you known him? — I cannot exactly state how long I have dealt with him.

Dealt with him in what? — In cheesemongery and butter, and things of that kind, and some hams.

For the use of your family? — Yes; and to sell.

I thought you were a hair-dresser; what! do you deal in hams? — My wife kept a shop of that sort, and I dressed hair.

Have you never had any other sort of dealings with Mr. Cox, than that which any man has with a fair tradesman that bought hams of him in the ordinary course of business? — No.

And you swear that, positively? — I do not remember anything else; if you name any particular charge, if it comes within my knowledge, I will own it.

Mr. *Erskine*. — I do not stand here to make charges.

*Gosling*. — I purchased hams of him, and in some there were great holes filled up with mortar and stones.

Then the hams were of a bad quality, filled up with mortar and stones? — Some of them were.

Then Mr. Cox, the cheesemonger, seems to have cheated you? — Certainly; he did not use me well when I was ignorant in the business. . . .

Am I to understand you to say, that you never dealt at all in stores; I do not mean to say dishonestly or improperly?

*Gosling*. — What kind of stores?

Mr. *Erskine*. — Naval stores — ship stores? — I have purchased old cordage, bad sacking, and such kind of things; but those I do not consider to come under the denomination of naval stores.

What were the articles that you purchased? — What is commonly called hand stuffing, used for the making of paper.

Did you never say, (I do not ask you whether you did it, because I have no right to do that,) but you never said that you were a dealer in raw materials; that the person you spoke to, asked you to explain it; and whether in answer to that you said



that you attended the sale of his majesty's stores at the dockyards, at Sheerness, and so on; that you were well acquainted with the storekeepers, and that you generally bought them at a fifth of their value, by feeing the storekeepers to condemn them? — I never said that; I will relate to you one circumstance upon which that is taken: I wished to get information respecting them, and Mr. Colquhoun would give me credit for that; it was upon that very business I was taken into his employment to give intelligence respecting that; I understood from Hillier that he had a relation who was a quartermaster there, and I wished, through his means, to obtain information for the service of government.

Why, you had a great deal upon your hands — you say you told him the same as Mr. Worship; you did not tell Mr. Worship that? — I told him I was a dealer in naval stores.

But did you tell Mr. Worship that the way you dealt was by feeing the storekeepers to condemn them? — No, I did not tell him that.

When you were reproved for that, did you not justify your conduct, and say that you had followed the practice for years, and thought it no crime to cheat the king? — Never.

Was it in the service of Mr. Colquhoun, that you bought that paper stuff and things? — I never bought any paper stuff belonging to his majesty in my life, upon my oath.

But I ask you, were you both a dealer in stores yourself honestly; and were you employed as an informer to prevent other people being dishonest? — I never had, to my knowledge, any charge brought against me for dishonesty for it; I obtained every information I could to prevent children and other persons, that might be tempted to purloin things; the information was not given against any person, but merely hints to prevent pilfering;

no person was accused upon that information nor did I receive any reward for it.

I do not comprehend you; explain to me, what was the reason why you told Hillier you had been in the constant course of cheating government in that fashion? — I did not tell Hillier I had been in a constant course of cheating the king; he mentioned to me his having a relation a quartermaster at the yards, and to whom he talked of sending some of the resolutions; I thought that from him, as it is the quartermaster that puts up the stores, that I might obtain some information relative to those stores.

Is that an answer to my question? I asked you why you told Mr. Hillier you were in the course of doing that which you have been now stating. — I did not tell him I had been in the course of cheating the king at all.

Nor anything to that effect? — I only told him that I was a dealer in naval stores, nothing farther.

Did you ever tell him that there were great quantities of copper conveyed out of the docks, and the manner in which it is conveyed out? — Never, the manner in which it is conveyed out.

Whether you did not tell him the copper was conveyed out of the dockyards in butter firkins? — No; I have given information to Mr. Colquhoun that copper has been sent away, but that was not from the king's stores; but supposed to be copper fraudulently conveyed away.

I am asking you, whether you did not tell him you had been employed yourself in conveying away this copper? — I never told him that I was employed; I wished to gain what information I could from him, and that was the sole purpose.

Did you ever tell him that you were acquainted with a woman who lived somewhere about Tooley-street, and that there were twelve hundred weight found upon her premises? — I told him I had heard

such a seizure had been made, but I never saw the woman in my life; I had heard of it, and merely related that I had heard that such a thing was the fact. . . .

*Edward Gosling* reexamined by *Mr. Garrow*.

. . . . You have been asked a vast number of questions, respecting *Mrs. Coleman's* will; was there any suit instituted to dispute the legality of that will?—None.

Was there any prosecution for that which is called the forgery of it?—None.

Was there ever, to your knowledge, any complaint made against you, that there was anything foul in the transaction?—Not that I know of; the brother came to town, and appeared perfectly satisfied. Was it, upon your oath, a fair, honest transaction, as far as you had anything to do with it; aye or no?—It was. . . .

Lord Chief Justice *EYRE* (in summing up the evidence for the jury):

On his cross-examination, *Gosling* is asked what situation he was in; he said he kept a broker's shop; he is asked if he did not deal in king's stores; he said he did say to a man to whom he was unwilling to give his name, that he dealt in naval stores, thinking that would put the man off from any further inquiry—he says that he is employed by a magistrate, in *Worship-street*, which occasioned him to say that. He denies that he lived by smuggling, and cheating the king in his stores. He was asked if he ever went by the name of *Douglas*; he says he did for six years, while he carried on the business of a hairdresser, which is ten years since, in *Petty France*, at No. 3. He says his father had a shop of business in the city, that he wished to go out for improvement, and did not like to appear as

a journeyman, when his father kept four or five men in his own house; that his taking the name of *Douglas* was a mere accidental circumstance.

. . . . He is then asked as to a *Mrs. Coleman*, who had lived with him, and died in his house; he says he made her will, and that no part of her property was left to her relations—he is asked if a brother of a former husband had not made some charge against him—he says he never heard any complaint, or any charge against his conduct respecting the will, but that a brother had come up to make a claim. He is asked if he knows one *Cox*, cheesemonger—he says he has dealt with him, and he did not use him very well, but nothing turns upon that, for he is not called. . . .

Gentlemen, I stated to you before, that this witness has given very important evidence, tending to show the determined purpose of this Convention to use force against the king, his family, and the government. If this man's evidence can be depended upon, he certainly states *Baxter* to use very strong language, so indiscreet, that one could hardly have thought that a man would have ventured to use—and on the other hand, the observation made upon this is certainly founded, that this man is not contradicted with regard to the testimony that he gives, and that all they rely upon to shake his credit is what turns out upon his cross-examination—the account he gives of himself, of his having told a man that he dealt in naval stores, for a vile purpose—having borne the name of *Douglas*—having acted about in that sort of way, and going there for the purpose of giving information to government. Gentlemen, it is your province to judge what degree of credit you think fit to give to this man's evidence.

202. G. L. DUPRAT. *Le Mensonge: étude de psychosociologie*. (1909. 2d ed. pp. 34, 132, 181, 187.) *Psychophysiology of Mendacious Invention*. Mendacious invention rests on a well-known physiological process. We do not mean to invoke here the supposed laws of mental association, as established by English psychologists from Locke and Hume to Stuart Mill, Bain, and Spencer. To say that syntheses of representations are formed by contiguity, resemblance, or contrast, is merely to describe certain facts, not to explain them. Every imaginative synthesis must be preceded by a dissociation of the elements which already formed other empiric syntheses; for the imagination does not create its materials, it only gives them a new form and new relations, not usually pushing the analysis very far. This dissociation is scarcely ever intentional. It is due to the mutual interference of different syntheses having common elements, but in such a way that the common elements are associated here with some and there with other assumptions. Thus the associations are less firm. A synthesis is indeed difficult to dissolve in proportion as its components have less "affinity" with other elements than with each other; and this "affinity" of the representations or their parts with each other depends on the person's habit of associating them or not.

Hence a prime condition for mendacious invention is an experience such as has already produced interferences of association which favor dissociation. This is why a denial, pure and simple, in which lying invention is at its minimum, is much more at the command of children and less experienced or less gifted adults than a deceptive affirmation; for the latter is the product of a somewhat fertile imagination.

This process of mental dissociation is based on a breakdown of nerve habits (what Ribot has termed the "dynamic associations" of nerve cells). Yet, once these habits are broken down, how are we to explain the establishment of new relations between the different nerve elements (neurones, or fibers) and between the separate cortical regions? Doubtless the oldest habits can be promptly restored, and sometimes this suffices to give rise to mental syntheses different from those which would represent a true assertion. But it still remains to explain what that stimulus is (varying from real experience) which can produce either the return of the original nerve habit or the process which ends in making a new habit.

It is useless to invoke (as Bain does) the "affinities"; we have just noted that the elements of our representations have no other "affinities" than those proceeding from our habits. Nor can we have recourse to those "nervous explosions" along the line of least resistance, of which William James speaks; these explosions might in all probability not produce the mental formation required by the interests to be served by a lie. Is an adequate reason to be found in Paulhan's law of systematic association and systematic inhibition? This, indeed, shows plainly enough that the psychic elements associate when they can form a *systematic* whole, when they can coexist in one and the same synthesis, from which are expelled the elements incompatible with those admitted; these incompatible elements thus being inhibited, *i.e.* deprived for a greater or less period of the maximum of conscious clearness. But this law does not sufficiently explain the whole case; for a system presupposes some principle or general end; . . . in a given object we perceive only that which interests us, *i.e.* responds to

a dominant tendency; and so too what we conceive is what interests us; in short, *our mental syntheses, including our mendacious inventions, are determined by our settled desires or repulsions.*

Thus the following principle may be offered as emerging from the foregoing analysis: *Every mendacious invention is determined by a tendency.* This principle Ribot has demonstrated for the creative imagination; and since, as above shown, the liar's imagination may include all modes of creative imagination, what is true of the one is true of the other. "All forms of the creative imagination," says Ribot, "imply affective (emotional) elements."<sup>1</sup> This fundamental physiological relation between the cerebral regions serving the emotional life (desire), and those serving ideation and imagination, is what must serve as the basis for explaining the process of mendacious invention. *This physiological relation matches the psychological one between the trait-tendencies of a person and his production of images enabling him to tell a lie.* A person of a specific trait or temperament will be led into certain kinds of lies in proportion as that trait or temperament is more favorable to excitation or depression. A mendacious denial is easy to people of calm, apathetic, or melancholy disposition, given to slow movements. A mendacious affirmation is easy to persons inclined to rapid movements, — to an activity, if not disorderly, at least multifold and varied. Literature has often drawn the contrast between these two opposed temperaments, — the calm, cold one, and the lively, daring one; and almost always the latter has been taken as the type of the liar, *e.g.* Daudet's "Numa Roumestan," the temperament of the South. But alongside of this temperament we must also point out its opposite, the smooth-tongued, soft-speaking personality, a radical enemy of truth, the type of hypocrites of all degrees.

Thus the diversity of human traits and tendencies produces a diversity of liars. And the lie is the more important, as psychological phenomenon, in proportion as it reveals the basis of the Ego beneath it. For then the derogation from the truth is not a mere casual incident in the life of an unstable imagination, but is a direct consequence of the person's rooted disposition to evil.

*Kinds of Mendacious Character.* [The mendacious tendency is found alike in persons psychologically normal and abnormal. Among abnormal classes may be noted the habitual criminal, the hysterical, the degenerate. The normal personality will here be considered.]

All men (says Ingegnieros) are simulators in a greater or less degree; but the tendency to simulate is the dominant note of the trait in those who form the type of simulator, — the most comprehensive type of those who fit the common term "liar." And no type is more frequently met with in persons of all ranks and occupations.

Ingegnieros has classified simulators as follows:<sup>2</sup> (1) the crafty, (2) the servile, (3) the practical jokers, (4) the "dissidents," (5) the neuropathic, (6) the suggested. (1) The *crafty* simulator is always ready to simulate; he has educated his emotional reactions so that they never betray them-

<sup>1</sup> A desire or a repulsion is, as we know, an incipient movement, or else a vivid image of a movement, united to a more or less clear representation of an end to which the movement tends.

<sup>2</sup> "Simulaci6n de la locura"; "Simulaci6n en la lucha por la vida."

selves in his countenance. He is a dissimulator to the roots of his being. But he employs the most varied means for succeeding. Women show themselves particularly apt in a thousand methods of sly dissimulation. (2) The *servile* simulator is a variety of the crafty one, with the peculiarity that his tendency is to subordinate his attitude, facial expression, and words to the requirements or desires or unspoken wishes of those who are his masters and whose good will or indulgence he hopes for. He may be either ambitious or shrewd, or lazy, apathetic, timid, or weak. (3) The *practical joker* turns simulation into an amusement. He enjoys mystifying his fellows without personal profit to himself. . . . This class may also be made to include the simulator who feigns the possession of exceptional talents or virtues and takes pleasure in duping the public at large or a select circle with his deceptive assertions and inventions. . . . (4) The "*dissidents*" are those who feign sentiments which they do not possess, in order to produce a reaction against current tendencies which they deplore and wish to improve. . . . (5) The *neuropathic* simulator is well known. These border on the hysterical, the alcoholic, and the degenerate. . . . (6) The simulator by *suggestion* is rather a victim than a culprit. But here must be included those persons who receive suggestion from the environment, *i.e.* are subjected to a vague influence which gives vent to their morbid tendency to deceptions and more or less skillful lies.

Ingénieros' classification may seem not systematic enough. It rests on the distinction between normal and pathologic persons, and utilitarian and disinterested ends. It would seem that there may well be as many secondary types of simulators as there are distinct human traits, *viz.*: (1) amorphous, and polymorphous or unstable; (2) unbalanced, and balanced; (3) impulsive, and obsessed; (4) emotional, and apathetic; (5) intuitive, or imaginative, and ratiocinative; (6) strong-willed and weak-willed. Thus they fall into groups (of contrasted traits), each presenting different aspects of simulation.

(1) The *amorphous* are susceptible of simulation under the influence of all sorts of suggestions. They have no more a fixed trait in their simulation than in the rest of their mental and social activity. They may exhibit trickery in any fashion required by their interests or desires or caprices, as circumstances vary. They are usually weak of will, and may thus yield to the exigencies of their environment, becoming, if need be, servile in their lies. — The *polymorphous* are often degenerates or hystericals, — liars and simulators to the degree that they change easily in personality. They do not long persist in any one species of simulation; *e.g.* they may in succession simulate piety and atheism, simple-mindedness and skepticism, cautiousness and imprudence, timidity and courage, — lying according to the rôle they are playing, often without interest to serve, and sometimes unconsciously. (2) The *unbalanced* are simulators only intermittently; they have accesses of candor which make them abandon for a period their system of feints and lies. They mislead by the uncertainty which they thus produce in the mind of the observer. (3) Next to them may be classed the *impulsives*. These yield, but only intermittently, to their need for lying and for simulating the sentiments calculated to induce confidence in their veracity. This need is most often explainable by sudden cravings or repulsions, unforeseeable even by the subjects themselves. Such a person,

without knowing why, will suddenly experience an irresistible desire to deceive in some way his wife or his friend, and will therefore simulate anger or grief or astonishment. — The *obsessed* are dominated by a fixed idea, an exclusive aim, an emotion, and sometimes are driven to simulation by the exigencies of a purposeful mind; success in their enterprises (sometimes such as do not merit approval) depends often on their aptness in feigning, in the expression of ideas which they know to be false. The pretenders who obtain a public following are of this type at bottom. (4) The *emotionals* have little aptness for simulation; they are not able to control themselves well enough. The *apathetics* will not take the trouble to do so. Nevertheless, some emotionals do become simulators, usually through fear, love, hatred, pride, or vanity; *e.g.* they will feign altruistic sentiments, for fear of seeing their egoism unmasked; or affect a deep sensitiveness in matters of æsthetics, religion, or morality; or carry on a mendacious discourse (often lacking coherence) while under the emotion's influence. The *apathetics* (or indifferent), being little inclined to altruism, simulate mostly a sympathy or a pity or even a burst of feeling, when circumstances and the environment constrain them; their discourse is then particularly deceptive. (5) The *ratiocinatives* are those who use dialectics (sometimes keen), captious argument, long series of propositions, so as to simulate depth of thought. How many such disputers — metaphysicians, theologians, and others — have abused the confidence of their hearers or readers by a sterile logomachy, of which they themselves have not always been the dupes! Must we not admit that there are many men, clever, educated, masters of thought and language, who are so devoted to empty disputatiousness that they overstep (in one or another way) the boundary between honesty and simulation? Starting with little real earnestness, they do not hesitate to make assertions of whose slender objective soundness they are well aware; but their logic draws them on; they must be consistent with themselves and their earlier professions of good faith; they are driven to simulate beliefs which they no longer entertain, and to defend dogmas and principles which they have ceased sincerely to approve. The fear of being a renegade or a heretic makes them persevere in their attitude, and lies and simulation form a larger and larger part of it. — The *intuitives*, while less the slaves of a purposeful mind, are often lacking in that check which logic puts upon excessive license in one's interpretations of experience; they are too ready to think that they can depart, without harmful consequences, from a strict veracity. — In contrast with persons of scientific mind, who are scrupulous in the observation of facts and the verification of hypotheses, are the *imaginatives*. Contradiction does not in the least alarm them; whether through dilettantism or through self-interest, they put forth at every turn their romances (sometimes very ingenious). These are the typical simulators, especially when their imagination is at the service of a will strong enough to persevere in important schemes. In this class belong notably those who simulate illness to obtain help, reward, or favor, or exoneration from military service, taxes, or other social burden.

All the above described temperaments lend themselves more or less to effectuate some form of simulation. Some persons seem to be innately disposed to this mode of life. Certain children at an early age exhibit as their peculiar trait a mendacity accompanied by simulation; experience

and habit, necessary for its development, increasingly betray it as they become older; and one may meet with adults and old persons whose every attitude, gesture, and discourse is directed to the deception of others. Success has made them persevere in this marked aptitude. One is almost tempted to believe that (in primitive as well as in civilized communities) supremacy is assured, in the struggle for existence, not to those who employ honest methods and conscientious assertions, but to the astute and shrewd simulators who employ their skill, when needed, to the detriment of the simple, — ending in the discomfiture or the elimination of the latter. . . .

*Conclusion.* The foregoing study has now shown us that the lie is a phenomenon common to all civilizations, all classes of society, all ages, and both sexes. . . . It is at one and the same time a psycho-physiologic and a psycho-sociologic phenomenon. . . . It originates spontaneously, — apart from imitation or faulty education, and merely by the combined operation of imagination and the personal tendencies or aims unsatisfied by the natural course of events. Nevertheless, education, imitation, fashion, manners and morals, all strengthen the mendacious tendency; while weakness, illness, mental and physiological incapacity, lack of the higher sentiments (united sometimes with arrest of intellectual development), degeneracy, all favor the hatching of the lie-tendency; and, finally, social causes, — such as war, persecution, popular emotions, mob frenzy, — repression by violence or coercion, combine to make mendacity almost inevitable.

We have thus shunned (it will be noted) all those shallow explanations of mendacity which merely use a form of words, — such epithets, for example, as “innateness,” “the inventive faculty,” etc., and such supposed laws as that “the lie tends to develop in a social medium in proportion as that medium becomes complex,” and the like. . . .

And in showing that the lie is due to specific tendencies which are themselves closely bound up with individual character, temperament, physiological constitution, and neuro-muscular activity, we have also shown the emptiness of the unconscionable claims of those moralists and pedagogues for whom our warfare against the lie has its basis in a commandment inscribed in golden letters for centuries past on the walls of churches and schools. In sober fact, the warfare is against rooted human desires or antipathies, often concealed from our view, and no less difficult to overcome than they are to discover. And our means of overcoming is *to awaken contrary tendencies*, — not artificial ones, but those tendencies and desires which are normally implanted in human nature and go to make up the noblest traits that mark humankind.

And so the warfare against the lie is simply a part of the great struggle for the moral life as a whole.

**SUBTITLE F: FEELING, EMOTION, BIAS**

203. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. pp. 236, 260.) . . . The effect of *desire on belief* cannot be omitted from consideration in such cases if we are to come to a correct conclusion. "If a certain objective combination," says Professor Stout; "presents itself as the only condition, or the most favorable condition, of obtaining a certain end, the active tendency towards this end is of itself a tendency to believe in the objective combination." As to the way in which Desire acts, the following is the same writer's account: "This influence of Desire on Belief often operates by simply diverting the attention from counter evidence. . . . The mind is so absolutely preoccupied by certain tendencies, that whatever crosses them either never comes before consciousness at all, or, if it does, is immediately dismissed. . . . It also directly intensifies the resistance offered by a mental combination to conditions which might otherwise dissolve it. . . . But the more often they (*i.e.* such beliefs) are acted upon, the more completely they become incorporated with the original combination so as to become an integral part of it; hence the support they receive from it is increased." With this may be compared the manner in which Feeling in general influences Belief: "This action of feeling on belief is in every case mediate; that is to say, it works by modifying the processes of ideation themselves. It is by giving preternatural vividness and stability to certain members of the ideational train called up at the time, *e.g.* ideas of occurrences which we intensely long for, or especially dread, and by determining the order of ideation to follow, not that of experience, but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type."

Feeling, then, acts in part by warping the intellectual element in Belief.

Emotion is a great source of illusion, because it disturbs intellectual operations. It gives a preternatural vividness and persistence to the ideas answering to it, *i.e.* the ideas which are its excitants or which are otherwise associated with it; hence when the mind is under the temporary sway of any feelings as, *e.g.* fear, there will be a readiness to interpret objects by help of images congruent with the emotion. A man under the control of fear will be apt to see any kind of fear-inspiring object whenever there is any resemblance to such in the things actually present to his vision. . . . The state of emotion (apart from its promotion of the flow of ideas if it be not too strong) is antagonistic to thinking, which implies at the moment a certain subsidence of the feelings and a considerable suppression of outward action or movement, but to paralyze the intellectual activity it must be very strong. . . . Professor James explains our tendency to believe in emotionally-exciting objects (objects of fear, desire, etc.), as due to the bodily sensations which emotions involve, for the more a conceived object excites us, the more reality it has; and he considers the greatest proof that a man is *sui compos* to be his ability to suspend belief in presence of an emotionally-exciting idea. Now, this power is the result of education, and does not exist in untutored minds, for which every exciting thought carries credence. . . .



If imagination is the most important quality [for correct thinking], prejudice is perhaps the worst impediment. Psychologically speaking, it is a case of mental preadaptation which may be voluntary or involuntary, and is a source of active illusions. . . . For good observation what is chiefly needed is self-restraint, in order to limit the attention to what is actually presented and exclude all irrelevant imaginative activity. The common faults of the bad observer are the impulse to go beyond the facts observed and stray into inference and to look out beforehand for a particular thing and so create a prepossession. The undisciplined mind is apt to see what it expects, wishes, or, may be, fears to see, and to overlook that which it is disinclined to believe. It often happens in consequence that a witness states things which appear to the more educated mind of the magistrate to be manifestly false or absurd and who is therefore inclined to reject the whole. But such an attitude is more frequently than not a wrong one. An effort should be made to arrive at what the witness actually saw, apart from the explanations he gives of them, for it is usually the tacit explanations which are wrong.

204. HANS GROSS. *Criminal Psychology*. (transl. Kallen, 1907, § 83, p. 375); and *Criminal Investigation*. (transl. Adam, 1907, p. 78.) *Intellectual Attitude as affecting Testimony*. It would be foolish to assert that we have the right to demand only facts from witnesses. Setting aside the presence of inferences in most sense perceptions, every exposition contains, without exception, the judgment of its subject matter, though only, perhaps, in a few dry words. It may lie in some choice expression, in the tone, in the gesture, but it is there, open to careful observation. Consider any simple event, *e.g.* two drunkards quarreling in the street. And suppose we instruct any one of many witnesses to tell us only the facts. He will do so, but with the introductory words, "It was a very ordinary event," "altogether a joke," "completely harmless," "quite disgusting," "very funny," "a disgusting piece of the history of morals," "too sad," "unworthy of humanity," "frightfully dangerous," "very interesting," "a real study for hell," "just a picture of the future," etc. Now, is it possible to think that people who have so variously characterized the same event will give an identical description of the mere fact? They have seen the event in accordance with their attitude toward life. One has seen nothing; another this; another that; and, although the thing might have lasted only a very short time, it made such an impression that each has in mind a completely different picture which he now reproduces. . . . Voltaire says, "If you ask the devil what beauty is, he will tell you that beauty is a pair of horns, four hoofs, and a tail." Yet, when we ask a witness what is beautiful, we think that we are asking for a brute fact, and expect as reliable an answer as from a mathematician. We might as well ask for cleanliness from a person who thinks he has set his house in order by having swept the dirt from one corner to another.

To compare the varieties of intellectual attitude among men generally, we must start with sense perception, which, combined with mental perception, makes a not insignificant difference in each individual. Astronomers first discovered the existence of this difference, in that they showed that various observers of contemporaneous events do not observe at the

same time. This fact is called "the personal equation." Whether the difference in rate of sense perception, or the difference of intellectual apprehension, or of both together, are here responsible, is not known, but the proved distinction (even to a second) is so much the more important, since events which succeed each other very rapidly may cause individual observers to have quite different images. And we know as little whether the slower or the quicker observer sees more correctly, as we little know what people perceive more quickly or more slowly. Now, inasmuch as we are unable to test individual differences with special instruments, we must satisfy ourselves with the fact that there are different varieties of conception, and that these may be of especial importance in doubtful cases, such as brawls, sudden attacks, cheating at cards, pocket-picking, etc.

The next degree of difference is in the difference of observation. Schiel says that the observer is not he who sees the thing, but who sees of what parts it is made. The talent for such vision is rare. One man overlooks half because he is inattentive or is looking at the wrong place; another substitutes his own inferences for objects, while another tends to observe the quality of objects, and neglects their quantity; and still another divides what is to be united, and unites what is to be separated. If we keep in mind what profound differences may result in this way, we must recognize the source of the conflicting assertions by witnesses. And we shall have to grant that these differences would become incomparably greater and more important if the witnesses were not required to talk of the event immediately, or later on, thus approximating their different conceptions to some average. Hence we often discover that when the witnesses really have had no chance to discuss the matter and have heard no account of it from a third person, or have not seen the consequences of the deed, their discussions of it showed distinct and essential differences merely through the lack of an opportunity or a standard of correction. And we then suppose that a part of what the witnesses have said is untrue, or assume that they were inattentive or blind.

Personal views are of similar importance. Fiesto exclaims: "It is scandalous to empty a full purse, it is impertinent to misappropriate a million, but it is unnamably great to steal a crown. The shame decreases with the increase of the sin." Exner holds that the ancients conceived *Œdipus* not as we do; they found his misfortune horrible; we find it unpleasant.

These are poetical criminal cases presented to us from different points of view; and we nowadays understand the same action still more differently, and not only in poetry, but in the daily life. Try, for example, to get various individuals to judge the same formation of clouds. You may hear the clouds called flower stalks with spiritual blossoms, impoverished students, stormy sea, camel, monkey, battling giants, swarm of flies, prophet with a flowing beard, dunderhead, etc. We have coming to light, in this accidental interpretation of fact, the speaker's view of life, his intimacies, etc. This emergence is as observable in the interpretation also of the ordinary events of the daily life. There, even if the judgments do not vary very much, they are still different enough to indicate quite distinct points of view. The memory of the curious judgment of one cloud formation has

helped me many a time to explain testimonies that seemed to have no possible connection.

*Attitude or feeling.* — This indefinable factor exercises a great influence on conception and interpretation. It is much more wonderful than even the march of events, or of fate itself. Everybody knows what attitude (*Stimmung*) is. Everybody has suffered from it, everybody has made some use of it, but nobody can altogether define it. According to Fischer, attitude consists in the compounded feelings of all the inner conditions and changes of the organism, expressed in consciousness. This would make attitude a sort of vital feeling, the resultant of the now favorable, now unfavorable, functioning of our organs. . . .

The attitude we call indifference is of particular import. It appears, especially, when the ego, because of powerful impressions, is concerned with itself; pain, sadness, important work, reflection, disease, etc. In this condition we depreciate or undervalue the significance of everything that occurs about us. Everything is brought into relation to our personal, immediate condition, and is, from the point of view of our egoism, more or less indifferent. It does not matter whether this attitude of indifference occurs at the time of perception or at the time of restatement during the examination. In either case, the fact is robbed of its hardness, its significance, and its importance; what was white or black, is described as gray.

*Strong Feeling as a Cause of Inaccuracy of Observation.* If men perceive the most insignificant facts in the most diverse manner, even when it is impossible that these facts should produce on the observer any emotion preventing him from observing with absolute calm, how much more will their impressions be diversified under circumstances calculated to produce in the onlookers excitement, fear, or terror. The fact is that in such a state they are absolutely incapable of observing accurately. . . .

Recently the author had the opportunity of verifying this by an analogous circumstance. He was present at an execution at which for some reason or other the executioner wore gloves. After the execution he asked four officials who were present what was the color of the executioner's gloves. Three replied, respectively, black, gray, white; while the fourth stoutly maintained that the executioner wore no gloves at all. Yet all four were in close proximity to the scaffold; each replied without hesitation, and all four are still perfectly confident that they made no mistake. — Again, a man of reserved and calm temperament, an old soldier, reported the day after a railway accident which he had witnessed, that there were at least one hundred dead, that he had himself on extricating himself from the smashed carriage seen many human heads, cut off by the wheels of the vehicles, rolling along the track. As a matter of fact, one man was killed and five persons wounded; all the rest was due to the imagination of a man ordinarily most composed, but at the moment suffering under strong excitement due to fear. — Another railway accident furnishes an example of what a man in a state of terror can see and hear. A brewer, a veritable Hercules, in the prime of life and in no way nervous, having jumped from the smashed carriage, took to running across the fields to the neighboring town, three quarters of an hour's distance, in the full belief that he saw and heard the locomotive of the train puffing and blowing after him. This

man, the prey to his imagination, had run so hard that he caught an inflammation of the chest, from which he died some months afterwards. The fact that he thus ran with such excess of vigor proves conclusively that in his imagination he had really seen and heard the pursuing locomotive. . . . It is interesting to note that in the murder of President Carnot by the Italian Caserio not a single person saw the blow struck, though the murderer had jumped upon the footrest of the carriage, pushed aside Carnot's arm, and thrust the dagger into his abdomen. In the carriage three gentlemen were seated, two grooms were standing behind, mounted officers were accompanying on either side, and yet no one saw the President stabbed; and the murderer would have easily escaped if he had refrained from calling out in a loud voice while running away: "Vive l'anarchie." . . .

If the statement of the witness appears improbable, and if at the time of the occurrence he was in a state of excitement, his story must be criticised with the most minute and scrupulous care. If the improbability of the statement is glaring, there is no difficulty, because we are at once put upon our guard. The danger arises when the observation of the witness has been at fault, when he tells in perfect good faith a most likely story, and thus creates great confusion. A long investigation ensues and only at the end of it, if at all, is the mistake discovered.

205. FRANCIS L. WELLMAN. *The Art of Cross-examination*. (1908. p. 149.) . . . Perhaps the most subtle and prolific of all of the "fallacies of testimony" arises out of unconscious partisanship. It is rare that one comes across a witness in court who is so candid and fair that he will testify as fully and favorably for the one side as the other. . . . What is it in the human make-up which invariably leads men to take sides when they come into court?

In the first place, witnesses usually feel more or less complimented by the confidence that is placed in them by the party calling them to prove a certain state of facts, and it is human nature to try to prove worthy of this confidence. This feeling is unconscious on the part of the witness, and usually is not a strong enough motive to lead to actual perjury in its full extent; but it serves as a sufficient reason why the witness will almost unconsciously dilute or color the evidence to suit a particular purpose, and perhaps add only a bit here, or suppress one there, but this bit will make all the difference in the meaning. Many men in the witness box feel and enjoy a sense of power to direct the verdict towards the one side or the other, and cannot resist the temptation to indulge it and to be thought a "fine witness" for their side. I say "their" side; the side for which they testify always becomes their side the moment they take the witness chair, and they instinctively desire to see that side win, although they may be entirely devoid of any other interest in the case whatsoever. It is a characteristic of the human race to be intensely interested in the success of some one party to a contest, whether it be a war, a boat race, a ball game, or a lawsuit. This desire to win seldom fails to color the testimony of a witness and to create fallacies and inferences dictated by the witness's *feelings*, rather than by his *intellect* or the dispassionate powers of observation. Many witnesses take the stand with no well-defined motive of what they are going to testify to, but upon discovering that they are being led into

statements unfavorable to the side on which they are called, experience a sudden dread of being considered disloyal, or "going back on" the party who selected them, and immediately become unconscious partisans and allow this feeling to color or warp their testimony.

There is still another class of persons who would not become witnesses for either side unless they felt that some wrong or injustice had been done to one of the parties, and thus to become a witness for the injured party seems to them to be a vindication of the right. Such witnesses allow their feelings to become enlisted in what they believe to be a cause of righteousness, and this in turn enlists their sympathy and feelings and prompts them to color their testimony, as in the case of those influenced by the other motives already spoken of. One sees, perhaps, the most marked instances of partisanship in admiralty cases which arise out of a collision between two ships. Almost invariably all the crew on one ship will testify in unison against the opposing crew, and, what is more significant, such passengers as happen to be on either ship will almost invariably be found corroborating the stories of their respective crews. It is the same, in a lesser degree, in an ordinary personal injury case against a surface railway. Upon the happening of an accident the casual passengers on board a street car are very apt to side with the employees in charge of the car, whereas the injured plaintiff and whatever friends or relatives happen to be with him at the time, will invariably be found upon the witness stand testifying against the railway company.

206. RICHARD WHATELY. *Elements of Rhetoric; comprising an Analysis of the Laws of Moral Evidence.* (ed. 1893. p. 83.) . . . A man strongly influenced by prejudice, to which the weakest men are ever the most liable, may even fancy he sees what he does not. And some degree of suspicion may thence attach to the testimony of prejudiced, though honest, men, when *their prejudices are on the same side with their testimony.* Otherwise, their testimony may even be the stronger. *E.g.* the early disciples of Jesus were, mostly, ignorant, credulous, and prejudiced men; but all their expectations — all their early prejudices — ran counter to almost everything that they attested. They were, in that particular case, harder to be convinced than more intelligent and enlightened men would have been. It is most important, therefore, to remember — what is often forgotten — that Credulity and Incredulity are the *same* habit considered in *reference to different things.* The more easy of belief any one is in respect of what falls in with his wishes or preconceived notions, the harder of belief he will be of anything that opposes these.

207. ROBERT HAWKINS' CASE. (G. L. CRAIK. *English Causes Célèbres.* 1844. p. 141.)

[The defendant, a clergyman, was charged with robbing one Larimore of money and jewelry. The defendant maintained that, owing to a dispute over church tithes, Larimore and others, including certain local magnates of an opposing faction, had concocted this charge of

robbery. Lord HALE presided at the trial at Aylesbury in 1668. The defendant, to prove Larimore's bias, called the village cobbler.]

*John Chilton.* — My Lord, I can say nothing, but that I am paid for my boots.

*L. C. B.* — What boots? *Chil.* —

My Lord, I am paid for my boots.

*L. C. B.*—Our business is not now about boots; but, however, come and tell me what thou meanest by them. *Chil.*—My Lord, Mr. Hawkins brought me a pair of tops, to put new legs to them, which I did, and he, coming by my shop, told me he wanted his boots; I replied, they were done; but I, being then about to go out, did promise Mr. Hawkins to lay them, in my window, so that he might take them as he went home, which, accordingly, he did; and when I came home I went to Mr. Hawkins, who at that time was at Sir John Croke's house, where he contented me for my work before we parted; and this is all that I can say, my Lord.

*L. C. B.*—What is this to the purpose? Can you say any more, Chilton? If you can, go on. *Chil.*—My Lord, Mr. Hawkins paid me honestly for the boots; but as soon as he began to demand the tithes of (the parish of) Chilton, and did sue for them, then they lay at me night and day to have me charge Mr. Hawkins with flat felony for stealing the said boots out of my shop; but I told them that I laid them in my shop window for him, and did bid him take them as he came back; and he paid me for my work, and, therefore, I cannot say that he stole them.

*L. C. B.*—Who were they that desired you to charge Mr. Hawkins with stealing of your boots? *Chil.*—This Larimore, Mr. Dodsworth Croke, Richard Mayne the Constable, Miles, and John Sanders (who is since dead, my Lord). . . .

*L. C. B.*—Did this Larimore desire you to charge this Mr. Hawkins with felony? And when did he desire you to do so? *Chil.*—My Lord, Larimore and the rest that I have named desired me to charge Mr. Hawkins with flat felony, for stealing the said boots, as soon as he demanded the tithes of Chilton; and they would have forced me to

fetch a warrant from a justice of peace to search for them, and did further threaten me, in case I would not do it, that Sir John Croke would indict me to the assizes, as one accessory to the stealing of my own goods.

*L. C. B.*—Was Larimore one of them? *Chil.*—Yes, my Lord, and he said that he would make me swear that Mr. Hawkins had stolen my boots, and for that end did serve me with a subpoena to be here.

Here *Larimore* the second time interrupted Chilton, and said, My Lord, this fellow (pointing at John Chilton) is hired by Mr. Hawkins to swear this. *Chilton* replied, No, my Lord, I am not hired by Mr. Hawkins to swear, but I might have been hired or borne out, if I would but swear that Mr. Hawkins stole my boots, by one Croxstone.

*L. C. B.*—How! what is that! hired or borne out to swear? By whom, and how? Tell me the story. *Chilton.*—My Lord, Thos. Croxstone, of Weston-on-the-Green, in the county of Oxon, told me upon Monday last, it being the 8th of March, 1668, that if I would but swear what he would have me against Mr. Hawkins (viz. that he stole my boots) he would bear me harmless; but I replied that it went against my conscience to do it . . . : to which Croxstone replied, that if I would swear it he would bear me out against the said Mr. Hawkins as far as an hundred pound would go, and if that would not do, as far as five hundred pound would go.

*L. C. B.*—I do not believe it to be true. *Chilton.*—As I live and breathe, my Lord, Croxstone did say, if I would swear that Mr. Hawkins stole my boots, he would bear me out, as I said before, and if I made any doubt of it, he would give me bond to make good his promise.

*L. C. B.*—This is strange. *Croxstone.*—My Lord, I said I would bear him out in speaking the truth, and no otherwise.

*Hawk.*—My Lord, may I be heard? *L. C. B.*—Yes, you may go on.

*Hawk.*—I thank your honor. My Lord, pray let me ask Mr. Croxstone two or three questions. *L. C. B.*—So you may; go on.

*Hawk.*—Mr. Croxstone, do you confess that you did promise to bear out Chilton (as you said before) in swearing the truth? *Croxstone.*—Yes, Sir, I did, and no otherwise.

*Hawk.*—Was it not about the boots? *Croxstone.*—Yes, Sir, it was so.

*Hawk.*—Did not you desire Chilton to swear that I had stolen his boots, after that he had told you I had paid him for them, and thereupon promise to bear him out against me, in £100 or £500. *Croxstone.*—I think you cannot prove it against me.

*Hawk.*—I pray, my Lord, . . . I have two witnesses more to prove the same against Mr. Croxstone, and I pray that they may be heard.

*L. C. B.*—What, more boots still! . . .

*L. C. B. HALE* then addressing the prisoner said: Sir, you have heard the indictment against you, and the evidence to prove it; you have heard the charge—now say what you can for your own defense, and you shall be heard. . . .

*Hawkins.*—Larimore is generally known to be a notorious Anabaptist, and an enemy to the church of England, and a hater of the ministry in general; but more particularly, he is more envious and malicious against myself, because I sued him for tithes, and caused him to be indicted for not coming to church, or baptizing his children; for which reason his malice against me hath appeared notorious several ways; as amongst others—

1. By dissuading all that owed me any money, not to pay me.

2. By his inducing those to whom I owed money to arrest and trouble me.

3. By dissuading those that I sued for tithes not to agree with me; he promising that Sir John Croke and himself would force me to run the country ere long.

4. By his continuing tormenting and vexing me with his false arrests, and illegal indictments.

5. By his constant endeavor to dissuade my friends from anyways relieving me or mine in my greatest wants and necessities—advising them to starve us.

[After several witnesses called by Hawkins to prove the conspiracy to drive him from the parish and ruin him, the following scene ensued.] . . . *Hawk.*—I have one witness more that I desire may be called, viz. Mr. Samuel Brown.

*L. C. B. HALE.*—Yes, yes, call him; come, Mr. Brown, what can you say? *Mr. Brown.*—My Lord, I can say something, but I dare not speak.

*L. C. B.*—Why dare you not? Come, speak the truth and spare not, and say no more. *Mr. Brown.*—I dare not speak, for Sir John Croke and this Larimore have threatened me, that if I came down to this assize to testify what I heard about this plot, Sir John Croke said he would fling me in the jail, and load with me action upon action of £1000, and ruin me and my family.

When the judge and the justices heard Mr. Brown relate this, every eye began to be fixed upon Sir John Croke. . . .

*Lord Chief Baron.*—Come, Mr. Brown, let us now hear what you say to this business.

*Mr. Brown.*—If it please your Honor, my Lord, upon Wednesday, the 16th of September last past, early in the morning, as I lay in my bed at Sir John Croke's house in Chilton . . . I heard this Larimore tell Sir John Croke that he had undone him, by causing him to contend with the parson. . . . Sir John replied, If thou wilt but act, I will hatch enough to hang

Hawkins. Larimore replied, But how shall we bring this to pass? Sir John Croke made answer, Canst not thou convey some gold or silver into Mr. Hawkins's house, and have a warrant ready to search his house, and then our work is done? Larimore replied, Sir, if we could but bring this to pass, it might do well, but I know not how. Sir John Croke said to Larimore . . . Take Dick Mayne, the constable, who is one of us, and will do whatever we desire him, and go and search Mr. Hawkins's house, and there you will find these things; and then charge him with flat felony, and force him before me, and no other justice, and I'll send him to jail without bail; and we will hang him at the next assizes. . . .

*L. C. B.*—Gentlemen, where is this Sir John Croke? They replied, He is gone.

*L. C. B.*—Is Sir John Croke gone? Gentlemen, I must not forget to acquaint you (for I thought that Sir John Croke had been here still) that this Sir John Croke sent me this morning two sugar loaves for a present, praying me to excuse his

absence yesterday. I did not then know, so well as now, what he meant by them; but to save his credit, I sent his sugar loaves back again. Mr. Harvey, did you not send Sir John his sugar loaves back again?

*Clerk of the Assize.*—Yes, my Lord, they were sent back again.

*L. C. B.*—I cannot think that Sir John Croke believes that the king's justices come into the country to take bribes. I rather think that some other person (having a design to put a trick upon him) sent them in his name. And so taking the letter out of his bosom, showing it to the justices, he said, Gentlemen, do you know this hand? To which some of them replied, they believed it might be Sir John Croke's own hand; which letter being compared with his mittimus (for he had no clerk) and some other of his writings there, it plainly appeared to be his own hand. So my Lord Chief Baron seeing that (putting up the letter into his bosom) said, he intended to carry that to London; and he added further, that he would relate the foulness of the business as he found occasions for it.

## 208. MARY BLANDY'S TRIAL. (1752. HOWELL'S *State Trials*. XVIII, 1153, 1164.)

[Mary Blandy was tried for murdering her father by poison. Her defense was that she had given him a love philtre, at her lover's instance, to remove her father's objections to her marriage with the lover. A house servant, Elizabeth Binfield, was a strong witness to prove that the accused had knowingly given poison to her father. Then Binfield was sought to be discredited by her bias against the accused]. . . .

*Elizabeth Binfield* sworn. *Binfield.*—I was a servant to Mr. Francis Blandy at Henley, and had been almost three years.

*Counsel.*—Did you ever hear Miss Blandy talk of something in the house, which she said presaged his death, or something like it?

*A.* I have often heard her talk of walkings and music in the house that she had heard; she said, she thought it to be her mother; saying, the music foretold her father's death.

*Q.* Do you remember any expression she made use of about her father? *A.* I heard her say, "Who would grudge to send an old father to hell for £10,000." Exactly them words.

*Q.* When was this? *A.* It was about a month before his death, or it may be more, I cannot justly tell.

*Q.* How was this conversation introduced? *A.* She was speaking of young girls being kept out of their fortunes.

*Q.* Who was with you at this time? *A.* It was to me and nobody else.



Q. Have you heard her use him with bad language? A. I have heard her curse him, call him rascal and villain. . . .

*Ann James* sworn, for the prisoner. *James.*—I live at Henley, and had use to wash for Mr. Blandy; I remember the time Mr. Blandy grew ill; before he was ill, there was a difference between Elizabeth Binfield and Miss Blandy, and Binfield was to go away.

*Counsel.*—How long before Mr. Blandy's death? A. It might have been pretty near a quarter of a year before; I have heard her curse Miss Blandy, and damn her for a bitch; and said she would not stay. Since this affair happened, I heard her say, "Damn her for a black bitch, I shall be glad to see her go up the ladder, and swing."

Q. How long after? A. It was after Miss was sent away to jail.

(*Cross-examined.*) *King's Counsel.*—What was this quarrel about? A. I do not know. I heard her say she had a quarrel, and was to go away, several times.

Q. Who was by at this time? A. Mary Banks was by, and nurse Edwards, and Mary Seymour; and I am not sure whether Robert Harman was there, or not. . . .

*Elizabeth Binfield* was called up again. *King's Counsel*—Did you, Elizabeth Binfield, ever make use of such an expression as this witness has mentioned? A. I never said such words.

Q. Did you ever tell this witness Miss and you had quarreled? A. To the best of my knowledge, I never told her about a quarrel.

Q. Have you ever had a quarrel? A. We had a little quarrel some time before.

Q. Did you ever declare you were to go away? A. I did.

*Mary Banks* sworn. *Banks.* I remember being in Mr. Blandy's kitchen in company with Ann James.

*Counsel.*—Who was in company? A. I do not remember.

Q. Do you remember a conver-

sation between Elizabeth Binfield and Ann James? A. I do not remember anything of it.

Q. Do you remember her aspersing Miss Blandy's character? A. I do not recollect.

Q. Did you hear her say, "She should be glad to see the black bitch go up the ladder to be hanged"? A. She did say, "she should be glad to see the black bitch go up the ladder to be hanged."

Q. When was this? A. It was the night Mr. Blandy was opened.

Q. Are you sure it was that day? A. I am sure it was.

Q. Where was Miss Blandy then? A. She was then in the house. . . .

*The Honorable Mr. Bathurst's Argument in Reply for the Prosecution.* Your lordships will, I hope, indulge me in a very few words by way of reply. . . . I will only make one other observation, which is that of all our witnesses she has attempted to discredit only one. She called two persons to contradict Elizabeth Binfield in regard to a scandalous expression (which she was charged with, but which she positively denied ever to have made use of) in saying, "She should be glad to see the prisoner go up the ladder, and swing." They first called Ann James; she swore to the expression, and said, It was after Miss Blandy was sent to Oxford jail. The next witness, Mary Banks, who, at first, did not remember the conversation, and, at last, did not remember who were present, said (upon being asked about the time) that she was sure the conversation happened upon the Thursday night on which Mr. Blandy was opened, and during the time that Miss Blandy was in the house. These two witnesses, therefore, grossly contradict one another; consequently ought not to take away the credit of Elizabeth Binfield. And let me observe, that Elizabeth Binfield proved nothing (besides some few expressions used by Miss Blandy), but what was confirmed by the other maid servant, Susan Gunnell.

209. CHARLES C. MOORE. *A Treatise on Facts, or the Weight and Value of Evidence*. (1908. Vol. II, §§ 1037, 1041, 1113, 1115, 1121). *Proclivities of Biased Witnesses*. Exaggeration is the most common vice of biased witnesses. They "make mountains of molehills," said Lord Stowell. "Although they may be honest in their purpose," said another judge, "they cannot, while human nature remains unchanged, overcome the tendency to distort, magnify, or minimize the incidents which they relate as their interest persuades." "A feature often attendant on the trial of collision cases" is "a tendency on the part of the witnesses for both sides to exaggerate in respect to points supposed to be vital and controlling." . . . If a biased witness testifying in impeachment of testamentary capacity had seen the testator a few times guilty of indecencies in the streets, he would club them together in his mind and would describe the conduct as a constant and perpetual habit. He will give the impression that single acts of eccentricity occurring, perhaps, at long intervals during many years, represented the testator's general conduct. Contestants of a will on the ground of testamentary incapacity due to intemperate habits would be likely to exaggerate them greatly; if the testator was occasionally or frequently intoxicated, they will say he was never sober. . . . "Nothing is more deceitful than half the truth," and biased witnesses are much addicted to half truths and false coloring of facts. Thus, a biased witness seeking to establish testamentary capacity of a dying testator may testify that the latter was able to sit up, and sat up for several minutes before he died, while it was a fact, known to the witness, that the testator could not lie down, but for two or three days had been artificially bolstered up, both before and behind. A witness testified that a testator, on returning home at night, instead of ringing the bell, would throw stones at the house; the fact being that on one occasion, when he was locked out, he threw a stone to attract attention that he might be let in. In a collision case the mate of a vessel testified that he "called the captain"; which, for a moment, was taken in its common sense, like calling a man to take his turn on deck, but by an accidental further question it turned out to mean, called him but could not make him hear; the fact being he could not wake him. Biased witnesses may speak what is not true, by an indifference to exactness in what they do say. Thus, a party may swear on his motion for a new trial that he did not know he could prove certain facts by a witness named until a specified date; whereas his conscience in thus swearing is satisfied by the mental reservation that he did not know until that date that the witness would recollect the transaction.

The unconscionable impositions that biased witnesses will perpetrate, without subjecting themselves to punishment for perjury — impositions that can be detected only by extraordinary sagacity of counsel if it happens that the witness alone knows the truth — are well illustrated in the case of a contested will in Pennsylvania. It was contended that the testatrix had conceived an insane hatred of her child, originating in causes which preceded its birth. As evidence of this uncontrollable hatred, a witness testified that the boy was shut up in a dark room with a shade over his eyes, which, the witness hinted, was intended to make his appearance eccentric. Yet it was a fact, known to the witness but not disclosed by him, that the boy was often tormented with weak eyes, and was even sent to the country to strengthen them, and that his confinement in a dark room was an effort

to relieve his sufferings, which was distorted by the witness into an act of barbarity. Surely, to such a witness the maxim "*falsus in uno, falsus in omnibus*," should be applied as unhesitatingly as to a witness who has corruptly testified to something entirely destitute of truth. Such a witness is more dangerous than one who commits a gross perjury, which is frequently more easily detected and exposed.

And the parson made it his text that week, and he said likewise  
That a lie which is half a truth is ever the blackest of lies;  
That a lie which is all a lie may be met and fought with outright,  
But a lie which is part a truth is a harder matter to fight.

— TENNYSON, "The Grandmother," VIII.

*Sources of Bias.* *Near relationships* between a witness and the party for whom he testifies is an influence which, common experience teaches us, tends to bias consciously or unconsciously the testimony of witnesses. "The difference between a direct pecuniary interest in the witness, and the interest of love and affection growing out of the closest family ties between the witness and the party pecuniarily interested, while theoretically wide, is not, in the majority of cases, of real importance." Husbands and wives testifying in behalf of each other, especially in criminal cases, "would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts." But relationship alone is not a sufficient ground for imputing perjury. . . . A desire to wreak out *feelings of personal vengeance* and anger is often a stronger incentive than any pecuniary interest could be, and the trier of facts should "watch narrowly and receive cautiously" the testimony of a witness who is at enmity with the party against whom he testifies. . . . The trier of facts should carefully scrutinize the story of a witness with a grievance; for example, the testimony of one who claims that the party has ill-used him, or the testimony of a discharged servant or employee.

*Queen Katherine.* If I know you well,  
You were the Duke's surveyor, and lost your office  
On the complaint o' th' tenants: take good heed  
You charge not in your spleen a noble person,  
And spoil your nobler soul.

"King Henry VIII," Act I, Sc. 2.

A New York judge said that whoever has witnessed in our courts the operation of the law by which *parties* and those directly and *most strongly interested* in suits are permitted to testify therein, must have been convinced that it has opened a wide door for the perversion of the truth, and placed before litigants a temptation to falsehood and perjury most difficult to resist. It is far more probable that an interested party has committed perjury than that half a dozen or more witnesses on the other side have concocted a wicked falsehood. Where the plaintiff in an action on a fire insurance policy was charged with arson and testified in his own behalf, the court reminded the jury that "his moral, social, and business standing for his future life is involved in your finding, and you could hardly expect, from your knowledge of human nature, that a man in such straits would tell the truth if the truth would injure his case." But the fact that witnesses are parties to a suit or have a large pecuniary interest therein does not necessarily discredit their testimony, although it furnishes a reason why it

should be carefully considered and scrutinized. Satisfactory demeanor, intrinsic probability of their statements, and the absence of any direct contradiction, should unquestionably entitle them to belief. Testimony is not to be disbelieved merely because the witnesses are *servants of the party* for whom they testify; for example, employees of a defendant railroad company in an action to recover damages for personal injuries. "The personal interest which such a relation might possibly create is not to be overlooked in weighing their evidence, but that their statements are to be utterly discredited or disregarded because of that fact is a conclusion which jurors are much too ready to adopt, and which neither reason nor experience warrants." Testimony of a servant attempting to exonerate himself from a charge of negligence should not be disbelieved upon a mere assumption that he is committing perjury. But if a court concluded there was perjury somewhere, it would rather impute the offense to a servant making an improbable statement in exoneration of himself from heavy responsibility for negligence, than charge with intentional falsehood a considerable number of opposing witnesses not obsessed by so strong an influence. In a collision case between vessels Mr. Justice Grier said: "It is vain to expect the truth from the steersman or pilot of the colliding boat. He will not admit that he was drunk or asleep, or paying no attention, and not keeping a proper lookout." . . . In a case in Vermont against a railroad company where it was a question whether the bell on the defendant's locomotive was rung just before the plaintiff was injured, servants of the defendant testified that it was rung, and the plaintiff's counsel (now a member of the United States Commerce Commission) made the following sarcastic comments in his argument to the jury: "I don't know how many suits in which railroad companies were involved you may have heard tried, but it is a general rule that the bell *always* rings. There is no case on record in which the bell did not ring. . . . One of the stock questions which a railroad manager asks an applicant for employment is, 'Does the bell ring?'" . . . The fact that a witness is a *defendant in a criminal case* does not condemn him unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. If the punishment prescribed for the offense or the disgrace of guilt is severe, the defendant would be under the strongest possible temptation to give evidence favorable to himself. The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence, in determining the measure of credence to which he is entitled.

210. JOHN C. REED. *Conduct of Lawsuits*. (1912. 2d. ed. § 50.) . . . We now add a quotation from Quintilian, which is more detailed in its directions, and which reads as if it were written by an experienced counsel of our time: "Let us allow plenty of time . . . and a place of interview free from interruption to the clients who shall have occasion to consult us. . . . Nor should the counsel be content with hearing only once: the client should be required to repeat the same things again and again; not only because some things might have escaped his memory at the first recital, especially if he be, as is often the case, an illiterate person; but also that we may see whether

he tells exactly the same story; for many state what is false, and, as if they were not stating their case, but pleading it, address themselves not as to an advocate, but as to a judge. We must never, therefore, place too much reliance on a client; but he must be sifted and cross-examined, and obliged to tell the truth; for as by physicians, not only apparent ailments are to be cured, but even such as are latent are to be discovered, even though the persons who require to be healed conceal them, so an advocate must look for more than is laid before him. . . . A client is often ready to promise everything, offering a cloud of witnesses and sealed documents quite ready, and averring that the adversary himself will not even offer opposition on certain points. If it is therefore necessary to examine all the writings relating to the case, it is not sufficient to inspect them; they must be read through; for very frequently they are either not at all such as they were asserted to be, or they contain less than was stated, or they are mixed with matters that may injure the client's cause, or they say too much and lose all credit from appearing to be exaggerated."

This passage, both in its exhortation to look with a skeptical spirit into every part of the case and its warnings against the biased representations of the party, deserves the meditation of every lawyer. If the advice of the celebrated author was wise in his day, it is more valuable now.

211. AMOS C. MILLER. *Examination of Witnesses*. (Illinois Law Review. 1907. Vol. II, p. 244.) . . . *How to find out who are available witnesses to support your Client*. To successfully accomplish this involves, in the start, what is to my mind the most important part of a proper preparation of any case for trial, and that is to ascertain the exact truth and the whole truth regarding the case and the strongest features on your side of the controversy. To the novice in the trial of cases, this task seems very easy. All he has to do is to listen to his client's tale, swallow it whole, and tell him to bring as many witnesses as he can to swear to the same thing. He then goes into the trial confident and happy. But before the trial has progressed very far, he learns to his dismay that there is another story. He is surprised, chagrined, and angered to find that witnesses, apparently disinterested, are willing to come into court and boldly commit perjury. He cross-examines angrily, and to no purpose, except to gain the ill-will of the court and jury and to bring out corroborative circumstances against him which opposing counsel had failed to elicit. His own apparent discomfiture adds to his heavy burden, and he is defeated. He goes home reflecting on the degeneracy of mankind, the ignorance of the court and the evils of our jury system. But when time has cooled his ardor — and especially after he has had one or two more such experiences — he begins to wonder if his client did really tell the truth. That doubt, upon further reflection, gradually ripens into a conviction that his client did not tell him the truth; and his pessimistic state of mind as to courts, jury, human nature, and things in general is thereby relieved.

After a few such experiences the young practitioner finds that getting at the truth, and all of the truth, far from being an easy matter, is a most difficult one; and especially is this so in cases involving complicated facts, or where the matters in dispute have occurred some years before (as is quite commonly the case here in this county when cases are reached for trial).

In all men the memory is more or less subject to the will and to the wish. The farther away the events, the more active and potent are these influences. Many persons deliberately conceal from their lawyers unfavorable facts and deliberately misrepresent others. We should expect to find this disposition only among the ignorant; but the fact is we frequently find it among successful business men accustomed to deal with matters of importance. Sometimes so strong is this disposition of clients, to cover up pitfalls even when talking to their own counsel, and to color the facts, if not to misrepresent, that often it will be found necessary to tell the client that if he concealed anything or misrepresented or colored anything, his lawyer cannot be of the slightest help to him; whereas, if he would be careful to state all of the facts, especially all the unfavorable facts, he might still disclose a good case and a winning case.

Not only must the trial lawyer be careful in talking to his client, but also in talking to his client's witnesses, even those who are wholly disinterested. When a disinterested person is enlisted as a witness on one side of the case, his sympathies and desires naturally become involved with the person calling him; and when he discovers what things the litigant desires to prove, a witness, especially if the events are distant in time, is apt to unconsciously give a strong coloring to the facts and sometimes to remember things he did not see; and more often to innocently misrepresent things he did see. It is no uncommon thing at all for a lawyer to discover that a witness, who, while waiting for the trial, has been fraternizing with other witnesses in the same case, finally remembers that he saw things which the other witnesses saw, but which he did not and could not have seen, and did not claim to have seen when first talked to. That fact arises, not from an intention to deliberately falsify, but from the *desire to be an important element* in the case. This fact, I have no doubt, accounts for a large part of the false testimony that we find in our courts in so many of the important cases that are tried, and especially in the personal injury cases.

212. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. p. 45.) Besides determining whether the witness be false or true, or an artful twister of facts, you will also ascertain whether he has a strong bias in one direction, or a prejudice in the other. If he have a strong leaning to the side of your opponent, you will have the less difficulty in disposing of him, because it will be easy to lead him on until his bias becomes so manifest and overpowering that the jury will discount his evidence, and to such an extent that, if the case depend upon him, they will throw it over altogether. A strong interest weakens the side on which it lies. It will therefore be clear that in cross-examining a witness of this kind it will be proper to elicit this at the earliest opportunity. If it comes last, it will be far weaker, because it will not altogether undo the effect which his evidence may have made upon the minds of the jury. *The interest a witness has in a case should therefore be shown early in the cross-examination*, if it has not been made manifest before.

But it may be the witness has no interest. He may nevertheless be a partisan; and partisanship is often stronger than self-interest, although the latter has somewhat erroneously, as it seems to me, been described as the most powerful principle influencing human actions. In a great number of cases there is something of partisanship, and you may take it as a rule

that an absolutely unbiased witness is rare. The strong partisan, however, is only produced by public matters, parochial disputes, boundary questions, quasi-political inquiries, medical cases, rating matters, running-down causes, and other investigations, where the witnesses seem naturally to take sides. You should remember that though a man may go into the witness-box under compulsion, he never gives his evidence without a motive. It may be a strong or a weak one, but it exists; find that out, and you will be able to do so if you watch and listen attentively. The man whose motive is simply to speak what he knows, manifests it in every tone, look, and word. You will not have much difficulty in dealing with him. If you believe in your own case, you may believe in this witness not to injure it if you are discreet in examining him; that is, if you examine in such a manner that his answers cannot be misunderstood. But what are you to ask him? Listen to his evidence: if it agrees with your case, *nothing*; if not, note the points that are against you. And in dealing with the modes of cross-examining the different kinds of witnesses further on, I will endeavor to point out the manner of dealing with a witness who has a pure motive, but whose evidence conflicts with your case.

But suppose the witness has some other motive in giving his evidence. You will endeavor to ascertain what it is. If you watch carefully, you will find a difference in tone and manner when he is speaking more directly from the particular motive. Suppose it's revenge? Any point which seems more particularly to damage his adversary will be laid stress upon. Any answer that he makes which he thinks will damage him will be uttered in a more ready tone and with evident satisfaction. It will manifest itself in his voice, in his look, and his whole demeanor. *That*, therefore, must be stamped upon the mind of the jury by your cross-examination. . . .

The truthful witness has been said to be the most difficult of all to cross-examine. I cannot help differing so much from that opinion as to say that I have always regarded him as the easiest of any. When I say *truthful*, I do not intend to imply that his evidence is necessarily true. If it were so, it would be idle to cross-examine at all. What I mean by a truthful witness is one who believes and intends his evidence to be true. He is the easiest to deal with, because he does not equivocate or prevaricate. He has no secret meaning, and gives his answers readily and without mental reserve. He desires to tell you all he knows, and his credibility, I will assume, is unimpeachable.

The first thing to ascertain in cross-examining a witness of this class, is whether he has any strong *bias* or *prejudice* in the matter under inquiry. One or two carefully worded questions will discover this, if you have not already learnt it from his answers-in-chief. Suppose, for example, he is a clergyman, and the question is as to a certain place of entertainment being a nuisance either as being badly conducted or conducing to immorality. He tells you truthfully enough what he has seen, and speaks with indignant or pathetic tones of the vicious example to the inhabitants of the neighborhood. . . . If he has not referred to particular instances, you may safely proceed to lead him to condemn all places of public amusement of a similar kind. If you lead him gently, he will follow with remarkable docility. I have seen this course pursued by eminent leaders with great success. A man who condemns all alike is not the witness to impress a jury with the

value of his evidence in the particular instance, especially where it is far more a matter of opinion than fact. Even fact itself may be represented as so shocking by a witness of this kind as to create laughter instead of indignation. I once heard . . . a clergyman describe the conduct of two individuals as *debased and disgusting*; when questioned as to what they were doing, he said, with great solemnity, "he saw the man kiss the girl and hold her hand." On being asked if he had never been guilty of similar conduct in his earlier days, he declined to answer, and amid an outburst of laughter said, "*But the girl was a Sunday school teacher.*" This not being enough to produce the effect he innocently anticipated, he threw into the scale, as a final circumstance of depravity, the fact that, at the time, *he believed* the young man was paying his addresses to another young woman.

213. A. G. W. CARTER. *The Old Court House [in Cincinnati]*. (1880. p. 412.) It is a solemn truth — regret it as we may — that preachers make bad, very bad, witnesses in court. It would seem that in the efforts of their life, they deal with so much of uncontradicted fancy, instead of fact, that they cannot tell how a fact transpired when they are called upon the witness stand. I remember more than one case in the old court and courthouse, where preachers were called to testify, and they invariably spoiled the broth. On one occasion in a murder trial, which created in the community the most intense interest, and the greatest excitement, a certain distinguished Methodist preacher was called upon to testify for the State, and he did do so "with a *whereas*." He in his testimony, as was very plainly to be seen, was for hanging the poor prisoner, and upon this point (he by no means wished to hang the jury), therefore, he was most absolute and positive in his declarations, and became so dogmatic, that the Court upon the call of the attorney for the defense stopped the witness and finally made him take his seat in the witness box. Now this witness colored everything he said with the fancies of his profession. . . . At one time he said, "the deceased trusted the defendant, and had all confidence in him, but the prisoner was a Judas to him, and stabbed him to the heart, and set his house on fire," and this was said as the truth and the fact by the preacher witness, and yet he did not see it, or know it. He only knew of some surrounding circumstances, and he testified to these so lamely and unfashionably, that the dogs would have barked at him if they could have understood how he was giving in his testimony. In the same case another preacher testified, as he happened to know some important items, and he being the preacher of my own church, I expected something better than he gave. He, too, could not testify to the plain facts which he saw before him, however, but he continually colored them with his peculiar and particular views as a preacher over a congregation. . . . Avoid preachers, then, as witnesses, we somewhat serio-comically say to lawyers — they are not good witnesses — they are bad, very bad, witnesses — almost as bad, good brethren, as doctors, and lawyers, and we all well know that they, the doctors and the lawyers, make the very worst of witnesses in any case in any court.

214. N. W. SIBLEY. *Criminal Appeal and Evidence*. (1908. p. 202.) . . . One very remarkable feature of Courvoisier's trial [*ante*, No. 144] is the discredit that attached to the police. From the moment they were called in



they directly charged Courvoisier with the crime. There is thus considerable ground for concluding that he was both terrorized and entrapped into a confession, and this before the reward was offered. He was told he had made a terrible mess of it, that an inmate of the house must have committed the crime, and that there was no doubt he would be brought to justice. Phillips, for the defense, directly insinuated that Courvoisier was the victim of a conspiracy among the policemen, anxious to divide the reward of £450 over his coffin. The summing up of TINDAL, C. J., renders it impossible to entirely reject this view. The Chief Justice directed the jury that the evidence of the policeman Baldwin was unworthy of credit; this witness originally adopted the view that a burglary had been committed, and the cross-examination of Phillips was directed to proving that he changed his view when the fact that a large reward had been offered came to his knowledge. It was dangerous, TINDAL, C. J., declared, in such a serious inquiry to give any weight to this man's evidence. . . .

Nearly a quarter of a century before this trial, that great reformer of the criminal law, Sir Samuel Romilly, animadverted, in the House of Commons, on the mischiefs arising from rewards given upon convictions. In 1692 an Act for encouraging the apprehension of highwaymen was passed, and by Sec. 2 a reward of £40 was offered "to him that shall take an highwayman." This Act was repealed in 1828. In 1756, MacDaniel, Berry, and Jones were indicted for the willful murder of Joshua Kidden, by maliciously causing him to be unjustly apprehended, falsely accused, tried, and convicted for highway robbery, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward. The fact was plainly proved against them upon this indictment, and the special matter being set forth in the indictment, the Court suffered them to be convicted and sentenced to death. . . . The baleful influence that the very large reward offered for the conviction of the murderer of Lord William Russell exercised over the whole of the police evidence at the trial of Courvoisier is doubtless the implicit historical explanation of the following passage in Best on "Evidence": "The English Government has for many years discontinued the offering rewards for the detection of crimes, on the ground that persons committed crimes for the purpose of obtaining the rewards by false accusations of the innocent; and the Home Office, though urgently requested to offer a reward for the discovery of a series of murders of women in Whitechapel in 1888, steadily refused to revive the practice on this ground."

215. RICHARD HARRIS. *Hints on Advocacy*. (1892. Amer. ed. pp. 91, 114.) *The Police*. As to the police in the witness box, I shall commence by saying, to counsel for an accused, As far as possible leave them alone. They are dangerous persons. They are *professional witnesses*, and in a sense that no other class of witnesses can be said to be. Their answers generally may be said to be stereotyped. All the ordinary questions have been answered scores of times by the well-disciplined, "active, and intelligent officer." Don't imagine, my young friend, that you are going to trip him up upon the path where his beat has been for many a year. He will perceive you coming while you are a long way off, and in all probability go out and meet you. Perhaps before you were born he answered the question you have just put. . . .

But try him with something just a little out of the common line by way of experiment. You see he looks at you as though he had got the sun in his eyes. He cannot quite see what you are about. And you must keep him with the sun in his eyes if you desire to make anything of him. Without accusing him even by implication of having no reverence for the sanctity of an oath, I must say that if he sees the drift of your questions, the chances are against your getting the answers you want, or in the form in which you would like them. He thinks it his duty to baffle you, and if you do not get an answer you don't want, it will probably be because the policeman is as young and inexperienced as you are.

To be effective with the policeman your questions must be rapidly put. Although he has a trained mind for the witness box, it is trained in a very narrow groove; it moves as he himself moves, slowly and ponderously along its particular beat; it travels slowly because of its discipline, and is by no means able to keep pace with yours, or ought not to be. You should not permit him to trace the connection between one question and another when you desire that he should not do so. If you ask him whether it was a very dark night, and the darkness has nothing whatever to do with the issue, he will commence a process of reasoning (invented at Scotland Yard) as to your motive, and what might possibly be the effect of his answer. While this mental exertion is going on, interrupt him suddenly with a question you have good reason for putting, and in all probability you will get something near the answer you require.

Policemen have a great deal of knowledge about the case, and a great deal of *belief*. The former you will find bad enough to deal with; but you must be careful not to elicit a large quantity of the latter: if you do, you may rest assured it will look so like fact that it will pass with the jury as such. You will be fortunate if it do not condense itself into fact by the time you get it.

Another matter there is to be on one's guard against, and that is, being overdone by police testimony. Very few policemen are really untruthful, I believe; and very few would unnecessarily "pile on the evidence" against a man. But all are zealous, and zeal is a force, as we all know, that will sometimes impel us beyond the boundary line of discretion. They require to be kept in with a steady and firm hand; for much zeal on their part, like too much anxiety on yours, is sure to operate against what the prosecution invariably calls "the interests of public justice."

*The Private Detective.* When the *private inquiry* man tells you that he made his inquiries by means of a gimlet and his eye, or that he saw behind the door through the keyhole; or distinguished voices that spoke whispers through brick walls, as if the object of the secret ones in this seclusion were to whisper expressly for the benefit of the inquiry man; he will have shown you enough to prove that he may be an anxious inquirer after truth, but not much of an artist in depicting it.

I always admire the wonderful boldness of these witnesses and their faith in human credulity. They seem to think they can make you believe that special miracles have been wrought for the purpose of carrying out their investigations.

The absolute positiveness with which this witness gives his evidence is a point in your favor; the impossibility of his having been mistaken is

another: simply because the jury will not believe in the infallibility of a human being in carnal matters. And if the witness *might* have been mistaken, they will not believe him either. So that the circumstances under which the detective has made his discovery are matters worthy of your skill.

With him suspicion is *almost* guilt, and almost every circumstance from his point of view is suspicious.

In a charge of arson against a shoemaker who had a small workshop in a village, this mode of proceeding by suspicion was demonstrated in a remarkable manner. The man's shop consisted of one room separated from other buildings. He worked there in the day, and left it locked up at night. His stock was worth about £50, and he had insured it for £70. A fire broke out at night after he had left, and burnt some of his stock, about £12 worth. Police came, but no suspicion rested upon him. He said he could not account for the fire; no one could have got in, as he had the key. A policeman, eager to convict *somebody*, finds this evidence:

1st. A policy of insurance, obtained on the day of the fire.

2d. A smell of paraffin all over the shop.

3d. Removal of a box to the prisoner's mother's on the day of the fire.

4th. Deaf man, who heard prisoner say, "I'm sorry you saw me move that box, as the police are making a fuss."

The explanation of these *suspicious* circumstances was this: The premium for insurance had been paid *months before*. The prisoner being at the insurance office on the day of the fire on other business, the manager said, "*You may as well have your policy.*"

The paraffin was burnt in lamps in the shop, and was used to clean the furniture: *had been used on that day* for the purpose. The rag so used was lying on the drawers, hence the smell of paraffin.

There had been a fire in the grate on that day.

The box taken to the mother, belonged to her; she had asked for it, and it was proved to have been empty when taken.

The deaf man broke down in cross-examination, although he had come up to the mark in his examination by the clever policeman; and had been somewhat intimidated by the language of that functionary.

Mr. Justice Stephen in summing up made these observations:

"If you *assume* that this man committed the crime, then there are a good many circumstances that look suspicious; but if you do not assume that he is guilty, then the circumstances are not suspicious, as they are easily accounted for."

This appears to me to be the exact point with regard to many of the facts that are *discovered* by the private inquiry man, as well as by your official detective. Once assume a person's guilt, and the most innocent circumstance will become invested with suspicion; many facts will be unconsciously exaggerated, first in the mind of the witness, and then in his evidence.

216. A. C. PLOWDEN. *Grain or Chaff; The Autobiography of a Police Magistrate*. (1903. p. 334.) One of the most difficult duties of a Magistrate is to judge fairly between conflicting statements — not to incline too much to the constable merely because he is a constable, and not to be opposed to the prisoner merely because he is a prisoner. . . .

A marked feature in a police constable — I might call it a useful defect —

is his lack of imagination. The absence of this quality tends to keep down exaggeration, and has a particular value in the witness box. Truth cannot be expressed too simply. It is dangerous to attempt to embellish it. More than once I have known a prisoner to be "run in" who on his way to the station has anxiously inquired the name of the Magistrate before whom he will appear on the morrow, and then on being informed he will express his satisfaction or his contempt for "Old Plowden," with a free indulgence in the vernacular. The constable will repeat it all in the witness box with an absolutely unmoved countenance, without the trace of a smile or the exhibition of the slightest feeling. It is his duty to report faithfully what a prisoner may say. This is all that is present to his mind — his duty. What the prisoner may have said from any other point of view, or how he may have said it, concerns him not at all, and has no effect whatever on his imagination.

It follows that as a rule police constables make very reliable witnesses. Their memory, too, is generally excellent, and it is very seldom they give any sign of undue feeling or prejudice. I feel under endless obligations to them not only for their assistance as truthful and intelligent witnesses, but generally for their never failing courtesy and the alacrity which they bring to the discharge of any duty that may be required of them.

#### SUBTITLE G: EXPERIENCE

220. JOSIAH ROYCE. *Outlines of Psychology*. (1903. p. 221.) We have only to consider the origin of our perceptions in order to become convinced that what at present our sense organs show us with regard to the object, not only constitutes but a small portion of what we know or may know about the object, but also has acquired its whole present meaning for us through processes that, in the past, have been as complex as those of the grasping child, or perhaps much more complex than his have yet become. Our present conscious perception of any object which impresses our sense organs is a sort of brief abstract and epitome of our previous experience in connection with such objects. . . . The total result of all such experiences is epitomized in the present instantaneous perception of this object. . . . What we mean by the perception of an object is a cerebral process involving features of the foregoing kinds. The substance of the matter is that the present sense disturbance is at once associated with a consciousness due to already established motor habits, which have been trained in the presence of objects similar to the one now present. These habits may be of the most various kinds, and the consciousness excited by the object may have the most various relations to the habits themselves. They were slowly acquired, by means of acts that took a considerable time, and that were associated with the varied and complex consciousness. The perception is relatively instantaneous. It is a case of simultaneous association. . . .

The practical application of all this is obvious. If you are to train the powers of perception, you must train the conduct of the person who is to learn how to perceive. Nobody sees more than his activities have prepared him to see in the world. We can observe nothing to which we have not already

learned to respond. The training of perception is as much a practical training as is the learning of a trade. And it is this principle upon which the value of all arts, such as those of drawing, of experimenting, and of workmanship, depends, in so far as such arts are used, as in all modern training is constantly done for the sake of developing the power to perceive. It is because he has played music that the musician so well perceives music. It is because of his habits of workmanship that the skilled artisan or engineer can so well observe the things connected with his trade. It is because they do not know what to do that the untrained travelers in a foreign land often see so little, and find what they had hoped to be a wealth of new experience a dreary and profitless series of perplexities.

221. HANS GROSS. *Criminal Investigation* (transl. Adam, 1907, p. 149); and *Criminal Psychology*. (transl. Kallen, 1911, pp. 229, 239, 388). A. *The Value of Experts*. Experts are the most important auxiliaries of an Investigating Officer; in some way or other they nearly always are the main factor in deciding a case. . . . But everything depends upon knowing how to make use of them. Indeed it is often less important to know *who* is to be questioned than to know *how*, *upon what*, and *when* questions must be put. But it is also an important thing for the Investigating Officer to know just whom he ought to apply to, *i.e.* what kind of expert he ought to select; moreover, he must know what the expert is capable of telling him in each case, that is to say, where his knowledge begins and what are the natural limits to it; and finally he must seize the proper moment for putting his question, *i.e.* the moment when he is in possession of sufficient material to render any further research superfluous. . . .

As regards the limits of the expert's knowledge, the Investigating Officer must be particularly careful not to ask too much, for if he were to do so he might look ridiculous; on the other hand, if he does not ask enough, he may deprive himself of information of great value. A case is recalled in which the Investigating Officer sought to know whether the blood stain on a piece of cloth was that of a boy or of a girl; another Investigating Officer took a stove to pieces and sent it carefully packed to the chemical examiner with a request to know whether bank notes had been burned in it or not; and a colleague of the author recently met with a case in which it was asked whether the arsenic found in the corpse could be identified with that found in a sausage. On the other hand, every Investigating Officer knows of cases in which the solution of problems, seeming to outsiders almost insoluble, has been obtained; in this way experts in physics will discover, by a magnetic process, traces of iron, where chemical experts have found nothing; botanists once furnished the author with certain proof that some branches of hops had been cut with a particular knife. What can be performed with the assistance of electricity, the refinements of photography, radioactive rays, Roentgen rays and other acquisitions, is simply illimitable. . . .

It must not be forgotten that to-day, in spite of, and perhaps because of, the great progress of science, people make statements with much less assurance than formerly. One has only to compare books on medical jurisprudence written thirty years ago with those of to-day to see that the writers of those days, acting upon a small number of cases at their disposal, did not hesitate to state general principles, the correctness of which are now much

shaken; for experimental science, now much more extensive, has found out so many exceptions that in the long run they sometimes become more numerous than the so-called rules. This principle must be applied to other domains, and we must not boast of our own knowledge, which is always more or less incomplete; if we do not know the exceptions ourselves, we have but to demand them of specialists. By conforming to this rule we will obtain astonishing results. The specialist will refute a well-established conviction, leading us to say, "I believe it is always thus," with a series of exceptions in which it is *not* always *thus*. In a recent case, medical experts who, on examination in the witness box affirmed positively that it was impossible for a cavity to form in lobar pneumonia, when confronted with authorities in cross-examination, admitted that such a thing was quite possible. If, therefore, experts themselves may be mistaken, how much more should the Investigating Officer be unashamed to question others upon things which seem beyond all doubt.

Moreover, the circle of experts must be enlarged as much as possible. Some Investigating Officers in many years have never made use of any other experts than doctors, analysts, and gunsmiths; it has never crossed their minds to consult workmen and artisans of all kinds. They have not thought that they might be able to obtain most precious information from such sources. The author must confess that he has often had business with experts without knowing at the outset what they might be able to tell him. He once sent for a cutler and gave him a knife found in the wound of a murdered person and asked him whether he could give any information about it; the cutler replied that such knives were only manufactured in the north of Bohemia. And this information brought about the discovery of the criminal. A turner pointed out that an article the criminal had left behind must have been turned by a left-handed person; the person arrested (who denied the crime) came from a distant town; search was made in that place for a left-handed turner, who, when found, identified the accused as the person who had bought the article from him. Linguists have indicated the nationality of the writer of a letter; a school-master has guessed the age of a bank-note forger, then unknown, from the mistakes in writing which he made; and astronomers have given the day in spring which, as regards the evening light, corresponded with a certain day in autumn. In the last case the Investigating Officer was able to visit a locality in spring in order to find out if the criminal would be able to see, and must have seen, such and such a thing at a certain hour on a certain day in the autumn. . . .

Often quite a series of workmen, etc., will have to be consulted when it is believed that some peculiarity is due to a certain kind of skill connected with some particular trade. One day, for an example, an important theft, extremely skillfully carried out, was committed in the following manner. A thief, a former servant of a banker who lived alone, had slipped during the daytime into the room next to the bedroom of his old master. The thief was aware that the banker was in the habit, before going to bed, of locking the door between his bedroom and the room where the former was hidden. He therefore resolved to wait until the old gentleman was asleep, then slip into the bedroom, take the key of the safe from the bed table, open the safe and complete the theft; which indeed he did. But, so as not to be

shut out in the room where he was hiding, it was necessary to make the banker believe that he had already locked the door of communication. The thief therefore shaped a small piece of wood to cork up the slot, or square opening, into which the bolt of the lock penetrates. When the banker went to lock the door before getting into bed, the bolt was unable to enter the hole in the doorpost, thus producing the same effect as if the door had been already locked; and indeed, the banker declared afterwards his belief that he had already locked the door without remembering having done so. The door therefore remained unlocked and the thief was able to carry out his project; but he had left the little piece of wood, which was prismatic in shape, in the slot, and it was shown to various experts. The first was a locksmith, who very sensibly remarked "the person who made this works more minutely than we do; it was not necessary to cork the hole with so much care; quite an ordinary little piece of wood would have done well enough, provided that it was of the proper length." A turner was then questioned, who on seeing the piece of wood was of opinion that its workmanship indicated a man who knew how to carve. A turner turns, but does not carve, and so it could not have been a turner was concerned in the theft. A wood carver was next questioned, and he was able by chance to indicate an instrument used exclusively by makers of boot and shoe trees. This instrument was procured, and the Investigating Officer was easily convinced of the accuracy of the wood carver's statements; and, on the result being communicated to the victim of the theft, the thief was easily found; in fact, the last servant whom the banker had dismissed had formerly been a tree maker, and indeed went back to that trade whenever he was out of a place. . . .

But, if experts are capable of informing the Investigating Officer on many points, care must at the same time be taken not to ask them (and especially medical ones) for too many or for too precise explanations. . . . Only those who have had long experience of them can know what qualities a good medical jurispudent should have; he ought certainly to be a specialist in all branches of medical knowledge, ought to know all the difficulties to be met with, and have special experience of criminals. It would not be fair to the medical jurispudent, who represents all branches of medical science, to pretend that any country doctor, even the very best, can be a medical jurispudent absolutely worthy of confidence. It is for this reason that the Investigating Officer should take care not to ask the medical man for too much. It is natural for a man to prefer to say "the thing is so" rather than "I do not know;" and, sometimes, the doctor will make precise replies when pressed by an Investigating Officer, replies which will not bear the examination of science. It has been necessary for the best-known professors in medical jurisprudence to boldly avow, "We do not know this, not yet that, and many other things besides" — and yet the scientists of former times used to make the most categorical statements. Take but a few examples. With what certainty did they not use to distinguish *ante mortem* from *post mortem* wounds? And yet every medical jurispudent of to-day points out most convincingly that the so-called distinctive signs are not always infallible. Again medical jurisprudents used to determine very accurately the beginning and the end of a gash or cut, a point perhaps very important in a case of murder or suicide; modern medical men

In all men the memory is more or less subject to the will and to the wish. The farther away the events, the more active and potent are these influences. Many persons deliberately conceal from their lawyers unfavorable facts and deliberately misrepresent others. We should expect to find this disposition only among the ignorant; but the fact is we frequently find it among successful business men accustomed to deal with matters of importance. Sometimes so strong is this disposition of clients, to cover up pitfalls even when talking to their own counsel, and to color the facts, if not to misrepresent, that often it will be found necessary to tell the client that if he concealed anything or misrepresented or colored anything, his lawyer cannot be of the slightest help to him; whereas, if he would be careful to state all of the facts, especially all the unfavorable facts, he might still disclose a good case and a winning case.

Not only must the trial lawyer be careful in talking to his client, but also in talking to his client's witnesses, even those who are wholly disinterested. When a disinterested person is enlisted as a witness on one side of the case, his sympathies and desires naturally become involved with the person calling him; and when he discovers what things the litigant desires to prove, a witness, especially if the events are distant in time, is apt to unconsciously give a strong coloring to the facts and sometimes to remember things he did not see; and more often to innocently misrepresent things he did see. It is no uncommon thing at all for a lawyer to discover that a witness, who, while waiting for the trial, has been fraternizing with other witnesses in the same case, finally remembers that he saw things which the other witnesses saw, but which he did not and could not have seen, and did not claim to have seen when first talked to. That fact arises, not from an intention to deliberately falsify, but from the *desire to be an important element* in the case. This fact, I have no doubt, accounts for a large part of the false testimony that we find in our courts in so many of the important cases that are tried, and especially in the personal injury cases.

212. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. p. 45.) Besides determining whether the witness be false or true, or an artful twister of facts, you will also ascertain whether he has a strong bias in one direction, or a prejudice in the other. If he have a strong leaning to the side of your opponent, you will have the less difficulty in disposing of him, because it will be easy to lead him on until his bias becomes so manifest and overpowering that the jury will discount his evidence, and to such an extent that, if the case depend upon him, they will throw it over altogether. A strong interest weakens the side on which it lies. It will therefore be clear that in cross-examining a witness of this kind it will be proper to elicit this at the earliest opportunity. If it comes last, it will be far weaker, because it will not altogether undo the effect which his evidence may have made upon the minds of the jury. *The interest a witness has in a case should therefore be shown early in the cross-examination*, if it has not been made manifest before.

But it may be the witness has no interest. He may nevertheless be a partisan; and partisanship is often stronger than self-interest, although the latter has somewhat erroneously, as it seems to me, been described as the most powerful principle influencing human actions. In a great number of cases there is something of partisanship, and you may take it as a rule



that an absolutely unbiased witness is rare. The strong partisan, however, is only produced by public matters, parochial disputes, boundary questions, quasi-political inquiries, medical cases, rating matters, running-down causes, and other investigations, where the witnesses seem naturally to take sides. You should remember that though a man may go into the witness-box under compulsion, he never gives his evidence without a motive. It may be a strong or a weak one, but it exists; find that out, and you will be able to do so if you watch and listen attentively. The man whose motive is simply to speak what he knows, manifests it in every tone, look, and word. You will not have much difficulty in dealing with him. If you believe in your own case, you may believe in this witness not to injure it if you are discreet in examining him; that is, if you examine in such a manner that his answers cannot be misunderstood. But what are you to ask him? Listen to his evidence: if it agrees with your case, *nothing*; if not, note the points that are against you. And in dealing with the modes of cross-examining the different kinds of witnesses further on, I will endeavor to point out the manner of dealing with a witness who has a pure motive, but whose evidence conflicts with your case.

But suppose the witness has some other motive in giving his evidence. You will endeavor to ascertain what it is. If you watch carefully, you will find a difference in tone and manner when he is speaking more directly from the particular motive. Suppose it's revenge? Any point which seems more particularly to damage his adversary will be laid stress upon. Any answer that he makes which he thinks will damage him will be uttered in a more ready tone and with evident satisfaction. It will manifest itself in his voice, in his look, and his whole demeanor. *That*, therefore, must be stamped upon the mind of the jury by your cross-examination. . . .

The truthful witness has been said to be the most difficult of all to cross-examine. I cannot help differing so much from that opinion as to say that I have always regarded him as the easiest of any. When I say *truthful*, I do not intend to imply that his evidence is necessarily true. If it were so, it would be idle to cross-examine at all. What I mean by a truthful witness is one who believes and intends his evidence to be true. He is the easiest to deal with, because he does not equivocate or prevaricate. He has no secret meaning, and gives his answers readily and without mental reserve. He desires to tell you all he knows, and his credibility, I will assume, is unimpeachable.

The first thing to ascertain in cross-examining a witness of this class, is whether he has any strong *bias* or *prejudice* in the matter under inquiry. One or two carefully worded questions will discover this, if you have not already learnt it from his answers-in-chief. Suppose, for example, he is a clergyman, and the question is as to a certain place of entertainment being a nuisance either as being badly conducted or conducing to immorality. He tells you truthfully enough what he has seen, and speaks with indignant or pathetic tones of the vicious example to the inhabitants of the neighborhood. . . . If he has not referred to particular instances, you may safely proceed to lead him to condemn all places of public amusement of a similar kind. If you lead him gently, he will follow with remarkable docility. I have seen this course pursued by eminent leaders with great success. A man who condemns all alike is not the witness to impress a jury with the

posed of woody fibrous matter finely pulverized; the deduction drawn was that the coat belonged to a carpenter, joiner, or sawyer, etc. But among the dust much gelatine and powdered glue was found; this not being used by carpenters or sawyers the further deduction was drawn that the garment belonged to a joiner, — which turned out to be in fact the case. . . .

(2) *The Chemical Analyst.* Here we may be brief; in effect, the chemist will be employed in all cases in which the microscopist may be called in. In many cases both are necessary, for there are few cases of a purely chemical category; the analyst has frequent recourse to the magnifying glass or microscope before or after his chemical work, for the purpose of completing or checking it. Conversely, the microscopist can hardly do analyst's work, and so we can only attain satisfactory results from the combined action of the microscopist and chemical analyst. Speaking generally we may say that the Investigating Officer does not employ the analyst or chemical examiner frequently enough, and that many cases which have remained in a state of obscurity would have taken another turn if the expert had been consulted. . . .

(3) *The Expert in Physics.* If the medical jurist cannot enlighten us, if the microscopist and chemical analyst are incapable of elucidating the matter, recourse must be had to the expert in physics. The cases in which one can and ought to approach him are legion; no one would be able to completely enumerate them. . . . Speaking generally, it may be stated: the physicist must always be called in when it is important to determine the effect of the natural forces which have exercised any influence upon a matter within the purview of the Penal Code. It goes without saying that every man is capable of determining this effect; but the scientist can better observe it and with more accuracy and justice, especially in cases requiring special knowledge, such as those involving calculations and the use of scientific appliances. . . . The same may be said of a large series of optical questions, when, *e.g.*, it is desired to know how a light effect has been produced, what has been its action, what amount of light has been necessary for the perpetration of determinate acts, how a certain shadow has been produced, how far it has stretched, what object has caused it, at what moment of the day the sun has produced such and such an effect, or at what hour in the night the moon has shown in a particular manner, and a thousand other questions. In a recent case in the Cuddapah District a man who was attacked in the night was said to have been lying on his left side on a cot facing the northern and open side of a chavadi or shed, the foot of his cot being a few feet from its eastern wall. It was alleged the stabbing took place about midnight and just as the moon was rising, the injured man stating in the witness box that he was lying awake and "watching the moon rise" when his assailants came up and attacked him, and therefore he recognized them. No one in Court was able positively to say whether at that time of the year he could possibly have seen the moon which, if his story was true, must have been a very northerly one. Had this witness's story not been completely broken down and found to be false in other directions, it is probable that he would have been believed when he asserted that he saw the moon rising. It would have been impossible to have adjourned the case, which was a sessions one, to a date upon which the moon would have been in an equivalent position, and it is very doubtful

whether any physicist could have been summoned for that trial. But had the Investigating Officer taken the precaution of verifying beforehand the man's story by communicating with an expert in natural philosophy, there would have been no such difficulty as was raised in this trial upon this point. . . .

(4) *Experts in Mineralogy, Zoölogy, and Botany.* Experts in Mineralogy and Zoölogy are but little consulted by the Investigating Officer. . . . We must repeat that nowhere is there greater danger than when we neglect to call in the expert and ourselves dabble in the matter. No doubt the layman who observes closely will discover something and form correct conclusions, but the true working insight is only to be obtained and judged by the expert. The zoölogist finds important employment when the question arises of how long a man lying in the open has been dead, under what conditions animal life of various sorts (especially insects) appear at different times upon every corpse. If the death does not take place in the cold part of the year, certain flies at once appear, somewhat later certain beetles, etc., are found, until at last, sometimes after many months, certain animals bring about the final work of destruction of the non-osseous parts. In such circumstances the zoölogist can often afford important and reliable information. . . . It is for the botanist to play the greatest rôle; he can indicate poisonous or abortive plants, discovering the smallest pieces; he can determine the nature of powdered substances composed of plants, seeds, and fruits; he can study the juices of these plants and the preparations made therefrom. These indications are often important, especially when such vegetable matter is discovered in a house search or upon the person, or in the stomach and intestines of deceased persons, or the matter vomited or passed by them. It must not be forgotten that the smallest atom of leaf, the most minute piece of bark or fiber, suffices for the botanist to recognize the entire plant. . . .

(5) *Expert in Firearms.* As indicated above, the examination of firearms requires, more than anything else, the assistance of a whole series of different experts; as a rule only a gunsmith is called in, but this the author considers a mistake. Nowadays local gunsmiths no longer exist as in former times; they are as rare as the local clockmakers of old; for both the local gunsmith and clockmaker sell instruments they have received ready-made from the factory; at the most they have only placed the various parts of the instrument together and know how to do certain repairs. The firearm and the watch are made only in the factory, and the merchant or shopkeeper cannot be expected to understand in a special manner their interior mechanism. Even when dealing with a gunsmith who knows his trade, we find his knowledge restricted in most cases to being able to indicate the origin and the price of the weapon, the names of its different parts, and other mechanical details; which, it must be confessed, will have in most cases a certain value. But he will not be able to say much regarding the use to which the instrument may be put, the effects which it is capable of producing, the connection existing between the arm itself and the bullet employed, besides numerous other questions of capital importance. Recourse must therefore be had to the experienced sportsman, the medical man, the inspector of musketry, the physicist, the chemist, and the microscopist. In many other cases, moreover, where the question is to

determine the effect of a bullet on different substances, yet other experts who are conversant with these substances must be questioned; in many cases experts consulted by the author have been unable to give a satisfactory reply, when an ordinary workman has answered without hesitation. The dresser of stone can tell us the resistance of the various kinds of stone, the locksmith can explain to us how a certain effect has been produced upon iron, and the botanist can indicate with accuracy the time and the season at which a bullet has struck a living tree and lodged in the wood.

*B. The Dangers of Expert Testimony.* . . . The first question that arises when we are dealing with an important witness who has made observations and inferences, is this: "How intelligent is he? and what use does he make of his intelligence? That is, what are his processes of reasoning?" . . . We start, therefore, with some simple fact which has arisen in the case and try to discover what the witness will do with it. It is not difficult; you may know a thing badly in a hundred ways, but you know it well in only one way. If the witness handles the fact properly, we may trust him. We learn, moreover, from this handling how far the man may be objective. His perception as witness means to him only an experience, and the human mind may not collect experiences without, at the same time, weaving its speculations into them. But though every one does this, he does it according to his nature and nurture. There is little that is as significant as the manner, the intensity, and the direction in and with which a witness introduces his speculation into the story of his experience. Whole sweeps of human character may show themselves up with one such little explanation. . . . It is Hume, again, I think, who so excellently describes what happens when some inconceivable story is told to uncritical auditors. Their credulity increases the narrator's shamelessness; his shamelessness convinces their credulity. Thinking for yourself is a rare thing, and the more one is involved with other people in matters of importance, the more one is convinced of the rarity. . . .

Now, how are we to meet people of this kind when they are on the witness stand? They offer no difficulty when they tell us that they know nothing about the subject in question. If, however, he is not honest enough immediately to confess his ignorance, nothing else will do except to make him see his position by means of questions, and even then to proceed carefully. It would be conscienceless to try to spare this man while another is shown up.

This is important when the witnesses examined are experts in the matter in which they are examined. I am convinced that the belief that such people must be the best witnesses, is false, at least as a generalization. Benneke has also made similar observations. "The chemist who perceives a chemical process, the connoisseur a picture, the musician a symphony, perceive them with more vigorous attention than the layman, but the actual attention may be greater with the latter." For our own affair, it is enough to know that the judgment of the expert will naturally be better than that of the layman; his apprehension, however, is as a rule one-sided, not so far-reaching and less uncolored. It is natural that every expert, especially when he takes his work seriously, should find most interest in that side of an event with which his profession deals. Oversight of legally important matters is, therefore, almost inevitable. I remember how an eager young

doctor was once witness of an assault with intent to kill. He had seen how in an inn the criminal had for some time threatened his victim with a heavy porcelain match tray. "The os parietale may here be broken," the doctor thought, and while he was thinking of the surgical consequences of such a blow, the thing was done and the doctor had not seen how the blow was delivered, whether a knife had been drawn by the victim, etc. Similarly, during an examination concerning breaking open the drawer of a table, the worst witness was the cabinetmaker. The latter was so much interested in the foreign manner in which the portions of the drawer had been cemented and in the curious wood, that he had nothing to say about the legally important question of how the break was made, what the impression of the damaging tool was, etc. Most of us have had such experiences with expert witnesses, and most of us have also observed that they often give false evidence because they treat the event in terms of their own interest and are convinced that things must happen according to the principles of their trades. However the event shapes itself, they model it and alter it so much that it finally implies their own apprehension.

As regards the practical method of procedure in examining experts, care must be taken not to allow different experts to make their experiments at the same time and give their advice together. The Investigating Officer who is directing the inquiry easily loses a concise view of the case when one expert draws conclusions from one side and another from the other side; it is difficult to understand the work of each, and it is impossible to reconcile the different statements and the conclusions given upon the whole. . . . Once the experiments are made and the reports sent in, the Investigating Officer will be able, following the case and the results of the reports, to bring the experts together, either all at once or in several groups; in this way he will perhaps find the agreement or the explanation of doubtful question or questions resolved in different ways; when the experts are already *au courant* with the matter and know what they have to reply they will agree together much more readily than if they have been allowed to work together from the outset.

222. RICHARD WHATELY. *Elements of Rhetoric; comprising an Analysis of the Laws of Moral Evidence.* (ed. 1893. p. 259.) . . . In no way, perhaps, are men, not bigoted to party, more likely to be misled by their favorable or unfavorable judgment of their advisers, than in what relates to the authority derived from *Experience*. Not that Experience ought not to be allowed to have great weight; but that men are apt not to consider with sufficient attention what it is that constitutes Experience in each point; so that frequently one man shall have credit for much experience, in what relates to the matter in hand, and another, who, perhaps, possesses as much, or more, shall be underrated as wanting it.

The vulgar, of all ranks, need to be warned, *First*, — that *time* alone does not constitute Experience; so that many years may have passed over a man's head, without his even having had the same opportunities of acquiring it, as another, much younger; *Secondly*, — that the longest practice in conducting any business in *one* way, does not necessarily confer any experience in conducting it in a different way; *e.g.*; an experienced Husbandman, or Minister of State, in Persia, would be much at a loss in Eu-

rope; and if they had some things less to learn than an entire novice, on the other hand they would have much to unlearn; and, *Thirdly*, — that merely being conversant about a certain class of *subjects*, does not confer Experience in a case where the *operations* and the *end* proposed are different. It is said that there was an Amsterdam merchant, who had dealt largely in corn all his life, who had never seen a field of wheat growing; this man had doubtless acquired, by Experience, an accurate judgment of the qualities of each description of corn, — of the best methods of storing it, — of the arts of buying and selling it at proper times, etc.; but he would have been greatly at a loss in its cultivation; though he had been, in a certain way, long conversant about corn. Nearly similar is the Experience of a practiced Lawyer (supposing him to be nothing more) in a case of Legislation. Because he has been long conversant about Law, the unreflecting attribute great weight to his legislative judgment; whereas his constant habits of fixing his thoughts on what the law *is*, and withdrawing it from the irrelevant question of what the law *ought* to be; — his careful observance of a multitude of rules (which afford the more scope for the display of his skill, in proportion as they are arbitrary and unaccountable) with a studied indifference as to that which is foreign from his business, the convenience or inconvenience of those Rules — may be expected to operate unfavorably on his judgment in questions of Legislation; and are likely to counterbalance the advantages of his superior knowledge, even in such points as do bear on the question. Again, a person who is more properly to be regarded as an Antiquarian than anything else, will sometimes be regarded as high authority in some subject respecting which he has perhaps little or no real knowledge or capacity, if he have collected a multitude of facts relative to it. Suppose, for instance, a man of much reading, and of retentive memory, but of unphilosophical mind, to have amassed a great collection of particulars respecting the writers on some science, the times when they flourished, the numbers of their followers, the editions of their works, etc., it is not unlikely he may lead both others and himself into the belief that he is a great authority in that Science; when perhaps he may in reality know — though a great deal *about* it — nothing *of* it (see “Logic,” Introd., § I, p. 3). Such a man’s mind, compared with that of one really versed in the subject, is like an antiquarian armory, full of curious old weapons, — many of them the more precious from having been long since superseded, — as compared with a well-stocked arsenal, containing all the most approved warlike implements fit for actual service. In matters connected with Political Economy, the experience of practical men is often appealed to in opposition to those who are called Theorists; even though the latter perhaps are deducing conclusions from a wide induction of facts, while the experience of the others will often be found only to amount to their having been long conversant with the details of office, and having all that time gone on in certain beaten tracks, from which they never tried, or witnessed, or even imagined a deviation. So also the authority derived from experience of a *practical* Miner, — *i.e.* one who has wrought all his life in one mine, — will sometimes delude a speculator into a vain search for metal or coal, against the opinion perhaps of *Theorists*, *i.e.* persons of extensive geological observation. It may be added, that there is a proverbial maxim which bears witness to the advantage sometimes possessed by an

observant bystander over those actually engaged in any transaction: "The looker-on often sees more of the game than the players." Now the looker-on (in Greek, *θεωπέω*) is precisely the *Theorist*.

223. SAMUEL S. PAGE. *Personal Injury Actions*. (Illinois Law Review, 1906. Vol. I, p. 35.) . . . There is a great field in the cross-examining of medical experts. Doctors who make a specialty of testifying for plaintiffs are very frequently both ignorant and vicious. They testify for contingent fees, and their evidence is frequently affected by their interest in the result. . . . It is sometimes easy to show the ignorance of some so-called "experts." Not long ago, in one of my cases, a doctor testified that he was a graduate of a medical college; was attending surgeon at a hospital and had been on its advisory board for some years; was professor of surgery in a clinical school, and had examined and treated plaintiff, and in addition to his physical injury, plaintiff's mind was affected. A man who makes a specialty of mental diseases or testifies as an expert in regard thereto is called an "alienist," a term common and well known amongst physicians. Suspecting that the doctor was not an intelligent and well-informed one, my first question was: Doctor, are you an alienist? He answered with vigor: I am an American citizen. Q. Well, are you an alienist? A. (again, emphatically) I am an American citizen. Q. I didn't ask you that; are you an alienist? A. I am an American citizen. Q. Well, are you an alienist? A. I am an American citizen. Q. Well, are you an alienist? A. I am an American citizen. Q. Is that all the answer you will make? A. Yes. Q. Do you answer that way because you think I am inquiring whether you are a citizen or an alien? A. I told you I am an American citizen. On further questioning he said: I heard the word "alien" but could not define it. What it means I could not say at present. Q. What do you think it means? A. I don't know.

One condition of the eye is known as "Argyle-Robertson pupil." When this doctor was asked if he knew what that is, he said: "I can give you fifty-five or a hundred names. Every specialist has his name attached to the reflexes and the eye trouble." When asked again what it is, he answered: "It is according to what book or dictionary you read. It is different in different books. They have all kinds of definitions." . . . There are a great many reflexes, as they are called, but to any intelligent physician who has made a slight study of them, they are not at all difficult to know.

In a certain case plaintiff's expert doctor testified as to certain reflexes. On cross-examination he was asked if he took certain reflexes, and said that he did, and certain others he said he did not take but recognized as being standard tests in that kind of a case. Amongst the latter was the "Cerebro-Piper-Heidsieck." It is needless to say that "Piper-Heidsieck" is the name of a brand of champagne and there is no such reflex as "Cerebro-Piper-Heidsieck."

224. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. pp. 84, 97, 117.) Another class of witness deserving of notice is that of the *semi-professional*. He is in fact semi-everything, — half veracious and half liar; his word is positive and his respectability comparative.

I have in my mind a little, lean old man, with a high, narrow forehead

and a much underhanging lip, a mouth that twitches with self-importance, and an impatience of contradiction. He wears glasses that shut up, and waves them with an air of consequence when he answers a question, putting them on and taking them off with his hand in front of his face when he wishes to evade your question. This gentleman always seems to have a map or plan of something before him, for he calls himself a surveyor, although his principal business is that of an undertaker. He is a great authority on party walls, boundary fences, old drains, and the locality of disused cesspools. A case of dilapidation could no more get along without him than a German band could proceed harmoniously without its most prominent instrument, the trombone. In fact, but for this worthy gentleman there would probably have been no action at all, for he usually combines the greed of a pettifogging lawyer with the quarrelsome faculty of the parochial meddler.

Now this man is full of "purlines," "bressimers," "architraves," "but-tresses," and other architectural expressions. With these and his eyeglasses he could prove any case against anybody, if you did not cross-examine him. He combines within himself all the qualities which make up a deceptive witness — truthful, false, dogmatic, opinionative, clever, cunning, and courteous. You could no more bully this man into telling a lie than you could persuade him to tell the truth. You can no more demolish his respectability than you can deprive him of his honest intentions.

How, then, will you cross-examine a man who has all the goodness of the canting hypocrite with all the pretensions of the scientific witness?

*Tenacity of opinion* is his weakness. He will sacrifice truth itself rather than give up his opinion. Drive him into that net and you have him a safe captive. . . . In all probability any one could do what Mr. Scraper is called upon to perform, namely, tell how many slates are off, how many windows broken, and how many doors require hinges. But in whatever circumstances this individual may appear, if you wish to attack his knowledge, cross-examine about *facts*, and you will soon learn whether he knows his business or not. If you yourself know nothing of what you are cross-examining to, he will beat you unmercifully at every point; if you do know something you will plumb the depth of his scientific ignorance very soon. . . . So he stands with his glasses in one hand and his compasses in the other, and the map before him, defining the boundary of some institution whose wall is supposed to have encroached upon the plaintiff's premises. He will tell you how it has "canted over" out of the upright, as he himself very often does, and how the fault was with the foundations, which could never have been good, and how that recently there must have been a subsidence and another "canting over," and so on. . . .

As this old gentleman peeps over the ledge of the witness box, and maintains his opinion to the death that the foundation of the wall was not good and sufficient, you will elicit that he cares nothing for all the opinions of all the scientific men of the day; it does not matter to him that the wall has stood for a hundred years at least in exactly the same state as now. He will maintain that the superstructure (be sure and feed him with long words) must have been sound, or it would not have stood so long. And although he agrees with others that there is not a crack to be found in the wall, he will maintain his opinion with greater obstinacy than ever, *because it is necessary*, the wall having lately, according to his theory, encroached or



canted over several inches; and when he is forced to admit that *it bulges into a circle without a crack*, he would rather believe in the capacity of the bricks to stretch or bend than in the possibility of his own evidence inclining to do either for the sake of his client. So he proves either that the wall was originally built as it is, or that every brick has stretched and bent in a miraculous manner. Such proof was given not long ago by the semi-professional witness. . . .

*The Medical Witness.* Medical witnesses should be carefully watched in these respects. They are witnesses of *theory*, and are most tenacious of their opinions. They take opposite sides, and arrive at opposite and adverse conclusions, not exactly from the same premises, but from a different conception of the premises, or from regarding them from a different standpoint. It will be acknowledged that it makes all the difference in the world whether these witnesses form an opinion from the facts, or whether they start with a theory and then endeavor to make the facts square with it.

A great deal of what is termed medical evidence is not medical evidence in any sense of the term, except that it is given by a medical practitioner: and in the same sense as a woman's might be said to be "female evidence." Much that a scientific witness gives might be given as well by an ordinary person and very often a great deal better. "I discovered considerable ecchymosis under the left orbit, caused by extravasation of blood beneath the cuticle," said a young house surgeon in a case of assault. Baron BRAMWELL: "I suppose you mean the man had a black eye?" Scientific Witness: "Precisely, my lord." Baron BRAMWELL: "Perhaps if you said so in plain English, those gentleman would better understand you?" "Precisely, my lord," answered the learned surgeon, evidently delighted that the judge understood his meaning, and accepting the rebuke as a compliment.

If you look at a plain fact through the lens of scientific language, its shape usually becomes distorted. Giving a man a "black eye" may be considered a trifling offense, and a jury might acquit; but impress them with the idea that the prisoner caused "extravasation of blood under the left orbit," and he is regarded as a monster of cruelty to whom no mercy can be shown.

An eminent Queen's counsel told me, apropos of the quickness with which medical practitioners sometimes arrive at a conclusion, of a case that occurred some years ago. A woman who had cohabited with a tradesman in a country village suddenly disappeared. Her paramour gave out that she had gone to America. Some years after a skeleton was found in the garden of the house where she had lived. On examination by a medical man *he at once pronounced it to be that of the missing woman*. He formed this opinion from the circumstance that one of the teeth was gone, and that he had extracted the corresponding one from the woman some years before. Upon this the prosecution was instituted, and the man was committed for trial to the assizes. Fortunately, there was time before the trial came on for a further investigation of the garden where the skeleton was found, and on digging near the spot another skeleton was discovered, and then another, and another; then several more. This threw some doubt upon the identification of the bones in question, and on further inquiries being made it turned out that the garden had once been a gipsy burial ground. It need scarcely be added that the prosecution, which had been vigorously taken up by the government, was at once vigorously abandoned.

*The Surveyor (Mr. Unilateral).* As diversities of climes and soils produce diversities of trees, so the various kinds of contentious legal business give rise to a vast variety of witnesses.

Here is a specimen you shall find on no other soil than a Railway Company's, or some other Public Company's or Board's, taken under the powers of their act. Let us study the characteristics of that important and respectable class of witnesses known as SURVEYORS. They are of two great divisions, the surveyors, and the surveyors who *survey them*; or they may be called the surveyors and their contradictors. One swears a house is worth fifteen hundred pounds, another that it is only worth one hundred and fifty; both conscientious men, swearing to the best of their ability; and very able swearing it is! Both conscientious, and nearly standing on the same spot from whence they take their survey, but standing as they do back to back, by no means looking at things from the same point of view.

Now, in estimating the value of Land, the value of a House, a Lease, a Business, or an Interest of any other kind, there is really no difficulty whatever in ascertaining the market value. If two men were to appoint to meet in London at a given time and place, they would meet: but if the same men started off to find one another without having mentioned time and place, there would be many difficulties in their way, many inquiries would be necessary, and in all probability some third person would have to bring them together. It is so in the life of surveyors; both sides start off in *opposite directions*, and it is a good while before they meet. Take a case where on the one side the offer was £250 and the claim on the other was £3950! Is it to be supposed that both parties were not well aware that these figures meant nothing, *except*, perhaps, that juries will sometimes add the two sums together and divide by two?

In this case, and in every other of a like character, you will find the conscientious witnesses ranging themselves on either side in preparation for the tussle, every one of them primed with reasons, prompt with measurements, and precise in figures. The most skillful adjuster of the minutest of apothecary's scales could not be more delicate in touch or exact in calculation than these conflicting gentlemen.

There is a mode in which calculations are sometimes made in these cases, which may be told in the words of a hack surveyor who was often employed in compensation cases of a minor kind. He was asked, privately, how he so readily made his calculations, seeing that he came into court without any report. "Oh," said he, "it's habit; after you have been at it some time it becomes a kind of second nature. It used to take me a long time to go over the premises and make all sorts of calculations; but now I let other people do that — *the other side*; I listen to their evidence, take their figures, which I think fair to *them*, and then *cut them down by three-fourths*, which I think fair to *us*."

I once heard a brickmaker, called to give evidence for a railway company, which had taken some brickfields, reduced to this by cross-examination: "I have come to speak to the loss sustained by the Plaintiff through having his brickmaking business taken from him; I come from —shire: I make bricks on a large scale there; the defendant Railway Company is a *great customer of mine*. . . . Plaintiff's bricks are the worst I ever saw. They are

not worth anything. There is no profit this year on good bricks: has not been any profit for the last three years; there will be a loss this year. If Plaintiff swears he made a profit this year, and proves by his books that he is making a profit, I would not believe him; I would not believe him or his books, or anything that is his. I do not believe him when he swears he has spent money in preparing his land for making bricks. I believe that taking the land and business of the Plaintiff away from him by the company *is a good thing for him*, and will put money into his pocket without any compensation at all." This brickmaking witness has been called over and over again by a railway company to cut down claims, although no tribunal with any self-respect could attach importance to his evidence.

*The Expert in Handwriting (Mr. Grapho).* An intelligent, keen-eyed man steps lightly into the box in a case of murder. There is a confident air about him which impresses you. He is scientific as well as philosophic. Can he, I wonder, read not only "sermons in stones," but murder in love letters, and divorce in everything? . . . "How long have I been studying handwriting, sir?" "Well," he thinks, "that is a most commonplace question, truly *the most commonplace* — I have answered it a thousand times." Nevertheless, he places his white hands on the book before him, one over the other, and, looking up to the ceiling, as though making the calculation for the first time, and the question were an abstruse one — "Five-and-thirty years, sir." Now he takes out his folding glasses, with the delicate touch of a man accustomed to deal with delicate matters only. He holds them between the tip of his thumb and the side of his middle finger, the forefinger being gracefully posed on the gold rim. These glasses, destined to play so important a part in his evidence, he shakes scornfully, scientifically, and almost mathematically at the young counsel. . . .

Yes, the charge is murder; and the proof handwriting. Here is the witness to prove that the prisoner is guilty. "No, no," says the expert to himself, "not I. You have given me specimens of handwriting to examine; I say they are in the handwriting of the prisoner. You say if he wrote them he is guilty, and so will say the jury." Beautiful distinction, but did you happen to know the probable effect of the examination before you made it, *Mr. Grapho*? . . . But what you still want to know is, *what influence was at work in his mind which may have led him to a particular conclusion* with reference to the loop of a G or the twist of a Y. How came he to think it was like the prisoner's? Did he know that a murder had been committed? "Not in reference to this case!"

Mark that answer and *repeat the question*. He *wasn't* told when the specimens were sent, of course: and he *wasn't* told that the specimens were the prisoner's, or that he was to compare the fatal paper with the specimens. And I will tell you why he *wasn't* told, as it is a point to be remembered on the very threshold of your cross-examination. *It is so easy to find resemblances in almost all handwritings of the same class of persons; of boys or girls in the same school; and even persons in the same employ, that you might well believe two or more persons' writing were written by the same hand. Boys copy their masters, girls their mistresses; junior clerks copy older clerks. And remember further, it is so-called peculiarities or eccentricities that will be sure to be copied.*

*Mr. Grapho* was not told; but if he had read of the murder he would know

two facts: one that a document was left by the murderer stating that some one else had committed it; the other that a shopman was the last person seen with the deceased; and he would know a third fact when the books in which were entries made *by the shopman* were given into his hands to compare with the *fatal paper*. So you see the expert would have no vague or indefinite idea of what he was about. That is the first point to establish — do it how you may: *not how long he has been studying his profession*.

The next point to make is *as to the mode of examination* by this experienced expert. And here you will be amazed at the elaboration of the system for finding out nothing, which has been invented by science. He “first of all,” he says — takes the “*undoubted handwriting of the prisoner’s*,” this is one of his scientific phrases — “the *undoubted handwriting of the prisoner’s*,” and he “*examines for peculiarities*” — another.

But this is begging the question at once, *are they peculiarities?* He calls them so and stamps them with guilt. He next *finds* “on line thirteen of page fourteen, my lord,” nodding at my lord with nervous respect: “line thirteen of page fourteen” — says the judge, counting vigorously — “yes, I see; I’ve got it.” “Your lordship will find” — here’s a sly look at counsel, as much as to say, now listen to this revelation — “the down stroke of the F in fool is at a very *remarkable angle*, an angle of fifty-four and a half, my lord. Now, this angle occurs only about once in fifty-four millions of handwritings. Then I find in looking at the disputed handwriting at page four of the daybook, line twenty-two the F in the word “foot” has precisely the same angle and the peculiar *crook*, if I may so call it” — pauses as though this powerful expression must elicit silent applause. You mark this scientific discovery and cross-examine upon it, because it is totally inapplicable and no more a “crook” or a peculiarity than you will find in the handwriting of nine persons of the prisoner’s class out of ten.

“There is next, my lord, at page five, line seventeen, an O which is made like a *semibreve*.”

“A what?” says the judge.

“Semibreve, my lord. Perhaps I shall be clearer if I say it is an O *recurbent*. Then, my lord, there’s a J of a very remarkable and pronounced kind; your lordship will observe that the loop or convolution is *elongated*. This is at page six, line two, my lord; and it occurs twice in the fatal document, and once in the undoubted handwriting.

“The next letter I come to, my lord, is a W, which is found on page seven, line eight of the daybook, and occurs three times in the fatal document. Your lordship will observe that it is *serrated*, or (turning to the jury) *like a saw, gentlemen*. Serrated, my lord. And that same serrated appearance is observable in the M’s of the undoubted handwriting of the prisoner, my lord.”

And thus, through the alphabet, Bias has hooks, crooks, crosses, convolutions, semibreves, humpbacks, dislocations, and deformities of all sorts, and letters that look like murderers, burglars, and other disreputable persons, with the common hangman amongst them. But bring common sense to bear upon it in cross-examination, so shall you reduce these exaggerated peculiarities to the natural tendency of persons *to copy one another*. Once show that the prisoner’s life depends upon the down stroke of a “D” or the up-stroke of a “C,” the crossing of a “T,” or the dot of an “I,” and he will live.

There are such things as forgeries, and forgers imitate peculiarities. Hand-writing is seldom to be believed, even when it speaks the truth.

There are other witnesses, doubtless, slightly varying in their peculiarities of disposition and temper, but these the reader will easily note from his own observation, and I doubt not will find, on examination, that most of them may be included within the classes enumerated.

But of whatever types they may be, and however much they may differ from one another, there is one weakness which runs through them all, and that is *vanity*. No human being is exempt from its influence; and the only difference between one man and another in this respect is as to the object of his vanity and the effect of it upon the other attributes of his nature. One man's vanity may impel him to aspire to a coronet, another's only to wear his hat a little on one side and to put his thumbs in the armholes of his waistcoat.

225. **DONELLAN'S CASE.** [Printed *post*, as No. 379.]

226. **LUETGERT'S CASE.** [Printed *post*, as No. 387.]

227. **HILLMON v. INSURANCE CO.** [Printed *post*, as No. 389.]

228. **THROCKMORTON v. HOLT.** [Printed *post*, as No. 390.]

229. **FRANK S. RICE.** *The Medical Expert as a Witness.* (Green Bag. 1898. Vol. X, 464.) Of all the cant that's canted in this canting world, expert medical cant is the most pernicious; and of all species of evidence offered in a court of justice, none is so thatched with suspicion or further removed from every suggestion of usefulness as is the evidence of a medical expert. Indeed these glib-tongued pundits have so effectually discountenanced themselves in juridical estimation that (to adopt the vigorous language of Lord Chancellor CAMPBELL in the Tracy Peerage Case, 10 Clark & F. 154): "They come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence." . . . Mr. Wharton pilloried the whole guild in one of his most admired passages, which is still quoted with approbation: "Few specialties are so small as not to be torn by factions; and often, the smaller the specialty, the bitterer and more inflaming and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which *there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand, and to defend it with vehemence when off the stand.* 'Nihil tam absurde dici potest, quod non dictatur ab aliquo philosophorum.' In the second place, the retaining of experts by a fee proportioned to the importance of their testimony, is now, in cases in which they are required, as customary as in the retaining of lawyers. No court would take as authority the sworn statement of law given by counsel retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind, as to lose the power of impartial judgment; and so intense is their conviction that there is no civilized community in which the reception of a present from a suitor does not only disqualify but disgrace a judge. Hence it is that, apart from the partisan

temper more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to the testimony itself. In adjusting this criticism, a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact, but as to opinion; and who are selected on all moot questions, either from the prior advocacy of, or from their readiness to adopt, the opinion to be proved." (Wharton, "Criminal Evidence," § 420). . . .

Let us consider briefly the usual environment of the average physician before he becomes deified as an expert. From the time he leaves college, his life is spent among those who are hopelessly ignorant of *materia medica* or of clinical procedure. Imperceptibly there fastens upon him, by insidious and subterraneous approaches, an exalted opinion of his own accomplishments, and a corresponding contempt for antagonistic views. He is a monomaniac on the subject of his own importance. The lawyer is emancipated in great measure from the effects of such an existence, as his postulates are constantly the subject of criticism and demur, his position and theories are controverted and denied, and by constant contact and attrition with other superior minds, he is admonished to place salutary limitations upon his own conceits, while he absorbs a wholesome respect for the opinion of his legal fraters. Not so with the physician. At rare intervals, usually at the instigation of an admirer, he is called into consultation on a critical case. There is no occasion in such an event for controversy. His presence would not be requested if there were the least danger of such a calamity. Professional etiquette requires him to sustain his colleague or copractitioner, and they meet in that spirit of camaraderie which makes disagreement impossible. . . . The consequence of this training, persisted in for a series of years without the least deviation, enables the serene Olympian to mount the witness stand with the perfect composure and touch-me-not-ish-ness that belongs to the elect Brahminical caste. He answers the interrogatories with a chilling and glacial hauteur that shows the impervious nature of his conceit and the braying folly of any attempt to remove it. Long years of hectoring over hypochondriacs, valetudinarians, and hospital nurses has imparted an aspect of infallibility to his "ipse dixit," that nothing but the most dropsical temerity would dispute. He is looked upon as the Gog and Magog of Hunnish desolation to any theorizing that contradicts that sacramental thing known as his "opinion." . . . If there are contending factions in his own specialty, our M.D. relapses into dogmatism, and we are apt to find a touch of irony now and then — when he refers to the "advanced scholarship of the profession," and the "demonstrations regarding the development of the microbe." Clotted nonsense of this type can never become the adjunct of intelligent exposition — it only leads to bewilder and dazzles to betray.

Thus far we have lingered in our exposé of the medical expert upon mere deficiencies in good taste and those debonair attitudes of mind that make man an agreeable companion — we have regarded nothing that menaces his integrity, or suggests more than ordinary caution in accepting his statements. Unfortunately, however, there is a distinctively knavish element in his testimony that assumes many disguises if plausibly presented and

adroitly maintained. . . . It is indisputable that the principal abuse ingrafted upon modern expert evidence arises directly from the enormous fees, so called, that are paid to these pampered witnesses. The ordinary subpoena is sufficient to bring into any court the multimillionaires of the country — the very Titans of our industrial enterprises, the men, in short, that have made America. But to secure the invaluable testimony of the medical "expert" resort is had to methods perilously close to bribery. Where is the distinction, in effect, between paying a witness an exorbitant sum of money for his testimony, under the flimsy guise of a "fee," or openly bribing him to say the same thing? Is it not morally certain that all his sympathies, prejudices, and predilections are enlisted upon the side that solicits his patronage and pays royally for it? And is he not in a more compromised position, if possible, when that fee or payment is contingent upon the success of the party calling him? (See Pollak v. Gregory, 9 Bosw., N. Y., 116). If not bribery, it has everything bad about it except bribery. . . .

The foregoing views have been in part suggested by the monumental exhibit of expert imbecility known as the Luetgert case [*post*, No. 387]. Of all the ghastly travesties upon common justice and common sense that have disgraced these closing years of the nineteenth century, that trial will probably stand as "primus inter pares." The demoniacal efforts of the experts to contradict each other and to prove some rival school of anatomy to be the mere nursing mother of a hoard of fakirs resulted, as might have been expected, in the total eclipse of the last faint struggling ray of intelligence that the jury may be supposed to have possessed. . . . Luetgert is breaking down under a sentence of life imprisonment rendered on the theory that his wife's bones were found in a sausage vat, and yet some of the most eminent osteologists of the age vehemently insist that the bones in question belonged to a hog. . . .

230. ALBERT S. OSBORN. *Expert Testimony from the Standpoint of the Witness*. (Albany Law Journal. 1905. Vol. LXVII, No. 11.) It is quite natural that competent expert witnesses who are able to testify to the truth, and only the truth, should feel that the great reform needed is the adoption or the perfecting of procedure that will make it easier for honest and competent men to assist in showing the facts in a court of law and more difficult and embarrassing for liars and incompetents to assist in concealing and distorting the truth. Some reformers attempt to bring about improvement, not by improving the method, but by wholesale denunciation of both classes of witnesses, good and bad. Nothing but harm comes from such a practice. . . .

No phase of expert testimony has been more misunderstood, misrepresented, and abused than testimony regarding handwriting and the numerous questions arising in relation to disputed documents. . . . The usual practice in the preparation of a case involving a questioned writing is easily described. In a large majority of such inquiries the facts are clearly in favor of one of the parties. The attorney on the right side seeks out and presents his case to those really expert specialists who are known to be competent and honest, and, as his contention is in harmony with the facts, such witnesses are secured. Does the opposing party abandon the case when he cannot get

the best witnesses? Not by any means, but promptly proceeds to get what he can, which may be the worst. Those witnesses are industriously sought out whose opinions are favorable, and often they are those who through incompetency may easily be mistaken, or those witnesses are deliberately sought for whose services are known to be available on any case, and then both sides prepare for trial, one side endeavoring to show the truth, the other attempting to distort or hide the fact and thus defeat the ends of justice. The case is taken into court and presented to a jury, and if the expert testimony, given it may be by an equal number of witnesses, is at the end summed up by "counting the witnesses," as unfortunately is sometimes done, such procedure certainly does not tend to promote the ends of justice.

The testimony of a competent handwriting expert witness in a good case — which is simply an argument under oath; that is, an opinion with reasons — cannot be nullified and made ineffective by liars and incompetents if the matter is considered and presented to a jury in the clear, judicial manner shown in the opinion quoted below. Such a sane, common-sense discussion of this important question should form a part of an important decision on this question by the highest court of every State. This opinion says: "Much has been said and written concerning the value of expert evidence, and there is a disposition to belittle the utility of evidence of this character. . . . It is urged that we find as many experts testifying upon one side as upon the other. That may be true, and it is also true that we will find as many lay witnesses upon each side in litigated cases giving different versions concerning a fact or circumstance. But this does not signify that the evidence of those witnesses must be disregarded because they disagree. Nor is it important specially which side has the greater number of expert or lay witnesses sworn in his behalf. It is the nature or character of the testimony given by the witness which is important. In the case of expert witnesses their opinions are valuable only in so far as they point out satisfactory reasons for the ultimate conclusion of the witness. If the witness simply testifies that he believes the signature genuine or not genuine, as the case may be, and gives no reason for reaching his conclusion, his opinion is valueless and the court will not consider it. If he *gives reasons for his opinion*, then it is the duty of the court to examine into and analyze those reasons and determine the correctness or incorrectness of the opinion and not simply consider the conclusion of the witness alone." (Matter of Burtis, 43 N. Y. Miscel. Reports.)

When a question of this character is considered and discussed in this sensible manner and thus presented to an intelligent jury, and the party in the right has prepared his case in the proper manner, justice will be done in a very large majority of cases, no matter how many mistaken or corrupt witnesses have sworn on the wrong side. As is said, "the nature or character of the testimony given" is the important thing. . . .

There is much discussion of the "disagreement" of expert witnesses that does not seem to consider that *one side is* in the right. What the competent witness who attempts to tell the truth objects to in criticisms of experts or expert testimony is generalizing that is made to apply to a specific case where it really does not apply. It is like generalizing on any question. The man who agrees with the much-criticized Roycroft sage when he says that lawyers have two objects in life, grand larceny and petty larceny, is one who



takes it for granted that a man steals when he has an opportunity ; and the man who says that there are no honest witnesses who are paid to investigate a question, prepare proper illustrations, and testify in court, is of the same pessimistic class. There still are honest lawyers and honest specialists who testify in court, and what they object to, lawyers as well as specialists, is that procedure, that prejudice, and that lack of information that does not attempt to discriminate, but puts all in one class. . . .

The prime requirement in any reform is that procedure that will assist in every way possible in separating the true from the false, the competent from the incompetent. It is impracticable to brand liars and incompetents, or keep them out of court rooms ; but it would be possible to protect competent men and recognize in an official way those witnesses who are worthy and qualified to be heard on a subject requiring expert testimony, those, in short, who really are experts. This is a reform that is practical, constitutional, and would undoubtedly be effective, and could be put into immediate use. The problem has been solved in England in this practical manner by the selection of certain men or a certain man of proved efficiency to act for the state in all such inquiries. This practice does not exclude other witnesses, and the "man who kept the cows" may still come forward and swear that black is white, and, therefore, this procedure would not take away the right under the Constitution that an accused man has of calling his own witnesses. Such an official designation of really expert witnesses would at once correct many of the faults and abuses of this phase of legal procedure and would still permit the fullest cross-examination on the question involved. No procedure should be adopted that directly or indirectly limits proper cross-examination. This official recognition would assist in classifying witnesses as to their competency, it would at least in a measure relieve witnesses of the charge of improper bias and partially protect them from insult, and it would enable lawyers in such investigations before trial, to get at once the best advice and assistance available.

231. WILLIAM L. FOSTER. *Expert Testimony*. (Harvard Law Review. 1897. XI, 169). . . It will be observed that the most frequent and most serious complaint concerning expert testimony is the *want of agreement* upon the same subject and in the same case, among equally learned men, rendering their testimony (it is said) uncertain, confusing, and bewildering to the extent that it is unreliable and of little value. And yet I doubt if an intelligent, thoughtful, and candid man can be found, who will not admit that, notwithstanding all its faults and imperfections, it would be impossible to get along without it. It is certainly true that there are and always will be differences of opinion among experts of the highest character, "rarely in regard to well-established facts, but often in regard to probable inferences from facts ; whilst entire agreement in matters of theory and speculation would be marvelous." But concerning this alleged misfortune, it seems hardly becoming for the *legal* profession to indulge in severe criticism, since there is no profession so strongly characterized by differences of opinion on every subject, — lawyers as well as judges constantly disagreeing, and the latter not unfrequently overruling one another's decisions, — unless it be the clerical profession, the members of which, it may have been observed, are not entirely unanimous in their interpretations of

the Holy Scriptures. Yes, it is a visible truth that doctors, as well as lawyers and ministers of the Gospel, do disagree. It would be marvelous and deplorable if they did not. If there were no disagreement, investigation and experiment would cease; and science, literature, and art would sink to a dead level of stupidity and laziness. If scholars and learned men had come to a condition of unanimous agreement a hundred years ago, we should have had none of the marvelous discoveries and inventions, — none of the magnificent victories and triumphs in medicine and surgery, — that have distinguished and illuminated the closing years of the nineteenth century.

It will be observed that the faults and imperfections of the present system and methods of procedure in the matter of scientific testimony are not magnified to my vision. For whatever is wrong and capable of redress, for so much of the evil of the present system as is not imaginary, what and where is the remedy? Without any progress toward a satisfactory result, search for it has been prosecuted for years and years.

(1) In Germany, and perhaps elsewhere on the European continent, the following method has been established. For certain matters and lines of business (I have not ascertained what these are) permanent experts are appointed by the State. They have no official title nor regular salary, and their payment barely compensates them for loss of time. But in most cases the expert is appointed by the particular judge sitting in the case. . . . There have been in this country many advocates of the German method. . . . Professor John Ordronaux is one of many who are in favor of having expert witnesses appointed by the court, and excluding all others. He thinks "the expert should be regarded as an '*amicus curiæ*,' whose opinion should be a conclusive judgment." That condition would seem to destroy his function as a witness, leaving him to *instruct* the judge as to what is the fact, and the judge to instruct the jury accordingly, — a theory and practice obnoxious in the extreme, and subversive of the rule that the jury alone shall determine all questions of fact. . . .

(2) Judge Washburn, while in favor of continuing the present method of summoning experts, thought the presiding judge should have power himself, if in his judgment the interests of justice would be promoted thereby, to summon experts of his own choice, who should review the whole testimony and evidence of the experts called by the litigants. The proposition strikes me favorably. . . .

(3) It has been proposed that "a certain number of scientific men should, in certain circumstances, sit upon juries and hear the evidence, as ordinary juries do at present." . . . •With reference to a jury or other tribunal composed wholly or in part of experts, one of the most eminent of English jurists, the late Sir James Fitzjames Stephen, discovered so many "difficulties of detail and practice" in the adoption of any such plan, that it seemed, in his judgment, to be most injurious. It was his opinion (in which I fully concur) that, "given uprightness, patience, and such intelligence as most educated members of society possess, a jury constituted as our juries are forms the very best tribunal which could be devised for the trial of complicated questions of fact, even if those questions involve delicate scientific considerations." . . . Ordinary men are quite capable of forming a trustworthy conclusion. I

say trustworthy; for that is all that can be expected or required. Comparatively few subjects of expert testimony are capable of absolute demonstration; and the judgment of a jury or an expert is ordinarily no more certain than that the conclusion, in a civil case, is *probably* correct, and, in a criminal case, that the accused is *probably* innocent, or that his guilt is established beyond a reasonable doubt.

Finally, my belief is, that the supposed evils of the present system are much exaggerated, and to a great extent imaginary; that they are not to be cured by any remedy that has been or seems likely to be devised, and that, on the whole, it is best to "let well enough alone."

**TITLE II: THE ELEMENTS OF THE TESTIMONIAL  
PROCESS ITSELF, AS AFFECTING THE TRUST-  
WORTHINESS OF TESTIMONY**

**SUBTITLE A: PERCEPTION (OBSERVATION, KNOWLEDGE)**

234. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913).<sup>1</sup>

1. *Perception, Opportunity to Perceive, and Knowledge; their Difference and their Practical Sameness*. It is obviously impossible to speak with accuracy of a witness's "knowledge" as that which the principles of testimony require. If the law received as absolute knowledge what he had to offer, then only one witness would be needed on any one matter; for the fact asserted would be demonstrated. When a thing is *known* to be, it *is*; and that would be the end of inquiry. A witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows. The law assumes that the matter is in truth of some particular complexion, but also realizes that to determine what its real complexion is the tribunal may have to listen to various persons; the statements of some of these it will reject, and of others it will accept. But from the persons to whom the tribunal will listen the law will attempt to require some qualification which will make them worth listening to. It will not presume to determine beforehand which witness is correct, *i.e.* which one really *knows*, but it will ask that each one offered shall be one *prima facie* likely to know, — in short, shall have had an *opportunity of perceiving or observing* what was or what happened and shall have *directed his attention* or observation to the matter. This is as far as the law can go.

But the law can at least go that far. Amidst the multitude of persons who have formed impressions and think that they "know" something about the subject in hand, practical experience shows that many or most have formed their beliefs without any basis of perception safe enough to be worth considering in a court of justice. A belief-basis adequate enough for the casual affairs of life may be too slender for settling the facts of rights and wrongs in court. For instance, a person may have a belief that the local post office opens at 7 A.M. and closes at 6 P.M.; but on careful self-scrutiny before acting on that belief, the person may acknowledge that he has no tangible basis at all for it. Hence, a Court may well insist on requiring some minimum of adequate basis for belief; or at least may insist on ventilating thoroughly whatever basis there is, so that the weight of it may be gauged.

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, §§ 650-654.)]

We are here concerned only with the latter process, *i.e.* with forcing into the open the data of witness's *opportunities* for having perceived with his own senses the event or act in question, and the extent of his *actual direction of attention* to it. A witness may have stated glibly that he "knows" something about it, and that he has been so placed as to have an opportunity of perceiving, and may have smoothly stated what he saw or heard; and yet, on closer inquiry, facts may be disclosed which show that he could not well have seen or heard, but acquired his impressions in some less adequate way. Such data will assist much in valuing his supposed perceptions.

This process of evoking into the open the witness's basis of perception is one of the commonest in trials. It puts in sharp contrast an *Impression*, *guess*, or *notion*, lacking in a basis of sense perception, with a *Knowledge*, or perception based on direct attention of the senses. The psychologists begin with the latter stage, assuming without question that it exists, and proceeding to point out the elements of fallibility that still inhere in it. But in the practical conduct of trials, its existence cannot be assumed; for so many persons lacking it thrust themselves (or are thrust) forward as witnesses that a first business of the courts must be, if not to eliminate them, at least to ascertain their actual qualifications, so as to value their testimony accordingly.

*Parnell Commission's Proceedings* (1888. 36th day, Times' Rep., pt. 10, p. 18). [The Irish Land League and its leaders being charged with complicity in certain crimes; particularly in the Phoenix Park assassination of 1882, certain of the known criminals testified that their body, the Invincibles, had received assistance money from the League; it had turned out, on cross-examining one of them, that his testimony to the receipt of this money from the League officers was not based on his own knowledge at all, but merely on what he had heard from others; another of these persons was now asked on direct examination as follows:]

Sir H. James: "Tell me of your own knowledge whether you know of his receiving any money from the Land League."

Sir C. Russell: "My Lords, I would ask my learned friend to be particular as to that question 'of his own knowledge' after the experience we had of Delaney's evidence. 'Did he see any one pay him?' is the proper form of question."

Sir H. James: "I think not."

Sir C. Russell: "With great deference, my Lords, it is. We had a deliberate statement the other day in answer to a similar question put to a witness, 'Did you know this?' and 'Did you know that?' and, afterwards in cross-examination, it turned out that he did not know it of his own knowledge, but it was what had been told him. I want to guard against a repetition of that. The proper form of question as I submit is, 'Did he see any money paid?'"

Sir H. James (to the witness): "You understand what I mean—do you know this of your own knowledge?"

Sir C. Russell: "I am objecting to the form of the question."

President Hannen: "It is a very usual form of question."

Sir C. Russell: "I respectfully say, in view of the reasons I have given, what the proper question is, 'Did he see any money paid?'"

President Hannen: "I shall not interfere with the discretion of counsel in asking a question in a manner which is quite usual."

Sir C. Russell: "I have pointed out the danger—the great danger—of putting the question in the form in which my learned friend is putting it."

President Hannen: "Precisely so; and you have also shown where the safeguard lies, namely, in cross-examination."

2. *Distinction between Experience and Knowledge.* Observation or Perception of the matters to be testified to is, then, an essential conception in the qualifications of every witness without exception. By Observation is meant that direction of attention which is the source of impressions. The distinction between Experience and Observation is that the former concerns the mental power or capacity to acquire knowledge on the subject of testimony, while the latter concerns the actual exercise of the faculties upon the subject of testimony.

It is true that the distinction between Experience and Observation is sometimes lost sight of in the practical tests applicable to certain subjects of testimony. For example, when a Court adopts the rule of thumb that farmers in the vicinity of a certain piece of land may testify to its value, it is ruling upon both these subjects; it is ruling that farmers are persons of sufficient experiential qualifications, and it is also ruling that persons in the vicinity have sufficient observation or knowledge of the general class of values in question and of the piece of land in question. Again, when a Court rules that a bank cashier who has handled the kind of notes alleged to be counterfeit may testify to the genuineness of the one in question, it is ruling that bank cashiers are experientially qualified to form an opinion on the matter, and it is also ruling that the handling of the notes sufficiently insures observation or knowledge of the general type of note in question. In these instances, as well as in others, the rule of thumb does not distinguish the two principles. But the two elements must always exist, however obscured.

3. *Knowledge may rest upon a Hypothetical Basis.* The direction of attention which constitutes the source of the knowledge will usually be made upon matters as they present themselves to the senses out of court. But the observation may also be directed to the same matter hypothetically placed before the witness in court. Thus, a physician may examine a patient at his home and observe certain symptoms, whence he reaches the conclusion that a fever exists; but the same symptoms may be stated to him by counsel in court, and he may then reach the same conclusion, and it will be receivable, except that it will rest upon the hypothesis that the symptoms stated to him actually existed. Here the direction of attention to the symptoms is that observation which the law requires before receiving his conclusion as to the nature of the disease; but in the one case the alleged symptoms are learned by his own senses and rest on his own testimonial credit, while in the other case they rest on the hypothesis that other persons will testify them to be true.

4. *Knowledge often a Double Element, including (1) a Class of Things, and (2) the Thing to be Classed.* In certain subjects the observation must be of a double sort. For example, a witness to the value of a horse should be acquainted with the value standards for different classes of horses, and must also be acquainted with the particular horse to be valued. A witness to the genuineness of handwriting should be acquainted with the type or standard of the handwriting of the alleged writer, and must also see the disputed writing which he is to say does or does not belong to that type. A witness to the identity of a person, a voice, or anything else, ought to be familiar with the person or voice or other thing as to which the identity is asserted, and ought also to see or hear or otherwise perceive the thing to be identified

with it. In short, wherever the subject of the testimony consists in classifying or identifying or testing or authenticating, the witness's observation necessarily involves two elements, (1) an observation of the class, type, or standard, and (2) an observation of the thing to be classified or identified. Both elements must be supplied in his testimony.

It may be noted that here it is not uncommon to supply the second element by hypothetical presentation. Thus, in valuing the cost of a house's construction, the witness may have actual observation of only the value standards of different sorts of houses, and then the features of the particular house to be valued may be placed before him by hypothetical description. So a witness to the identity of a murdered person with one J. S. may have had actual observation of J. S. but not of the body of the murdered man, and the latter element may be supplied by showing him a photograph assumed to be that of the deceased, and then verifying the photograph as that of the deceased.

235. HANS GROSS. *Criminal Psychology*. (transl. Kallen. 1911. § 35, p. 187.) I. *Sense Perceptions*. Our conclusions depend upon perceptions made by ourselves and others. And if the perceptions are good, our judgments *may* be good; if they are bad, our judgments *must* be bad. Hence, to study the forms of sense perception is to study the fundamental conditions of the administration of law, and the greater the attention thereto, the more certain is the administration.

1. *The Senses*. (a) *General Considerations*. The criminalist studies the physiological psychology of the senses and their functions, in order to ascertain their nature, their influence upon images and concepts, their trustworthiness, their reliability and its conditions, and the relation of perception to the object. The question applies equally to the judge, the jury, the witness, and the accused. Once the essence of the function and relation of sense perception is understood, its application in individual cases becomes easy.

There has always, of course, been a quarrel as to the *objectivity* and reliability of *sense perception*. That the senses do not lie, "not because they are always correct, but because they do not judge," is a frequently quoted sentence of Kant's. . . . Descartes, Locke, and Leibnitz have suggested that no image may be called, as mere change of feeling, true or false. Sensationalism in the work of Gassendi, Condillac, and Helvetius undertook for this reason the defense of the senses against the reproach of deceit, and as a rule did it by invoking the infallibility of the sense of touch against the reproach of the contradictions in the other senses.

That these various theories can be adjusted is doubtful, even if, from a more conservative point of view, the subject may be treated quantitatively. The modern quantification of psychology was begun by Herbart, who developed a mathematical system of psychology by introducing certain completely unempirical postulates concerning the nature of representation and by applying certain simple premises in all deductions concerning numerical extent. Then came Fechner, who assumed the summation of stimuli. And finally these views were determined and fixed by the much-discussed Weber's Law, according to which the intensity of the stimulus must increase in the proportion that the intensity of the sensation is to increase;

*i.e.* if a stimulus of 20 units requires the addition of 3 before it can be perceived, a stimulus of 60 units would require the addition of 9. This law, which is of immense importance to criminalists who are discussing the sense perceptions of witnesses, has been thoroughly and conclusively dealt with by A. Meinong.

‡ Modern psychology takes qualities perceived externally to be in themselves subjective but capable of receiving objectivity through our relation to the outer world. . . . The qualitative character of our sensory content produced by external stimuli depends primarily on the organization of our senses. This is the fundamental law of perception, of modern psychology, variously expressed, but axiomatic in all physiological psychology. . . . We see things in the external world through the medium of light which they direct upon our eyes. The light strikes the retina, and causes a sensation. The sensation brought to the brain by means of the optic nerve becomes the condition of the representation in consciousness of certain objects distributed in space. . . . We make use of the sensation which the light stimulates in the mechanism of the optic nerve to construct representations concerning the existence, form, and condition of external objects. Hence we call images perceptions of sight. . . . *Our sensations are effects caused in our organs, externally*, and the manifestation of such an effect depends essentially upon the nature of the apparatus which has been stimulated.

There are certain really known *inferences*, *e.g.* those made by the astronomer from the perspective pictures of the stars to their positions in space. These inferences are founded upon well-studied knowledge of the principles of optics. Such knowledge of optics is lacking in the ordinary function of seeing; nevertheless it is permissible to conceive the psychical function of ordinary perception as unconscious inferences, inasmuch as this name will completely distinguish them from the commonly so-called conscious inferences. The last-named condition is of especial importance to us. We need investigation to determine the laws of the influence of optical and acoustical knowledge upon perception. That these laws are influential may be verified easily. . . . If we were unaware that light is otherwise refracted in water than in air, we could say that a stick in the water has been bent obtusely, but inasmuch as everybody knows this fact of the relation of light to water, he will declare that the stick appears bent but really is straight.

From these simplest of sense perceptions to the most complicated, known only to half a dozen foremost physicists, there is an infinite series of laws controlling each stage of perception, and for each stage there is a group of men who know just so much and no more. We have, therefore, to assume that their perceptions will vary with the number and manner of their accomplishments, and we may almost convince ourselves that each witness who has to give evidence concerning his sense perception should literally undergo examination to make clear his scholarly status and thereby the value of his testimony. Of course, in practice this is not required. First of all, we judge approximately a man's nature and nurture and according to the impression he makes upon us, thence, his intellectual status. This causes great mistakes. But, on the other hand, the testimony is concerned almost always with one or several physical events, so that a simple relational interrogation will establish certainly whether the witness



knows and attends to the physical law in question or not. But anyway, too little is done to determine the means a man uses to reach a certain perception. If instantaneous contradictions appear, there is little damage, for in the absence of anything certain, further inferences are fortunately made in rare cases only. But when the observation is that of one person alone, or even when more testify but have accidentally the same amount of knowledge and hence have made the same mistake, and no contradiction appears, we suppose ourselves to possess the precise truth, confirmed by several witnesses, and we argue merrily on the basis of it. In the meantime we quite forget that contradictions are our salvation from the trusting acceptance of untruth — and that the absence of contradiction means, as a rule, the absence of a starting point for further examination. For this reason and others modern psychology requires us to be cautious.

Among the others is the circumstance that *perceptions are rarely pure*. Their purity consists in containing nothing else than perception; they are mixed when they are connected with imaginations, judgments, efforts, and volitions. How rarely a perception is pure I have already tried to show; judgments almost always accompany it. I repeat, too, that owing to this circumstance and our ignorance of it, countless testimonies are interpreted altogether falsely. . . .

The *individuality* of the particular person makes the perception in a still greater degree individual, and makes it almost the creature of him who perceives. . . . The variety is still further increased by means of the comprehensive activity which Fischer presupposes. "Visual perception has a comprehensive or compounding activity. We never see any absolute simple and hence do not perceive the elements of things. We see merely a spatial continuum, and that is possible only through comprehensive activity — especially in the case of movement in which the object of movement and the environment must both be perceived." But each individual method of "comprehension" is different. And it is uncertain whether this is purely physical, whether only the memory assists (so that the attention is biased by what has been last perceived), whether imagination is at work or an especial psychical activity must be presupposed in compounding the larger elements. The fact is that men may perceive an enormous variety of things with a single glance. And generally the perceptive power will vary with the skill of the individual. The narrowest, smallest, most particularizing glance is that of the most foolish; and the broadest, most comprehensive, and comparing glance, that of the most wise. This is particularly noticeable when the time of observation is short. The one has perceived little and generally the least important; the other has in the same time seen everything from top to bottom and has distinguished between the important and the unimportant, has observed the former rather longer than the latter, and is able to give a better description of what he has seen. And then, when two so different descriptions come before us, we wonder at them and say that one of them is untrue. . . . In the variety of perception lies the power of presentation (in our sense of the term). . . .

In this connection there are several more conditions pertaining to general sense perception. First of all there is that so-called *vicariousness of the senses* which substitutes one sense for another, in representation. The

*actual* substitution of one sense by another as that of touch and sight, does not belong to the present discussion. The substitution of sound and sight is only apparent. *E.g.* when I have several times heard the half-noticed voice of some person without seeing him, I will imagine a definite face and appearance which *are* pure imagination. So, again, if I hear cries for help near some stream, I see more or less clearly the form of a drowning person, etc. It is quite different in touching and seeing; if I touch a ball, a die, a cat, a cloth, etc., with my eyes closed, then I may so clearly see the color of the object before me that I might be really seeing it. But in this case there is a real substitution of greater or lesser degree. . . .

The vicariousnesses of visual sensations are the most numerous and the most important. Anybody who has been pushed or beaten, and has felt the blows, will, if other circumstances permit and the impulse is strong enough, be convinced that he has seen his assaulter and the manner of the assault. Sometimes people who are shot at will claim to have seen the flight of the ball. And so again they will have seen in a dark night a comparatively distant wagon, although they have only heard the noise it made and felt the vibration. It is fortunate that, as a rule, such people try to be just in answering to questions which concern this substitution of one sense perception for another. And such questions ought to be urgently put. . . .

Still more significant is that characteristic phenomenon, to us of considerable importance, which might be called *retrospective illumination of perception*. It consists in the appearance of a sense perception under conditions of some noticeable interruption, when the stimulus does not, as a rule, give rise to that perception. . . . In a case in court, there was a shooting in some house and an old peasant woman, who was busy sewing in the room, asserted that she had just before the shooting heard a *few* steps in the direction from which the shot must have come. Nobody would agree that there was any reason for supposing that the person in question should have made his final steps more noisily than his preceding ones. But I am convinced that the witness told the truth. The steps of the new arrival were perceived subconsciously; the further disturbance of the perception hindered her occupation and finally, when she was frightened by the shot, the upper levels of consciousness were illuminated and the noises which had already reached the subconsciousness passed over the threshold and were consciously perceived.

I learned from an especially significant case, how the same thing could happen with regard to vision. A child was run over and killed by a careless coachman. A pensioned officer saw this through the window. His description was quite characteristic. It was the anniversary of a certain battle. The old gentleman, who stood by the window thinking about it and about his long-dead comrades, was looking blankly out into the street. The horrible cry of the unhappy child woke him up and he really began to see. Then he observed that he had in truth seen everything that had happened *before* the child was knocked over — *i.e.* for some reason the coachman had turned around, turning the horses in such a way at the same time that the latter jumped sidewise upon the frightened child, and hence the accident. The general expressed himself correctly in this fashion: "I saw it all, but I did not perceive and know that I saw it until *after* the

scream of the child." . . . His story was confirmed by other witnesses. This psychological process is of significance in criminal trials.

(b) *Mistakes of the Senses; Illusions.* As sensation is the basis of knowledge, the sensory process must be the basis of the correctness of legal procedure. The information we get from our senses and on which we construct our conclusion, may be said, all in all, to be reliable, so that we are not justified in approaching things we assume to depend on sense perception with exaggerated caution. Nevertheless, this perception is not always completely correct, and the knowledge of its mistakes must help us and even cause us to wonder that we make no greater ones.

Psychological examination of sense perception has been going on since Heracitus. Most of the mistakes discovered have been used for various purposes, from sport to science. They are surprising and attract and sustain public attention; they have, hence, become familiar, but their influence upon other phenomena and their consequences in the daily life have rarely been studied. For two reasons. First, because such illusions seem to be small and their far-reaching effects are rarely thought of, as when, *e.g.*, a line drawn on paper seems longer or more inclined than it really is. Secondly, it is supposed that the influence of sensory illusions cannot easily make a difference in practical life. If the illusion is observed, it is thereby rendered harmless and can have no effect. If it is not observed and later on leads to serious consequences, their cause cannot possibly be sought out, because it cannot be recognized as such. . . .

Witnesses do not of course know that they have suffered from illusions of sense; we rarely hear them complain of it, anyway. And it is for this very reason that the criminalist must seek it out. The requirement involves great difficulties, for we get very little help from the immense literature on the subject. There are two roads to its fulfillment. In the first place, we must understand the phenomenon as it occurs in our work, and by tracing it back determine whether and which illusion of the sense may have caused an abnormal or otherwise unclear fact. The other road is the theoretical one, which must be called, in this respect, the preparatory road. It requires our mastery of all that is known of sense illusion and particularly of such examples of its hidden nature as exist. Much of the material of this kind is, however, irrelevant to our purpose, particularly all that deals with disease and lies in the field of medicine. . . . It is indubitable that we make many observations in which we get the absolute impression that matters of sensory illusion which do not seem to concern us lie behind some witnesses' observations, etc., although we cannot accurately indicate what they are. The only thing to do when this occurs is either to demonstrate the possibility of their presence or to wait for some later opportunity to test the witness for them.

Classification will ease our task a great deal. The apparently most important divisions are those of *normal* and *abnormal*. But as the boundary between them is indefinite, it would be well to consider that there is a third class which cannot fall under either heading. This is a class where especially a group of somatic conditions either favor or cause illusory sense perceptions, *e.g.* a rather over-loaded stomach, a rush of blood to the head, a wakeful night, physical or mental overexertion. . . .

Another question is the limit at which illusions of sense begin, how, in-

deed, they can be distinguished from correct perceptions. The possibility of doing so depends upon the typical construction of the sense organs in man. By one's self it would be impossible to determine which sensation is intrinsically correct and which is an illusion. There are a great many illusions of sense which all men suffer from under similar conditions, so that the judgment of the majority cannot be normative. Nor can the control of one sense by another serve to distinguish illusory from correct perception. In many cases it is quite possible to test the sense of sight by touch, or the sense of hearing by sight, but that is not always so. The simplest thing is to say that a sense impression is correct and implies reality when it remains identical under various circumstances, in various conditions, when connected with other senses, and observed by different men, with different instruments. It is illusory when it is not so constant.

I have found still another distinction which I consider important. It consists in the difference between real *illusions* and those false conceptions in which the mistake originates as *false inference*. In the former the sense organ has been really registering wrongly, as when, for example, the pupil of the eye is pressed laterally and everything is seen double. But when I see a landscape through a piece of red glass, and believe the landscape to be really red, the mistake is one of inference only, since I have not included the effect of the glass in my concluding conception. So, again, when in a rain I believe mountains to be nearer than they really are, or when I believe the stick in the water to be really bent, my sensations are perfectly correct, but my inferences are wrong. In the last instance, even a photograph will show the stick in water as bent.

This difference in the nature of illusion is particularly evident in those phenomena of expectation that people tend to miscall "illusions of sense." If, in church, anybody hears a dull, weak tone, he will believe that the organ is beginning to sound, because it is appropriate to assume that. In the presence of a train of steam cars which shows every sign of being ready to start you may easily get the illusion that it is already going. Now, how is the sense to have been mistaken in such cases? The ear has really heard a noise, the eye has really seen a train, and both have registered correctly, but it is not their function to qualify the impression they register, and if the imagination then effects a false inference, that cannot be called an illusion of sensation. . . .

The matter is different when we do not *properly estimate an uncustomary sense impression*. A light touch in an unaccustomed part of the body is felt as a heavy weight. After the loss of a tooth we feel an enormous cave in the mouth, and what a nonsensical idea we have of what is happening when the dentist is drilling a hole in a tooth! In all these cases the senses have received a new impression which they have not yet succeeded in judging properly, and hence, make a false announcement of the object. It is to this fact that all fundamentally incorrect judgments of new impressions must be attributed, — for example, when we pass from darkness into bright light and find it very sharp; when we find a cellar warm in winter that we believe to be ice-cold in summer; when we suppose ourselves to be high up in the air the first time we are on horseback, etc. Now, the actual presence of sensory illusions is especially important to us because we must make certain tests to determine whether testimony depends on them or

not, and it is of great moment to know whether the illusions depend on the individual's mind or on his senses. We may trust a man's intellect and not his senses, and conversely, from the very beginning.

It would be superfluous to insist on the importance of sensory illusion in the determination of a verdict. . . . There are many mistakes of judges based entirely on ignorance of this matter. Once a man who claimed, in spite of absolute darkness, to have recognized an opponent who punched him in the eye, was altogether believed, simply because it was assumed that the punch was so vigorous that the wounded man saw sparks by the light of which he could recognize the other. And yet already Aristotle knew that such sparks are only subjective. But that such things were believed is a notable warning.

2. *The Sense of Sight.* (a) *General Considerations.* Just as the sense of sight is the most dignified of all our senses, it is also the most important in the criminal court, for most witnesses testify as to what they have seen. If we compare sight with the hearing, which is next in the order of importance, we discover the well-known fact that what is seen is much more certain and trustworthy than what is heard. "It is better to see once than to hear ten times," says the universally valid old maxim. No exposition, no description, no complication which the data of other senses offer, can present half as much as even a fleeting glance. Hence, too, no sense can offer us such surprises as the sense of sight. . . . People know little of optical illusions and false visual perceptions, though they are aware that incorrect auditions are frequent matters of fact. Moreover, to the heard object a large number of more or less certain precautionary judgments are attached. If anybody, *e.g.*, has *heard* a shot, stealthy footsteps, crackling flames, we take his experience always to be *approximate*. We do not do so when he assures us he has *seen* these things or their causes. Then we take them — barring certain mistakes in observation — to be indubitable perceptions in which misunderstanding is impossible. . . .

The *visual process* itself consists, according to Fischer, "of a compounded series of results which succeed each other with extraordinary rapidity and are causally related." In this series the following elements may principally be distinguished: (1) The physicochemical process. (2) The physiologicosensory. (3) The psychological. (4) The physiologicomotor. (5) The process of perception.

It is not our task to examine the first four elements. In order clearly to understand the variety of perception, we have to deal with the last only. I once tried to explain this by means of the phenomenon of instantaneous photographs (cinematographs). If we examine one while representing an instant in some quick movement, we will assert that we never could have perceived it in the movement itself. This indicates that our vision is slower than that of the photographic apparatus, and hence, that we do not apprehend the smallest particular conditions, but that we each time unconsciously compound a group of the smallest conditions and construct in that way the so-called instantaneous impressions. If we are to compound a great series of instantaneous impressions in one galloping step, we must have condensed and compounded a number of them in order to get the image that we see with our eyes as instantaneous. We may therefore say that the least instantaneous image we ever see with our eyes con-

tains many parts which only the photographic apparatus can grasp. Suppose we call these particular instances a, b, c, d, e, f, g, h, i, j, k, l, m; it is self-evident that the manner of their composition must vary with each individual. One man may compound his elements in groups of three: a, b, c, — d, e, f, — g, h, i, etc.; another may proceed in dyads: a, b, — c, d, — e, f, — g, h, — etc.; a third may have seen an unobservable instant later, but constructs his image like the first man: b, c, d, — l, m, n, etc.; a fourth works slowly and rather inaccurately, getting: a, c, d, — f, h, i, — etc. Such variations multiply, and when various observers of the same event describe it, they do it according to their different characteristics. And the differences may be tremendous. Substitute numerals for letters and the thing becomes clear.

The *relative slowness of our apprehension* of visual elements has the other consequence that we *interpolate* objects in the lacunæ of vision *according to our expectations*. The best example of this sort of thing would be the perception of assault and battery. When ten people in an inn see how A raises a beer glass against B's head, five expect: "Now he'll pound him," and five others: "Now he'll throw it." If the glass has reached B's head none of the ten observers have seen how it reached there, but the first five take their oath that A pounded B with the glass, and the other five that he threw it at B's head. And all ten have really seen it, so firmly are they convinced of the correctness of their swift judgment of expectation. Now, before we treat the witness to some reproach like untruth, inattention, silliness, or something equally nice, *we* had better consider whether his story is not true, and whether the difficulty might not really lie in the imperfection of our own sensory processes. This involves partly what Liebmenn has called "anthropocentric vision," *i.e.* seeing with man as the center of things. Liebmenn further asserts, "that we see things only in perspective sizes, *i.e.* only from an angle of vision varying with their approach, withdrawal and change of position, but in no sense as definite cubical, linear, or surface sizes. The apparent size of an object we call an angle of vision at a certain distance. But, what indeed is the different, true size? We know only relations of magnitude."

This description is important when we are dealing with testimony concerning *size*. It seems obvious that each witness who speaks of size is to be asked whence he had observed it, but at the same time a great many unexpected errors occur, especially when what is involved is the determination of the size of an object in the same plane. One need only to recall the meeting of railway tracks, streets, alleys, etc., and to remember how different in size, according to the point of view of the witness, various objects in such places must appear. Everybody knows that distant things seem smaller than near ones, but almost nobody knows what the difference amounts to. . . .

In addition we often think that the clearness of an object represents its *distance* and suppose that the first alone determines the latter. But the distinctness of objects, *i.e.* the perceptibility of a light impression, depends also upon the absolute brightness and the differences in brightness. The latter is more important than is supposed. Try to determine how far away you can see a keyhole when the wall containing the door is in the shadow, and when there is a window opposite the keyhole. A dark object of the

size of a keyhole will not be visible at one hundredth of the distance at which the keyhole is perceived. Moreover, the difference in intensity is not alone in consideration; the intensity of the object with regard to its background has yet to be considered. Aubert has shown that mistakes often occur, so that a man dressed in dark clothes but in full light will be described as wearing lighter clothes than one who wears light clothes in the shadow.

Differences of *illumination* reveal a number of phenomena difficult to explain. . . . If, in daylight, we look into a basement room from outside, we can perceive nothing, almost; everything is dark, even the windows appear black. But in the evening, if the room is ever so slightly illuminated, and we look into it from outside, we can see even small articles distinctly. Yet there was much intenser light in the room in question during the day than the single illumination of the night could have provided. . . . It is often said that a witness was able to see this or that under such and such illumination, or that he was unable to see it, although he denies his ability or inability. The only solution of such contradictions is an experiment. The attempt must be made either by the judge or some reliable third person, to discover whether, under the same conditions of illumination, anything could be seen at the place in question or not.

As to *what* may be seen in the *distance*, experiment, again, is the best judge. The human eye is so very different in each man that even the acute examination into what is known of the visual image of the Pleiades shows that the *average* visual capacity of classic periods is no different from our own, but still that there was great variety in visual capacity. What enormous visual power is attributed to half-civilized and barbarous peoples, especially Indians, Eskimos, etc. ! Likewise among our own people there are hunters, mountain guides, etc., who can see so clearly in the distance that mere stories about it might be fables. In the Bosnian campaign of 1878 we had a soldier who in numerous cases of our great need to know the enemy's position in the distance could distinguish it with greater accuracy than we with our good field glasses. He was the son of a coal miner in the Styrian mountains, and rather a fool. Incidentally it may be added that he had an incredible, almost animal power of orientation.

In addition to the natural differences of sight there are also those *artificially* created. How much we may help ourselves by skillful distinctions, we can recognize in the well-known and frequently mentioned business of reading a confused handwriting. We aim to weaken our sense perception in favor of our imagination, *i.e.* so to reduce the clearness of the former as to be able to test upon it in some degree a larger number of images. We hold the Ms. away from us, look at it askant, with contracted eyebrows, in different lights, and finally we read it. Again, the converse occurs. If we have seen something with a magnifying glass, we later recognize details without its help. Definite conditions may bring to light very great distinctions. A body close to the face or in the middle distance looks different according as one eye or both be used in examining it. This is an old story and explains the queer descriptions we receive of such objects as weapons and the like, which were suddenly held before the face of the deponent. In cases of murderous assault it is certain that most uncanny stories are told, later explained by fear or total confusion or intentional dis-

honesty, but really to be explained by nothing more than actual optical processes. . . .

Concerning *color vision* only a few facts will be mentioned. . . . (3) It is well known that in the diminution of brightnesses red disappears before blue, and that at night, when all colors have disappeared, the blue of heaven is still visible. So if anybody asserts that he has been able to see the blue of a man's coat but not his red-brown trousers, his statement is possibly true, while the converse would be untrue. . . . (7) According to Aubert, sparkle consists of the fact that one point in a body is very bright while the brightness diminishes almost absolutely from that point. . . . It is therefore conceivable that at a great distance, under conditions of sharp or accidental illuminations, etc., we are likely to see things as sparkling which do not do so in the least. . . .

Everybody knows what the *blind spot* is, and every psychology and physiology textbook talks about it. . . . According to Helmholtz: "The effect of the blind spot is very significant. If we make a little cross on a piece of paper and then a spot the size of a pea two inches to the right, and if we look at the cross with the left eye closed, the spot disappears. The size of the blind spot is large enough to cover in the heavens a plate which has twelve times the diameter of the moon. It may cover a human face at a distance of 6', but we do not observe this because we generally fill out the void. If we see a line in the place in question, we see it unbroken, because we know it to be so, and therefore supply the missing part." . . .

I have not met with a practical case in which some fact or testimony could be explained only by the blind spot, but such cases are conceivable.

(b) *Illusions of Sight.* It will be best to begin the study of optical illusions with the consideration of those conditions which cause extraordinary, lunatic images. They are important because the illusion is recognizable with respect to the possibility of varied interpretations by any observer, and because anybody may experiment for himself with a bit of paper on the nature of false optical apprehension. If we should demonstrate no more than that the simplest conditions often involve coarse mistakes, much will have been accomplished for the law, since the "irrefutable evidence" of our senses would then show itself to need corroboration. Nothing is proved with "I have seen it myself," for a mistake in one point shows the equal possibility of mistakes in all other points.

Generally, it may be said that the position of lines is not without influence on the estimation of their size. Perpendicular dimensions are taken to be somewhat greater than they are. Of two crossed lines, the vertical one seems longer, although it is really equal to the horizontal one. An oblong, lying on its somewhat longer side, is taken to be a square; if we set it on the shorter side it seems to be still more oblong than it really is. . . . It will hardly be believed, and certainly is not consciously known, that in the letter S the upper curve has a definitely smaller radius than the lower one; but the inverted S shows this at once. To such types other false estimations belong: inclinations, roofs, etc., appear so steep in the distance that it is said to be impossible to move on them without especial help. But whoever does move on them finds the inclination not at all so great. . . .

Such confusions become most troublesome when other estimations are added to them. So long as the informant knows that he has only been



estimating, the danger is not too great. But as a rule the informant does not regard his conception as an estimate, but as certain knowledge. He does not say, "I estimate"; he says, "It is so." Aubert tells how the astronomer Förster had a number of educated men, physicians, etc., estimate the diameter of the moon. The estimation varied from 1" to 8" and more. The proper diameter is 1.5" at a distance of 12."

It is well known that an unfurnished room seems much smaller than a furnished one, and a lawn covered with snow, smaller than a thickly grown one. We are regularly surprised when we find an enormous new structure on an apparently small lot, or when a lot is parceled out into smaller building lots. When they are planked off we marvel at the number of planks which can be laid on the surface. The illusions are still greater when we look forward. We are less accustomed to estimation of verticals than of horizontals. An object on the gutter of a roof seems much smaller than at a similar distance on the ground. Aërial perspective has a great influence on the determination of these phenomena, particularly such as occur in the open and at great distances. . . . The condition of the air, sometimes foggy and not pellucid, at another time particularly clear, makes an enormous difference, and statements whether about distance, size, colors, etc., are completely unreliable. A witness who has several times observed an unknown region in murky weather and has made his important observation under very clear skies, is not to be trusted. . . .

To all these illusions may be added those which are connected with movement or are exposed by movement. During the movement of certain bodies we can distinguish their form only under definite conditions. As their movement increases they seem shorter in the direction of movement and as it decreases they seem broader than normally. An express train with many cars seems shorter when moving directly near us, and rows of marching men seem longer. . . . As a rule, optical illusions occur when there is an interruption in the communication between the retina, the sense of movement, and the sense of touch, or when we are prevented from reducing the changes of the retinal image to the movement of our body or of our eyes. This reduction goes on so unconsciously that we see the idea of the object and its condition as a unit. Again, it is indubitable that the movement of the body seems quicker when we observe it with a fixed glance than when we follow it with our eyes. The difference may be so significant that it is often worth while, when much depends on determining the speed of some act in a criminal case, to ask how the thing was looked at.

The so-called *captivation of our visual capacity* plays a not unimportant part in distinguishing correct from illusory seeing. In order to see correctly we must look straight and fully at the object. Looking askance gives only an approximate image, and permits the imagination free play. Anybody lost in a brown study who pictures some point in the room across the way with his eyes can easily mistake a fly, which he sees confusedly askance, for a great big bird. . . . These examples indicate how indirect vision may be corrected by later correct vision, but such correction occurs rarely. We see something indirectly; we find it uninteresting, and do not look at it directly. When it becomes of importance later on, perhaps enters into a criminal case, we think that we have seen the thing as it is, and often swear that "a fly is a big bird."

These illusions again, I must repeat, are of no importance if they are at all doubted, for then the truth is ascertained. When, however, they are not doubted and are sworn to, they cause the greatest confusion in trials. A barroom quarrel, a swung cane, and a red handkerchief on the head, are enough to make people testify to having seen a great brawl with bloody heads. A gnawing rat, a window accidentally left open through the night, and some misplaced, not instantaneously discovered object, are the ingredients of a burglary. . . .

3. *The Sense of Hearing.* (a) *General Considerations.* We have two problems with regard to sound — whether the witnesses have heard correctly, and whether we hear them correctly. Between both witnesses and ourselves there are again other factors. Correct comprehension, faithful memory, the activity of the imagination, the variety of influences, the degree of personal integrity; but most important is the consideration, whether the witness has heard correctly. As a general thing we must deny in most cases completely accurate reproduction of what witnesses have heard. In this connection dealing with questions of honor is instructive. If the question is the recall of slander, the terms of it will be as various as the number of witnesses. We discover that the sense, the tendency of slander, is not easily mistaken. At least if it is, I have not observed it. The witness, *e.g.* will confuse the words “scamp,” “cheat,” “swindler,” etc., and again the words: “ox,” “donkey,” “numbskull,” etc. But he will not say that he has heard “scamp” where what was said was “donkey.” He simply has observed that A has insulted B with an epithet of moral turpitude or of stupidity and under examination he inserts an appropriate term. Often people hear only according to meanings, and hence the difficulty of getting them to reproduce verbally and directly something said by a third person. They always engage upon indirect narration because they have heard only the meaning, not the words. Now if the witnesses only reproduced the actual meaning of what they heard, no harm would be done, but they tell us only what they *suppose* to be the meaning, and hence we get a good many mistakes. It does seem as if uneducated and half-educated people are able to shut their ears to all things they do not understand. Even purely sensory perception is organized according to intelligent capacity.

The determination of auditory power is, however, insufficient, for this *power varies* with the degree any individual can distinguish a single definite tone among many, hear it alone, and retain it. And this varies not only with the individual but also with the time, the place, the voice, etc. . . .

It is repeatedly asserted, *e.g.* by Tyndall, that a comparatively large number of people do not hear high tones like the chirping of crickets, although the normal hearing of such people is acute. Others again easily sense deep tones, but distinguish them with difficulty because they retain only a roll or roar, but do not hear the individual tones. And generally, almost all people have difficulty in making a correct valuation of the direction of sound. Wundt says that we locate powerful sounds in front of us and are generally better able to judge right and left than before and behind. These data, which are for us quite important, have been subjected to many tests. Wundt's statement has been confirmed by various experiments which have shown that sound to the right and the left are best distinguished,

and sounds in front and below, in front to the right and to the left, and below, to the right and to the left, are least easily distinguished. Among the experimenters were Preyer, Arnheim, Kries, Münsterberg.

All these experiments indicate certain constant tendencies to definite mistakes. Sounds in front are often mistaken for sounds behind and felt to be higher than their natural head level. Again, it is generally asserted that binaural hearing is of great importance for the recognition of the direction of sound. With one ear this recognition is much more difficult. This may be verified by the fact that we turn our heads here and there as though to compare directions whenever we want to make sure of the direction of sound. In this regard, too, a number of effective experiments have been made.

When it is necessary to determine whether the witness deposes correctly concerning the direction of sound, it is best to get the official physician to find out whether he hears with both ears, and whether he hears equally well with both. It is observed that persons who hear excellently with both ears are unfortunate in judging the direction of sound. Others again are very skillful in this matter, and may possibly get their skill from practice, sense of locality, etc. But in any case, certainty can be obtained only by experimentation.

The differences that *age* makes in hearing are of importance. Bezold has examined a large number of human ears of different ages and indicates that after the fiftieth year there is not only a successive decrease in the number of the approximately normal hearing, but there is a successively growing increase in the degree of auditory limitation which the ear experiences with increasing age. The results are more surprising than is supposed. Not one of 100 people over fifty years of age could understand conversational speech at a distance of 16 meters; 10.5 per cent understood it at a distance of 8 to 16 meters. Of school children 46.5 per cent (1918 of them) from seven to eighteen understood it at a distance of 20 meters plus, and 32.7 per cent at a distance of from 16 to 8 meters. The percentage then is 10.5 for people over fifty as against 79.2 of people over seven and under eighteen. Old women can hear better than old men. At a distance of 4 to 16 meters the proportion of women to men who could hear was 34 to 17. The converse is true of children, for at a distance of 20 meters and more the percentage of boys was 49.9 and girls 43.2. The reason for this inversion of the relation lies in the harmful influences of manual labor and other noisy occupations of men. These comparisons may be of importance when the question is raised as to how much more a witness may have heard than one of a different age.

(b) *Illusions of Hearing.* From the point of view of the criminalist, auditory illusions are hardly less significant than visual illusions, the more so, as incorrect hearing is much more frequent than incorrect seeing. This is due to the greater similarity of tones to each other, and this similarity is due to the fact that sound has only one dimension, while vision involves not only three, but also color. . . .

The study of auditory illusions is rendered especially difficult by the rarity of their repetition, which makes it impossible reliably to exclude accidents and mistakes in observation. . . . I made an observation at a bicycle school. As is known, beginners are able frequently to ride by themselves, but need help in mounting and dismounting their machines. To do so,

they call a teacher by crying out: "Herr Maier." At a certain place this sound would seem distinctly to be "mamma." I was at first much surprised to hear people of advanced age cry cheerfully, "mamma." Later I discovered what the word really was, and acquaintances whose attention I called to the matter confirmed my observation. Such things are not indifferent; they show that really very different sounds may be mistaken for one another, that the test of misunderstandings may often lead to false results, since only during the test of an illusion are both auditor and speaker accurately in the same position as before. Finally, these things show that the whole business of correcting some false auditions is very difficult. . . .

As regards the general treatment of auditory illusions, it is necessary, first of all, to consider their many and significant differences. In the first place, there are the *varieties of good hearing*. That normal and abnormal hearers vary in degree of power is well known. There are also several special conditions, causing, *e.g.* the so-called hyperauditive, who hear more acutely than normal people. Of course, such assertions as those which cite people who can hear the noise of sulphur rubbed on the poles of quartz crystals and so on, are incorrect, but it is certain that a little attention will reveal a surprising number of people whose hearing is far acuter than that of normal individuals. Apart from children, the class is made up of musicians, of young girls, and of very nervous, excitable, and sickly persons. The musicians in fact have become so because of their ears; the young girls hear well largely because of their delicate organization and the very fine construction of their ears; and the nervous people because of their sensibility to the pain involved in loud noises. Many differences of perception among witnesses are to be explained by differences of audition, and the reality of apparent impossibilities in hearing must not be denied, but must be tested under proper conditions. One of these conditions is location. The difference between hearing things in the noisy day and in the quiet night, in the roar of the city, or in the quiet of the mountains, is familiar. . . .

The illusions of hearing which completely normal people are subject to are the most difficult of all. Their number and frequency is variously estimated. The physician has nothing to do with them. The physicist, the acoustician, and physiologist do not care about the criminalist's needs in this matter, and we ourselves rarely have time and opportunity to deal with it. As a result our information is very small, and no one can say how much is still undiscovered. . . . Certain dispositions make some difference in this respect. The operating physician hears the low groaning of the patient after the operation without having heard his loud cries during the operation. During the operation the physician must not hear anything that is likely to disturb his work, but the low groan has simply borne in upon him. The sleeping mother often is deaf to considerable noise, but wakes up immediately when her child draws a deeper breath than usual. Millers and factory hands, travelers, etc., do not hear the pounding of their various habitual environmental noises, but they perceive the slightest call, and everybody observes the considerable murmur of the world, the sum of all distant noises, only in the silence of the night that misses it.

Illusions of *direction* of sound are very common. It is said that even animals are subject to them; and everybody knows how few human beings

can distinguish the source and direction of street music, a rolling wagon, or a ringing bell. . . .

All these enumerated circumstances must show how very uncertain all acoustic perceptions are, and how little they may be trusted if they are not carefully tested under similar conditions, and if — what is most important — they are not isolated. We are here led back to the old principle that every observation is not proof, but means of proof, and that it may be trusted only when it is confirmed by many parallel actions which are really consistent. . . .

4. *The Sense of Taste.* (a) *General Considerations.* The sense of taste is rarely of legal importance, but when it does come into importance it is regularly very significant because it involves, in the main, problems of poisoning. . . . At the same time, it is necessary, when tests are made, to depend upon general, and rarely constant impressions, since very few people mean the same thing by, stinging, prickly, metallic, and burning tastes, even though the ordinary terms sweet, sour, bitter, and salty, may be accepted as approximately constant. . . .

(b) *Illusions of Taste.* Illusions of taste are of importance for us only in cases of poisoning in which we want the assistance of the victim, or desire to taste the poison in question in order to determine its nature. That taste and odor are particularly difficult to get any unanimity about is an old story, and it follows that it is still more difficult clearly to understand possible illusions of these senses. . . . Intermittent fevers tend to cause, when there is no attack and the patient feels comparatively well, a large number of metallic, particularly coppery, tastes. If this is true, it may lead to unjustified suspicions of poisoning, inasmuch as the phenomena of intermittent fever are so various that they cannot all be identified.

Imagination makes considerable difference here. . . . The eye has especial influence, and the story cited and denied a hundred times, that in the dark, red wine and white wine, chicken and goose, cannot be distinguished, that the going out of a cigar is not noted, etc., is true. With your eyes closed it may be possible to eat an onion instead of an apple.

Prior tastes may cause significant gustatory illusions. Hence, when assertions are made about tastes, it is always necessary to inquire at the outset what had been eaten or drunk before. . . . All in all, it must not be forgotten that the reliability of the sense of taste cannot be estimated too low. The illusions are greatest especially when a thing has been tasted with a preconceived notion of its taste.

5. *The Sense of Smell.* (a) *General Considerations.* The sense of smell would be of great importance for legal consideration if it could get the study it deserves. It may be said that many men have more acute olfactory powers than they know, and that they may learn more by means of them than by means of the other senses. The sense of smell has little especial practical importance. It only serves to supply a great many people with occasional disagreeable impressions, and what men fail to find especially necessary they do not easily make use of. The utility of smell would be great because it is accurate, and hence powerful in its associative quality. But it is rarely attended to; even when the associations are awakened, they are not ascribed to the sense of smell, but are said to be accidental. . . .

(b) *Illusions of Smell.* Olfactory illusions are very rare in healthy people and are hence of small importance. They are frequent among the mentally

diseased. . . . The largest number of olfactory illusions are due to imagination. Carpenter's frequently cited case of the officials who smelled a corpse while a coffin was being dug up, until finally the coffin was found to be empty, has many fellows. . . . Statements by witnesses concerning perceptions of odor are valueless unless otherwise confirmed.

6. *The Sense of Touch.* (a) *General Considerations.* I combine, for the sake of simplicity, the senses of location, pressure, temperature, etc., under the general expression: sense of touch. The problem this sense raises is no light one because many witnesses tell of perceptions made in the dark or when they were otherwise unable to see, and because much is perceived by means of this sense in assaults, wounds, and other contacts. In most cases such witnesses have been unable to regard the touched parts of their bodies, so that we have to depend upon this touch sense alone. Full certainty is possible only when sight and touch have worked together and rectified one another.

The deceptive possibilities in touch are seen in the well-known mistakes to which one is subjected in blind touching. At the same time practice leads to considerable accuracy in touch, and on many occasions the sense is trusted more than sight — *e.g.* whenever we test the delicacy of an object with our fingertips. The fineness of paper, leather, the smoothness of a surface, the presence of points, are always tested with the fingers. . . . Whoever has to depend much on the sense of touch increases its field of perception, as we know from the delicacy of the sense in blind people. The statements of the blind concerning their contact sensations may be believed even when they seem improbable; there are blind persons who may feel the very color of fabrics, because the various pigments and their medium give a different surface quality to the cloth they color. In another direction, again, it is the deaf who have especial power. So, we are assured by Abercrombie that in his medical practice he had frequently observed how deaf people will perceive the roll of an approaching wagon, or the approach of a person, long before people with good hearing do so.

It is important to know what a *wounded man* and his enemy feel in the first instant of the crime and in what degree their testimonies are reliable. First of all, we have to thank the excellent observations of Weber, for the knowledge that we find it very difficult to discover with closed eyes the angle made by a dagger thrust against the body. It is equally difficult to determine the direction from which a push or blow has come. On the other hand, we can tell very accurately in what direction a handful of hair is pulled. With regard to the time it takes to feel contact and *pain*, it is asserted that a short powerful blow on a corn is felt immediately, but the pain of it one to two seconds later. It may be that corns have an especial constitution, but otherwise the time assigned before feeling pain is far too long. . . . We can only say that the perception of a peripheral pain occurs an observable period after the shock, *i.e.* about a third of a second later than its cause.

The sensation of a *stab* is often identified as contact with a hot object, and it is further asserted that the wounded person feels close to the pain which accompanies the push or the cut, the cold of the blade, and its presence in the depths of his body. So far as I have been able to learn from wounded people, these assertions are not confirmed. Setting aside individuals who exaggerate intentionally and want to make themselves interesting or to indicate

considerable damage, all answers point to the fact that stabs, shots, and blows are sensed as pushes. In addition, the rising of the blood is felt almost immediately, but nothing else; pain comes much later. . . .

(b) *Illusions of Touch.* The high standing of the sense of touch which makes it in certain directions even the organ of control of the sense of sight, is well known, and Condillac's historic attempt to derive all the senses from this one is still plausible. If what is seen is to be seen accurately, there is automatic resort to the confirmatory aid of the sense of touch, which apprehends what the eye has missed. . . .

But important and reliable as the sense of touch is, it is nevertheless not to be trusted when it is the sole instrument of perception. We must never depend on the testimony of a witness based entirely on perceptions by touch, and the statements of a wounded person concerning the time, manner, etc., of his wound are unreliable unless he has also seen what he has felt. We know that most knife and bullet wounds, *i.e.* the most dangerous ones, are felt, in the first instance, as not very powerful blows. Blows on the extremities are not felt as such, but rather as pain, and blows on the head are regularly estimated in terms of pain, and falsely with regard to their strength. If they were powerful enough to cause unconsciousness, they are said to have been very massive, but if they have not had that effect, they will be described by the most honest of witnesses as much more powerful than they actually were. Concerning the location of a wound in the back, in the side, even in the upper arm, the wounded person can give only general indications, and if he correctly indicates the seat of the wound, he has learned it later but did not know it when it occurred. According to Helmholtz, practically all abdominal sensations are attributed to the anterior abdominal wall. Now such matters become of importance when an individual has suffered several wounds in a brawl or an assault and wants to say certainly that he got wound A when X appeared, wound B when Y struck at him, etc. These assertions are almost all false because the victim is likely to identify the pain of the moment of receiving the wound with its later painfulness. If, for example, an individual has received a rather long but shallow knife wound and a deep stab in the back, the first will cause him a very considerable burning sensation, the latter only the feeling of a heavy blow. Later on, at the examination, the cut has healed and is no longer painful; the dangerous stab which may have reached the lung, causes pain and great difficulty in breathing, so that the wounded man assigns the incidence of the stab to the painful sensation of the cut, and conversely. . . .

There are many examples of the fact that *uncontrolled touch* leads to false perceptions. Modern psychophysics has pointed to a large group of false perceptions due to illusions of pressure, stabs, or other contact with the skin. The best known and criminalistically most important experiments, are those with open compasses. Pressed on the less sensitive parts of the body, the back, the thigh, etc., they are always felt as one, although they are quite far apart. . . . Similarly, mere touch cannot give us proper control over the organs of the body. . . . This shows that the tactile sense is not in a very high stage of development, since it needs, when unhelped by long experience, the assistance of the sense of sight. Perceptions through touch alone, therefore, are of small importance. . . . This is shown by a youthful game we used to play. It consisted of stretching certain harmless

things under the table — a soft piece of dough, a peeled, damp potato stuck on a bit of wood, a wet glove filled with sand, the spirally cut rind of a beet, etc. Whoever got one of these objects without seeing it thought he was holding some disgusting thing and threw it away. His sense of touch could present only the dampness, the coldness, and the motion, *i.e.* the coarsest traits of reptilian life, and the imagination built these up into a reptile and caused the consequent action. Foolish as this game seems, it is criminalistically instructive. It indicates what unbelievable illusions the sense of touch is capable of causing. To this inadequacy of the tactile imagination may be added a sort of transferability of certain touch sensations. For example, if ants are busy near my seat, I immediately feel that ants are running about under my clothes, and if I see a wound or hear it described, I often feel pain in the analogous place on my own body. That this may lead to considerable illusion in excitable witnesses is obvious.

II. *Perception and Conception.* What lawyers have to consider in the transition from purely sensory impressions to intellectual conceptions of these impressions, is the possibility of later reproducing any observed object or event. Many so-called scientific distinctions have, under the impulse of scientific psychology, lost their status. Modern psychology does not see sharply drawn boundaries between perception and memory, and suggests that the proper solution of the problem of perception is the solution of the problem of knowledge.

With regard to the relation of consciousness to perception we will make the distinctions made by Fischer. There are two spheres or regions of consciousness: the region of sensation, and of external perception. The former involves the inner structure of the organism; the latter passes from the organism into the objective world. Consciousness has a sphere of action in which it deals with the external world by means of the motor nerves and muscles, and a sphere of perception which is the business of the senses. External perception involves three principal functions: apprehension, differentiation, and combination. Perception in this narrower sense of the term is the simple sensory conscious apprehension of some present object stimulating our eyes. We discover by means of it what the object is, its relation to ourselves and other things, its distance from us, its name, etc.

What succeeds this apprehension is the most important thing for us lawyers, *i.e.* *recognition*. Recognition indicates only that an object has sufficiently impressed a mind to keep it known and identifiable. It is indifferent what the nature of the recognized object is. According to Hume the object may be an enduring thing ("noninterrupted and nondependent on mind"), or it may be identical with perception itself. In the latter case the perception is considered as a logical judgment like the judgment: "It is raining," or the feeling that "it is raining," and there recognition is only the recognition of a perception. Now judgments of this sort are what we get from witnesses, and what we have to examine and evaluate. . . .

The essential mistakes are classified by Schiel under two headings. Mistakes in observation are positive or negative, wrong observation or oversight. The latter occurs largely through preconceived opinions. The opponents of Copernicus concluded that the earth did not move because otherwise a stone dropped from the top of a tower would reach the ground a



little to the west. If the adherents of Copernicus had made the experiment, they would have discovered that the stone does fall as the theory requires. Similar oversights occur in the lawyer's work hundreds of times. We are impressed with exceptions that are made by others or by ourselves, and give up some already tried approach without actually testing the truth of the exception which challenges it. I have frequently, while at work, thought of the story of some one of the Georges, who did not like scholars and set the following problem to a number of philosophers and physicists: "When I put a ten-pound stone into a hundred-pound barrel of water the whole weighs a hundred and ten pounds, but when I put a live fish of ten pounds into the barrel the whole still weighs only a hundred pounds?" Each one of the scholars had his own convincing explanation, until finally the king asked one of the footmen, who said that he would like to see the experiment tried before he made up his mind. I remember a case in which a peasant was accused of having committed arson for the sake of the insurance. He asserted that he had gone into a room with a candle and that a long spider's web which was hanging down had caught fire from it accidentally and had inflamed the straw which hung from the roof. So the catastrophe had occurred. Only in the second examination did it occur to anybody to ask whether spider's web can burn at all, and the first experiment showed that that was impossible. Most experiences of this kind indicate that in recognizing events we must proceed slowly, without leaping, and that we may construct our notions only on the basis of knowledge we already possess. Saint Thomas says, "Omnis cognitio fit secundum similitudinem cogniti in cognoscente."

If this bit of wisdom were kept in mind in the examination of witnesses, it would be an easier and simpler task than usual. . . . It naturally is not necessary to ask whether a narrator has ever seen the things he speaks of, nor to convince one's self in examination that the person in question knows accurately what he is talking about. At the same time, the examiner ought to be clear on the matter and know what attitude to take if he is going to deal intelligibly with the other. I might say that all of us, educated and uneducated, have apprehended and remember definite and distinct images of all things we have seen, heard, or learned from descriptions. When we get new information we simply attach the new image to the old, or extinguish a part of the old and put the new in its place, or we retain only a more or less vigorous breath of the old with the new.

The fact that a good deal of what is said is incorrect and yet not consciously untrue, depends upon the existence of these images and their association with the new material. The speaker and the auditor have different sets of images; the first relates the new material differently from a second, and so of course they cannot agree. . . .

The great trouble consists in once for all discovering *what memory images were present before the witness perceived* the event in question. The former have a great influence upon the perception of the latter. . . .

No one can determine the boundary where the sense activity ends and the intellectual begins. Somebody has noted the interesting fact that not one of twenty students in an Egyptian museum knew why the hands of the figures of Egyptian wall pictures gave the impression of being incorrect — nobody had observed the fact that all the figures had two right hands. I

once paid a great deal of attention to card-sharping tricks, and as I acquired them, either of myself or from practiced gamblers, I demonstrated them to the young criminalists. For a long time I refused to believe what an old Greek told me: "The more foolish and obvious a trick is, the more certain it is; people never see anything." The man was right. When I told my pupils expressly, "Now I am cheating," I was able to make with safety a false coup, a false deal, etc. Nobody saw it. If only one has half a notion of directing the eyes to some other thing, a card may be laid on the lap, thrust into the sleeve, taken from the pocket, and God knows what else. Now who can say in such a case whether the sensory glance or the intellectual apprehension was unskillful or unpracticed? According to some authorities the chief source of error is the senses, but whether something must not be attributed to that mysterious, inexplicable moment in which sensory perception becomes intellectual perception, nobody can say.

My favorite demonstration of how surprisingly little people perceive is quite simple. I set a tray with a bottle of water and several glasses on the table, call express attention to what is about to occur, and pour a little water from the bottle into the glass. Then the stuff is taken away and the astonishing question asked what have I done? All the spectators reply immediately: you have poured water into a glass. Then I ask further with what hand did I do it? How many glasses were there? Where was the glass into which I poured the water? How much did I pour? How much water was there in the glass? Did I really pour or just pretend to? How full was the bottle? Was it certainly water and not, perhaps, wine? Was it not red wine? What did I do with my hand after pouring the water? How did I look when I did it? Did you not really see that I shut my eyes? Did you not really see that I stuck my tongue out? Was I pouring the water while I did it? Or before, or after? Did I wear a ring on my hand? Was my cuff visible? What was the position of my fingers while I held the glass? These questions may be multiplied. And it is as astonishing as amusing to see how little correctness there is in the answers, and how people quarrel about the answers, and what extraordinary things they say. Yet what do we require of witnesses who have to describe much more complicated matters to which their attention had not been previously called, and who have to make their answers, not immediately, but much later; and who, moreover, may, in the presence of the fact, have been overcome by fear, astonishment, terror, etc. . . . At a trial a circumstantial and accurate attempt was made to discover whether it was a significant alteration to bite a man's ear off. The court, the physician, the witnesses, etc., dealt with the question of altering, until finally the wounded man himself showed what was meant, because his other ear had been bitten off many years before, — but then nobody had noticed that mutilated ear.

In order to know what another person has seen and apprehended we must first of all know how he thinks, and that is impossible. If we know, at least approximately, the kind of mental process of a person who is as close as possible to us in sex, age, culture, position, experience, etc., we lose this knowledge with every step that leads to differences. We know well what great influence is exercised by the multiplicity of talents, superpositions, knowledge, and apprehensions. . . . Exner calls attention to the fact that it is in this direction especially, that the "dark perceptions" play a great

rôle. "A great part of our intelligence depends on the ability of these 'dark perceptions' to rise without requiring further attention, into the field of consciousness. There are people, *e.g.*, who recognize birds in their flight without knowing clearly what the characteristic flight for any definite bird may be. Others, still more intelligent, know at what intervals the flyers beat their wings, for they can imitate them with their hands. And when the intelligence is still greater, it makes possible a correct description in words." Suppose that in some important criminal case several people, of different degrees of education and intelligence, have made observations. We suppose that they all want to tell the truth, and we also suppose that they have observed and apprehended their objects correctly. Their testimonies, nevertheless, will be very different. With the degree of intelligence rises the degree of effect of the "dark subconscious perceptions." They give more definite presentation and explanation of the testimony; they turn bare assertions into well-ordered perceptions and real representations. But we generally make the mistake of ascribing the variety of evidence to varying views, or to dishonesty.

III. *Imagination.* (a) *General Considerations.* The things witnesses tell us have formerly existed in their imaginations, and the *how* of this existence determines in a large degree the *quale* of what they offer us. Hence, the nature of imagination must be of interest to us, and the more so, as we need not concern ourselves with the relation between being and imagination. . . . When we speak with a witness, however, we rarely know the conditions under which he has obtained his images, and we learn them only from him. Now it happens that the description offered by the witness adds another image, *i.e.* our own image of the matter, and this, and that of the witness, have to be placed in specific relation to each other. Out of the individual images of all concerned an image should be provided which implies the image of the represented event. Images can be compared only with images, or images are only pictures of images.

The difficulty of this transmutation lies fundamentally in the nature of representation. Representation can never be identical with its object. Helmholtz has made this most clear: "Our visions and representations are effects; objects seen and represented have worked on our nervous system and on our consciousness. The nature of each effect depends necessarily upon the nature of its cause, and the nature of the individual upon whom the cause was at work. To demand an image which should absolutely reproduce its object and therefore be absolutely true, would be to demand an effect which should be absolutely independent of the nature of that object on which the effect is caused. And this is an obvious contradiction." What the difference between image and object consists of, whether it is merely formal or material, how much it matters, has not yet been scientifically proved and may never be so. We have to assume only that the validity of this distinction is universally known, and that everybody possesses an innate corrective with which he assigns proper place to image and object, *i.e.* he knows approximately the distinction between them. The difficulty lies in the fact that not all people possess an identical standard, and that upon the creation of the latter practically all human qualities exert an influence.

We get this situation in miniature each time we hear of a crime, however

barren the news may be, — no more than a telegraphic word. The event must naturally have some degree of importance, because, if I hear merely that a silver watch has been stolen, I do not try to imagine that situation. If, however, I hear that near a hostelry in X, a peasant was robbed by two traveling apprentices, I immediately get an image which contains not only the unknown region, but also the event of the robbery, and even perhaps the faces of those concerned. It does not much matter that this image is completely false in practically every detail, because in the greater number of cases it is corrected. The real danger lies in the fact that this correction is frequently so bad and often fails altogether and that, in consequence, the first image again breaks through and remains the most vigorous.

(b) *The Subconscious.* It is my opinion that the importance of unconscious operations in legal procedure is undervalued. We could establish much that is significant concerning an individual whose unconscious doings we knew. For, as a rule, we perform unconsciously things that are deeply habitual, therefore, first of all what everybody does — walk, greet your neighbor, dodge, eat, etc.; secondly, we perform unconsciously things to which we have become accustomed in accordance with our especial characters. When, during my work, I rise, get a glass of water, drink it, and set the glass aside again, without having the slightest suspicion of having done so, I must agree that this was possible only in my well-known residence and environment, and that it was possible to nobody else, not so familiar. The coachman, perhaps, puts the horses into the stable, rubs them down, etc., and thinks of something else while doing so. He has performed unconsciously what another could not. . . . Such complicated processes go down to the simplest operations. Aubert indicates, for example, that in riding a horse at gallop you jump and only later observe whether you have jumped to the right or the left. The brain does not merely receive impressions unconsciously, it registers them without the coöperation of consciousness, works them over unconsciously, awakens the latent residua without the help of consciousness, and reacts like an organ endowed with organic life toward the inner stimuli which it receives from other parts of the body. This also influences the activity of the imagination.

(c) *Hallucinations and Illusions.* The limits between illusions of sense and hallucinations and illusions proper can in no sense be definitely determined inasmuch as any phenomena of the one may be applied to the other, and vice versa. Most safely it may be held that the cause of illusions of sense lies in the nature of sense organs, while the hallucinations and illusions are due to the activity of the brain. The latter are much more likely to fall within the scope of the physician than sense illusions, but at the same time many of them have to be determined upon by the lawyer, inasmuch as they really occur to normal people or to such whose disease is just beginning so that the physician cannot yet reach it. Nevertheless, whenever the lawyer finds himself face to face with a supposed illusion or hallucination he must absolutely call in the physician. . . .

Hallucination and illusion have been distinguished by the fact that hallucination implies no external object whatever, while in illusion objects are mistaken and misinterpreted. When one thing is taken for another, *e.g.* an oven for a man, the rustle of the wind for a human song, we have illusion. When no objective existence is perceived, *e.g.* when a man is seen to enter,

a voice is heard, a touch is felt, although nothing whatever has happened, we have hallucination. Illusion is a partial, hallucination is a complete, supplementation of an external object. Most human beings are from time to time subject to illusions; indeed, nobody is always sober and intelligent in all his perceptions and convictions. The luminous center of our intelligent perceptions is wrapped in a cloudy half-shadow of illusion. Sully aims to distinguish the essential nature of illusion from that characterized by ordinary language. Illusion, according to him, is often used to denote mistakes which do not imply untrue perceptions. We say a man has an illusion who thinks too much of himself, or when he tells stories otherwise than as they happen because of a weakness of memory. Illusion is every form of mistake which substitutes any direct self-evident or intuitive knowledge, whether as sense perception or as any other form.

Nowadays the cause of hallucination and illusion is sought in the over-excitement of the cerebro-spinal system. As this stimulation may be very various in its intensity and significance, from the momentary rush of blood to complete lunacy, so hallucinations and illusions may be insignificant or signs of very serious mental disturbances. When we seek the form of these phenomena, we find that all those psychical events belong to it which have not been *purposely* performed or lied about. When Brutus sees Cæsar's ghost; Macbeth, Banquo's ghost; Nicholas, his son; these are distinctly hallucinations or illusions of the same kind as those "really and truly" seen by our nurses. The stories of such people have no significance for the criminalist, but if a person has seen an entering thief, an escaping murderer, a bloody corpse, or some similar object of criminal law, and these are hallucinations like classical ghosts, then are we likely to be much deceived. Hoppe enumerates hallucinations of apparently sound (?) people. 1. A priest, tired by mental exertion, saw, while he was writing, a boy's head look over his shoulder. If he turned toward it, it disappeared; if he resumed writing, it reappeared. 2. "A thoroughly intelligent" man always was seeing a skeleton. 3. Pascal, after a heavy blow, saw a fiery abyss into which he was afraid he would fall. 4. A man who had seen an enormous fire, for a long time afterward saw flames continually. 5. Numerous cases in which criminals, especially murderers, always had their victims before their eyes. 6. Justus Möser saw well-known flowers and geometrical figures very distinctly. 7. Bonnet knows a "healthy" man who saw people, birds, etc., with open eyes. 8. A man got a wound in his left ear and for weeks afterward saw a cat. 9. A woman eighty-eight years old often saw everything covered with flowers, — otherwise she was quite "well."

A part of these stories seems considerably fictitious, a part applies to indubitable pathological cases, and certain of them are confirmed elsewhere. That murderers, particularly women murderers of children, often see their victims is well known to us criminalists. . . . Cases are told of in which prisoners who were constipated had all kinds of visual and auditory hallucinations and appeared, *e.g.*, to hear in the rustling of their straw, all sorts of words. That isolation predisposes people to such things is as well known as the fact that constipation causes a rush of blood to the head, and hence, nervous excitement. The well-known stories of robbers which are often told us by prisoners are not always the fruit of malicious invention. Probably a not insignificant portion are the result of hallucination. Hoppe

when the mistake, at least in its main characteristic, is due to the aural mechanism. The latter is intended when there is a mistake in the comprehension of a word or of a sentence. In this case the ear has acted efficiently, but the mind did not know how to handle what had been heard and so supplements it by something else in connection with matter more or less senseless. Hence, misunderstandings are so frequent with foreign words. Compare the singing of immigrant school children, "My can't three teas of tea" for "My country 'tis of thee," or "Pas de lieu Rhone que nous" with "Paddle your own canoe."

The question of misunderstandings, their development and solution, is of great importance legally, since not only witnesses but clerks and secretaries are subject to them. If they are undiscovered they lead to dangerous mistakes, and their discovery causes great trouble in getting at the correct solution. . . . The mistakes of the secretaries may in any event be reduced to a minimum if all dictations are read immediately, and not by the secretary but by the examining judge himself. If the writer reads them he makes the same mistakes, and only a very intelligent witness will perceive them and call attention to them. Unless it so happens the mistake remains. I cite a few of the errors that I have observed. From a protocol with the suspect: "On the twelfth of the month I left Marie Tomizil" (instead of, "my domicile"). Instead of "irrelevant," — "her elephant." Very often words are written in, which the dictator only says by the way; *e.g.* "come in," "go on," "hurry up," "look out," etc. If such words get into the text at all, it is difficult to puzzle out how they got in. How easily and frequently people misunderstand is shown by the oath they take. Hardly a day passes on which at least one witness does not say some absolute nonsense while repeating it.

(2) *Other Misunderstandings.* The quantitative method of modern psychophysics may lead to an exact experimental determination of such false conceptions and misunderstandings as those indicated above, but it is still too young to have any practical value. It is vitiated by the fact that it requires artificial conditions and that the results have reference to artificial conditions. Wundt has tried to simplify apparatus, and to bring experiment into connection with real life. But there is still a far cry from the psychological laboratory to the business of life. With regard to misunderstandings the case is certainly so. Most occur when we do not hear distinctly what another person is saying and supplement it with our own notions. Here the misunderstanding is in no sense linguistic, for words do not receive a false meaning. The misunderstanding lies in the failure to comprehend the sense of what we have heard, and the substitution of incorrect interpretations. . . .

How frequently and hastily we build things out is shown by a simple but psychologically important game. Ask anybody at hand how the four and the six look on his watch, and let him draw it. Everybody calmly draws, IV and VI, but if you look at your watch you will find that the four looks so, IIII, and that there is no six. This raises the involuntary question, "Now what do we see when we look at the watch if we do not see the figures?" and the further question, "Do we make such beautiful mistakes with all things?"

I assert that only that has been reliably seen which has been drawn. My

father asked my drawing teacher to teach me not to draw but to observe. And my teacher, instead of giving me copies, followed the instruction by giving me first one domino, then two, then three, one upon the other, then a match box, a book, a candlestick, etc. And even to-day, I know accurately only those objects in the household which I had drawn. Yet frequently we demand of our witnesses minutely accurate descriptions of things they had seen only once, and hastily at that.

And even if the thing has been seen frequently, local and temporal problems may make great difficulties. . . . For example, if you have traveled numerous times on the train from A to B, and for once you start your journey from C, which is beyond A, the familiar stretch from A to B looks quite different and may even become unrecognizable. The estimation of time may exercise considerable influence on such and similar local effects. . . . One needs only to observe how quickly witnesses tend to identify objects presented for identification: *e.g.* knives, letters, purses, etc. To receive for identification and to say yes, is often the work of an instant. The witness argues, quite unconsciously, in this fashion: "I have given the judge only one clew (perhaps different from the one in question), now here again is a clew, hence, it must be the one I gave him." That the matter may have changed, that there has been some confusion, that perhaps other witnesses have given similar things, is not at all considered. Here again we have to beware of confusing of identities with agreements.

Finally, we must consider fatigue and other conditions of excitation. A witness who has been subjected to a prolonged and fatiguing examination falls into a similar condition and knows at the end much less than at the beginning. Finally, he altogether misunderstands the questions put to him. The situation becomes still worse when the defendant has been so subjected to examination, and becomes involved, because of fatigue, etc., in the famous "contradictions." If "convincing contradictions" occur at the end of a long examination of a witness or a defendant, it is well to find out how long the examination took. If it took much time the contradictions mean little.

The same phenomena of fatigue may even lead to suspicion of negligence. Doctors, trained nurses, nursery maids, young mothers, etc., who became guilty of "negligence" of invalids and children have, in many instances, merely "misunderstood" because of great fatigue. It is for this reason that the numerous sad cases occur in which machine tenders, switch tenders, etc., are punished for negligence. If a man of this class, year after year, serves twenty-three hours, then rests seven hours, then serves twenty-three hours again, etc., he is inevitably overtaken by fatigue and nervous relaxation in which signals, warnings, calls, etc., are simply misunderstood.

236. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. p.133.) . . . I. *Attention as an Element in Perception*. First, we shall attempt to describe psychologically in what attention consists, and this cannot be done in a few words. Attention is not a separate faculty of the mind which acts on the other psychical phenomena, but is the name given to a certain state of consciousness as a whole, and that state is one of monoidism. "The normal condition," says Ribot, "is plurality of states of consciousness or polyideism. Attention is the momentary inhibition, to the exclusive benefit of a single

state, of this perpetual progression; it is a monoideism." . . . If you try to analyze attention further you get the following factors given by Wundt. Attention contains three essential constituents; an increased clearness of ideas; muscle sensations which generally belong to the same modality as the ideas, and feelings which accompany and precede the ideational change. At the same time the concept of attention proper has no reference to the first of these processes, but only to the last two. Apperception, therefore, denotes the objective change set up in ideational content, attention the subjective sensations and feelings which accompany this change or prepare the way for it. Both processes belong together as parts of a single psychological event. Attention in the wider sense is not — and this is the important point — a special activity, existing alongside of its three constituent factors, something not to be sensed or felt, but itself productive of sensation and feelings. No! in terms of our own psychological analysis, at least, it is simply the name of the complex process which includes those three constituents. . . .

The fundamental property of the nervous system consists in the transformation of a primitive excitation into a movement. This is reflex action, the type of nervous activity. But we also know that certain excitations may impede, slacken, or suppress a movement, *e.g.* suppression of the movements of the heart through irritation of the pneumogastric nerve. This power of inhibition exists also in the brain, just as we can begin, continue, or increase a movement, we can also suppress, interrupt, or diminish it; every act of volition, whether impulsive or inhibitory, acts only upon muscles and through muscles. The mechanism of attention is motor, and in all cases of attention there must necessarily be a play of muscular elements, real or nascent movements, upon which the power of inhibition acts. Spontaneous attention is natural and devoid of effort, and is produced by some anterior emotional state; voluntary attention is artificial, caused by the struggle for existence and under pressure of necessity and by education. . . .

That we attend to what we are interested in is of course so universally admitted as to be almost a truism; we only notice such items, and without selective interest our experience would be a chaos. It follows from this that *attention will vary* with the number and nature of the *interests* which observers possess. "We dissociate," says Professor James, "the elements of originally vague totals by attending to them or noticing them alternately, of course. But what determines which elements we shall attend to first? There are two immediate and obvious answers: *first*, our practical or instinctive interests, and *secondly*, our æsthetic interests. . . . A creature which has few instinctive impulses or interests, practical or æsthetic, will dissociate few characters, and will at best have limited reasoning powers, whilst one whose interests are very varied will reason much better." Now it is often laid down as the mark of a false witness that he declines to commit himself to details on which he might be contradicted, falling back on such excuses as that he did not notice, or he does not recollect, etc., and it is not always easy to decide whether such pleas are genuine or not. The details on which he is questioned are really matters which, assuming he were a genuine witness, he might or might not be expected to have noticed according to the interests which he naturally possesses; and it by no means follows that because one witness has observed certain details, others, if they were really



present, could have done the same, *i.e.* unless all men have the same interests. It is difficult for the judge and the advocate who are considering the matter after the event, when it has become a subject of special interest to them, to realize that before the existence of the case there was no such cause to excite the interest of the witness, and it is also difficult for them, equipped as they are with certain interests of their own, to place themselves mentally in the position of a man differently equipped, and estimate how much can reasonably be expected from him in the way of attention. . . .

Among the other determinants of attention are the strength and persistence of an impression, its suddenness, novelty, and generally its disturbing character in relation to the preëxisting state of mind. This is really again the volume and intensity of the feeling it excites, which may be bound up with the idea of past impressions and so revived along with them. . . .

*The Effects of Attention.* . . . It shortens reaction time and accelerates perception. . . . It is doubtful whether it actually augments the intensity of sensations, but it increases the clearness of all that we perceive or conceive, and this it does in several ways. It chooses the appropriate states and maintains them, by inhibition, within our consciousness, and so secures a certain persistence in the sensation or idea; it thus leads to its retention and so secures its reproduction (as described under the head of Memory).

Again, the concentration of attention upon some objects diminishes the intensity of presentation of others in the same field, whether the concentration be voluntary or non-voluntary; for our power of attention is limited, and if, therefore, attention is drawn off by new presentations, it must be at the expense of the old ones; if it is kept concentrated on old ones, new ones cannot gain an entrance into consciousness. It is this redistribution of attention which explains its influence on will.<sup>1</sup> . . . It is not uncommon to hear it given as a reason for discrediting a statement, that the witness could not possibly have seen or heard all that he professed to have been aware of, his attention being taken up at the time by this or that event, and it is a frequent saying that one cannot attend to two things at the same time. I therefore propose to say something as to the powers of attention which the ordinary individual possesses :

To understand this we must distinguish between consciousness and attention. There are various grades of consciousness, down to actual unconsciousness, but we only call it attention when the psychical content is clearly grasped and the mental state is accompanied by a special feeling; other psychical contents are merely apprehended, they are included in the field of consciousness but attention is not concentrated upon them. These latter contents come and go within the field of consciousness but do not advance to the fixation point at which we have attention. . . . Speaking roughly, therefore, a man can be *aware* of three or four times as much as he can actually *attend to*, and it is untrue that he can only attend to one impression or one idea at a time. . . .

II. *Relative Variance of Powers of Perception.* A second condition on which depends the capacity of a party to give a faithful account of things is, according to Best, "his powers, either natural or acquired, of perception and observation." . . . We rather wish to insist on the point that though

<sup>1</sup> J. Ward, Art. "Psychology," *Encyclopædia Britannica*, 9th ed., Vol. XX, pp. 42 *et seq.*; *Animal Magnetism*, p. 319.

each individual may be sure of his own sense perceptions, he cannot, or should not, be equally sure that others necessarily perceive as he does. Yet the attitude of the ordinary man is to accept the statements of others as to their sense perceptions only so far as what they say agrees with his own experience. It is a natural attitude, it is true; but we think it would be well to recollect the assumption on which it is founded, and to be sometimes less skeptical as to the possibility of what others say they have experienced. . . . Some individuals possess powers beyond the average. . . . Professor James has quoted a number of instances of hyperæsthesia of the senses,<sup>1</sup> in one of which a person was able to pick out a blank card from a pack of similar ones merely by its weight, in another a man was actually able to read the image of a page of a book reflected on the operator's cornea and to discriminate with the naked eye details in a microscopic preparation. . . .

Lastly, reference must be made to unusual powers which blind people sometimes appear to possess. Thus Mr. W. H. Levy stated that he seemed to perceive objects through the skin of his face and to have the impressions immediately transmitted to the brain. None of the five senses had anything to do with this power, and he regarded it as an unrecognized sense which he called "facial perception." By it he could distinguish shops from private houses, point out doors and windows whether they were shut or open, estimate the height of a fence and discover irregularities in height and projections and indentations in walls. Helen Keller, who lost her sight and hearing in early infancy, can recognize persons by the mere contact of their hands. . . .

We think that it has been sufficiently shown that under certain circumstances unusual powers of sensation are displayed, and that we have no grounds for limiting the possibility of their display to those particular circumstances. When therefore it is asserted on oath by an apparently respectable witness that he saw or heard or otherwise experienced something involving a display of power of the sense concerned beyond what the magistrate believes to be possible to himself or mankind in general, his statement should not be forthwith discredited as impossible. "When a supposed fact," says Best ("Evidence," § 24), "is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible." But the laws of nature are not fixed and immutable, and such an assumption is absurd. . . .

It is not improbable that some readers may regard it as extravagant or foolish to even take into consideration such matters as hyperæsthesia, hypnotism, thought transference and the like in connection with legal evidence and the decisions of the law courts. If so, we must protest against such an attitude.<sup>2</sup> . . . Sir James Stephen no doubt has advocated the method of deciding truth and falsehood according to the views held by the bulk of the community, and has on this ground justified convictions for witchcraft by juries in the past, and this is a very parallel instance. He argues that it was the duty of a jury to refuse to consider what were then the merely fanciful speculations which denied the existence of witchcraft, and in consequence of this many innocent persons were convicted, apparently

<sup>1</sup> James, *Psychology*, Vol. II, pp. 609-611. See also his "Essay on Psychical Research," in *The Will to Believe and Other Essays*, pp. 229 *et seq.*

rightly, in his opinion. In just the same way now, by a refusal to examine into the question of the existence of the unusual phenomena to which we have drawn attention, because the bulk of the community, without serious inquiry, decline to believe in them, true statements may be, and doubtless sometimes are, disbelieved and injustice is done. We are now at the stage in which those who assert the existence of such phenomena are held by the bulk of the community to indulge in fanciful speculations; but before we determine to adopt this view we may remember that in the case of witchcraft such persons proved to be right; and may therefore pause to consider whether it will not be wiser to first study what the experts have said on the subject.

237. WM. C. ROBINSON. *Forensic Oratory; a Manual for Advocates*. (1893. p. 184.) *Cross-examination; Exposure of Incorrectness in the Testimony of a Credible Witness; Incorrectness Arising from Stating Inferences as Facts*. Witnesses, like all other men, are liable to draw erroneous inferences from what they see and hear, and, having drawn them, to substitute them for the facts from which they were derived. Much of the evidence introduced in court, especially concerning promises, admissions, threats, and other spoken words, is of this character, the witness describing, not the language or events which operated on his senses, but the conclusions which he formed from them in his own mind. If undisputed, these conclusions are accepted by the jury as the facts themselves, and their judgment in the premises thus merely reflects that of the witness. Here, therefore, is a source of error which the cross-examiner should never overlook. His method of combating it is by refusing to receive the inferences of the witness, and insisting on the full disclosure of the facts on which the inference is based. . . .

*Incorrectness Arising from Mistakes of Fact*. Misrepresentations which arise out of mistakes as to the facts themselves are frequently discovered in the evidence. Men often think they see what they do not see, and still more often misinterpret what they hear. The physical senses, however accurate and reliable in themselves, depend for the correctness of their impressions so entirely on surrounding circumstances, that without considering these the truth of those impressions cannot be determined. Whenever, therefore, the direct examination has revealed important facts resting upon the sensations of the witness, the condition under which those sensations were experienced demand the careful scrutiny of the cross-examiner. Thus, where the witness gained his information through the sense of sight, the degree of light, the distance and position of the object, the characteristics which distinguish it from other classes of objects and from other objects of the same class, its resemblance to surrounding objects, the familiarity of the witness with it, the extent and duration of his attention to it, and many other matters bearing a similar relation to the act of vision, are necessary subjects of inquiry. The operation of the other senses demands the same kind of investigation. . . .

*Want of Attention*. The degree of intellectual attention with which an object was regarded is another element to be considered in determining the accuracy and completeness with which it was observed. The impressions made upon the eye and ear are not necessarily communicated to the mind. By whatever psychological hypothesis the fact may be explained, it is still true that unless the thought is fixed upon the object of sensation, the sensation

terminates with the organic sense, exciting no ideas and leaving no trace in the memory. There is a constant ratio between the mental concentration of the observer on the object, and the fullness and precision of the ideas which he obtains concerning it. . . . It is on this fact that the rule of evidence is based which gives to one affirmative witness greater weight than to many merely negative; a recognition that though in all those who were present the same physical sensations may have been experienced, yet only those would intellectually apprehend the action or event whose thought was antecedently directed to it. . . . By the same fact the wonderful variety with which the details of a transaction are described by a variety of witnesses is explained, each relating incidents which especially attracted his attention and omitting all the others.

*Want of Attention: Its Causes.* The degree of attention with which any given object is regarded depends in part upon the *power of mental concentration* naturally possessed by the observer, and in part upon the circumstances under which the observation itself is made. Some persons, either through a constitutional defect or from improper training, have no faculty of fixing and controlling their own thoughts. Except in the rarest instances, they never give their full attention to anything. In reading, the eye scans the printed page, but the mind constantly wanders from it. In conversation, the ear catches the words, the understanding comprehends their meaning, and the tongue replies, but all the while the current of their thoughts is flowing toward entirely different subjects. Other persons habitually bend all their energies to the work in hand. Their eyes see all that their knowledge of the attributes of things enables them to perceive. Their ears catch every sound of natural objects, every syllable and undulation of the human voice. Their senses are alive to every impression of the present moment, and what their sense perceives is communicated instantly and freely to their minds, uninterrupted by distractions, unconfused by reveries. Between these two extremes are all varieties of men, each of perceptions whose accuracy is in proportion to the attention with which he surveys the objects from which his physical sensations are derived. *The circumstances of the observer and the object*, and the relations subsisting between it and him, also affect the attention with which he regards it, and its consequent impression on his mind. The degree of mental energy of every kind depends largely on the physical condition of the man himself. Weakness, discomfort, pain of whatever character or location, destroy his power of concentration, and centralize his thoughts upon his own distress. Mental disturbance, haste, anxiety, preoccupation, or any other sensible emotion, produces the same absorption in himself and corresponding inattention to external objects. The interest or indifference of the observer toward the object, its familiarity or strangeness to him, the motive in obedience to which he directed his attention toward it, its relations to him as the sole object of attention or but one object among many equally interesting and important to him, the duration and the force of its operation on his senses, the sensations which preceded it and succeeded it, and the effort produced by these upon the one in question, — in short, every circumstance which acted at the time upon his mind or body, and by which his attention toward this one object may have been diminished or intensified, is worthy of investigation and consideration, as indicative of the degree to which the object took possession of his thoughts.

238. ARTHUR C. TRAIN. *The Prisoner at the Bar*. (2d ed. 1908. p. 224.) The probative value of all honestly given testimony depends, naturally, first, upon the witness's original capacity to observe; second, upon the extent to which his memory may have played him false; and third, upon how far he really means exactly what he says. . . .

The first consideration is how far the witness was originally capable of receiving correct impressions through his senses. Naturally this depends almost entirely upon his physical equipment and the keenness and accuracy of his general observation, both of which are usually evidenced to a considerable degree by his appearance and conduct upon the stand. . . .

Witnesses are often honestly mistaken, however, as to their own ability to observe facts, and will unhesitatingly testify that they could hear sounds and discern objects at extraordinary distances. Lawyers frequently attempt to induce aged or infirm witnesses to testify that they could hear plainly what was said by the defendant, in an ordinary tone, at a distance, say, of forty feet. The lawyer speaks in loud and distinct tones during the preliminary examination, and then gradually drops his voice to that usually employed in speaking, in the hope that the witness will ask him to repeat the question. This ruse usually fails, by reason of the fact that the lawyer, in his anxiety to show that the witness could not possibly hear the distance claimed, lowers his voice to such an extent that the test is obviously unfair.

For similar reasons counsel often call upon such witnesses to state the time by the clock which usually hangs upon the rear wall of the court room. A distinguished but conceited advocate, not long ago, after securing an unqualified statement from an octogenarian, who was bravely enduring cross-examination, that he "saw the whole thing as if it had occurred ten feet away," suddenly challenged him to tell the time by the clock referred to. The lawyer did not look around himself, as he had done so about half an hour before, when he had noticed that it was half after eleven. The old man looked at the clock and replied, after a pause, "Half-past eleven," upon which the lawyer, knowing that it must be nearly twelve, turned to the jury and burst into a derisive laugh, exclaiming sarcastically, "That is *all*," and threw himself back in his seat with an air of having finally annihilated the entire value of the witness's testimony. The distinguished practitioner, however, found himself laughing alone. Presently one of the jury chuckled, and in a trice the whole court room was in a roar at the lawyer's expense. The clock had stopped — at half-past eleven. . . .

In daily life we are quite as likely as not to be deceived by what we have seen, and this fact is so familiar to jurors that they are apt to distrust witnesses who profess to have seen much of complicated or rapidly conducted transactions. They want the main facts stated convincingly. The rest can take care of themselves. The extraordinary extent to which the complex development of modern life has dwarfed our powers of observation is noticeable nowhere more markedly than in the court-room. Things run so smoothly, transportation facilities are so perfect, specialization is carried to so high a degree, and our whole existence goes on so much indoors, that it ceases to be a matter of note or even of interest that the breakfast is properly cooked and served, that we are whisked downtown (a little matter say of five miles) in ten or twelve minutes, that we are shot up to our offices through

twenty floors in an electric elevator, that there is a blizzard or a deluge, or that part of Broadway has been blown up or a fifteen-story building fallen down. We pass days without paying the remotest attention to the weather, and forget that we have relations. Instead of walking home to supper, pausing to talk to our friends by the way, we drop into the subway, bury ourselves in newspapers, and are vomited forth almost without our knowing it at our front doorsteps. The multiplicity of detail deprives us of either the desire or the capacity to observe, and we cultivate a habit of not observing lest our eyes and brains be overwhelmed with fatigue. Observation has ceased to be necessary and has taken its place among the lost arts.

Compare the old days when a Greek could go to hear the "Ædipus," and on returning home could recount practically the whole of it from beginning to end for the benefit of the wife (who was not allowed to go herself), or even the comparatively recent period when the funeral oration over Alexander Hamilton could be reported in the "Evening Post" from memory.

#### SUBTITLE B: MEMORY

239. HANS GROSS. *Criminal Psychology*. (1911. transl. Kallen, § 51, p. 258.) (a) *General Theory of Memory*. In direct connection with the association of ideas is our recollection and memory, which are only next to perception in legal importance in the knowledge of the witness. Whether the witness *wants* to tell the truth is, of course, a question which depends upon other matters; but whether he *can* tell the truth depends upon perception and memory. Now the latter is a highly complicated and variously organized function which is difficult to understand, even in the daily life, and much more so when everything depends upon whether the witness has noticed anything, how, how long, what part of the impression has sunk more deeply into his mind, and in what direction his defects of memory are to be sought. It would be inexcusable in the lawyer not to think about this and to make equivalent use of all the phenomena that are presented to him. To overlook the rich literature and enormous work that has been devoted to this subject is to raise involuntarily the question, for whom was it all done? Nobody needs a thoroughgoing knowledge of the essence of memory more than the lawyer. . . .

According to Herbart and his school, memory consists in the possibility of recognizing the molecular arrangements which had been left by past impressions in the ganglion cells, and in reading them in identical fashion. According to Wundt and his pupils, the problem is one of the disposition of the central organs. And it is the opinion of James Mill that the content of recollection is not only the idea of the remembered object, but also the idea that the object had been experienced before. Both ideas together constitute the whole of that state of mind which we denote as memory. . . . When we take all these opinions concerning memory together we conclude that neither any unity nor any clear description of the matter has been attained. Ebbinghaus's sober statement may certainly be correct: "Our knowledge of memory rises almost exclusively from the observation of extreme, especially striking, cases. Whenever we ask about more special

solutions concerning the detail of what has been counted up, and their other relations of dependence, their structure, etc., there are no answers." . . .

We find in our own experience evidence of the fact that memory and the capacity to recall something often depend upon health, feeling, location, and chance associations which cannot be commanded, and happen as accidentally as anything in life can. Nobody has as yet paid attention to the simple daily events which constitute the routine of the criminalists. We find little instruction concerning them, and our difficulties as well as our mistakes are thereby increased. Even the modern repeatedly cited experimental investigations have no direct bearing upon our work.

We will content ourselves with viewing the individual conceptions of memory and recollection as occurring in particular cases and with considering them, now one, now the other, according to the requirements of the case. We shall consider the general relation of "reproduction" to memory. "Reproduction" we shall consider in a general sense and shall subsume under it also the so-called involuntary reproductions which rise in the forms and qualities of past events without being evoked, *i.e.* which rise with the help of unconscious activity through the more or less independent association of ideas. Exactly this unconscious reproduction, this apparently involuntary activity, is perhaps the most fruitful. . . .

The theories may be divided into three essential groups :

1. What is received, fades away, becomes a "trace," and is more or less overlaid by new perceptions. When these latter are ever set aside, the old trace comes into the foreground.

2. The ideas sink, darken, and disintegrate. If they receive support and intensification, they regain complete clearness.

3. The ideas crumble up, lose their parts. When anything occurs that reunites them and restores what is lost, they become whole again.

Ebbinghaus maintains, correctly enough, that not one of these explanations is universally satisfactory ; but it must be granted that now one, now another is useful in controlling this or that particular case. The processes of the destruction of an idea may be as various as those of the destruction and restoration of a building. If a building is destroyed by fire, I certainly cannot explain the image given by merely assuming that it was the victim of the hunger of time. A building which has suffered because of the sinking of the earth I shall have to image by quite other means than those I would use if it had been destroyed by water.

For the same reason when, in court, somebody asserts a sudden "occurrence," or when we want to help him and something occurs to him, we shall have to proceed in different fashion and determine our action empirically by the conditions of the moment. We shall have to go back, with the help of the witness, to the beginning of the appearance of the idea in question and study its development as far as the material permits us. In a similar manner we must make use of every possibility of explanation when we are studying the disappearance of ideas. At one point or another we shall find certain connections. One chief mistake in such reconstructive work lies in overlooking the fact that no individual is merely passive when he receives sensations ; he is bound to make use of a certain degree of activity. Locke and Bonnet have already mentioned this fact, and anybody may verify it by comparing his experiments of trying to avoid seeing or hearing, and trying

actively to see or to hear. For this reason it is foolish to ask anybody how it happened that he perceived less than another, because both have equally good senses and were able to perceive as much. On the other hand, the grade of activity each has made use of in perception is rarely inquired into, and this is the more unfortunate because memory is often proportionate to activity. If, then, we are to explain how various statements concerning contemporaneous matters, observed a long time ago, are to be combined, it will not be enough to compare the memory, sensory acuteness, and intelligence of the witnesses. The chief point of attention should be the activity which has been put in motion during the sense perception in question.

(b) *The Forms of Reproduction.* There is a series of phenomena for which we possess particular types of images which often have little to do with the things themselves. . . . Lotze shows correctly that memory never brings back a blinding flash of light, or the overpowering blow of an explosion with the intensity of the image in proper relation to the impression. . . . Maudsley points out correctly that we can have no memory of pain. . . . But one need not limit one's self to pain, but may assert that we *lack memory of all unpleasant sensations*. The first time one jumps into the water from a very high springboard, the first time one's horse rises over a hurdle, or the first time the bullets whistle past one's ear in battle, are all most unpleasant experiences, and whoever denies it is deceiving himself or his friends. But when we think of them we feel that they were not so bad, that one merely was very much afraid, etc. But this is not the case; there is simply no memory for these sensations.

This fact is of immense importance in examination. I believe that no witness has been able effectively to describe the pain caused by a body wound, the fear roused by arson, the fright at a threat, — not, indeed, because he lacked the words to do so, but because he had not sufficient memory for these impressions, and because he has nothing to-day with which to compare them. Time, naturally, in such cases makes a great difference, and if a man were to describe his experiences shortly after their uncomfortable occurrence, he would possibly remember them better than he would later on.

But these ideas may be not only voluntarily brought up; we have also a certain degree of power in *making these images clearer* and more accurate. It is rather foolish to have the examiner invite the witness to "exert his memory, to give himself the trouble, etc." This effects nothing, or something wrong. But if the examiner is willing to take the trouble, he may excite the imagination of the witness and give him the opportunity to exercise his power over the imagination. How this is done depends naturally upon the nature and education of the witness, but the judge may aid him just as the skillful teacher may aid the puzzled pupil to remember. When the pianist has completely forgotten a piece of music that he knew very well, two or three chords may lead him to explicate these chords forward or backward, and then — one step after another — he reproduces the whole piece. Of course the chords which are brought to the mind of the player must be properly chosen or the procedure is useless. . . . Whatever may especially occur to aid the memory of an event, occurs best *at the place where the event itself happened*, and, hence, one cannot too insistently advise the examination of witnesses, in important cases, only in *loco rei sitæ*. . . . Then the differences between what has passed, what has been later added, and what is found



to-day can be easily determined by sticking to the rule of Uphues, that the recognition of the present as present is always necessary for the eventual recognition of the past. Kant has already suggested what surprising results such an examination will give: "There are many ideas which we shall never again in our lives be conscious of, unless some occasion cause them to spring up in the memory." But such a particularly powerful occasion is locality, inasmuch as it brings into play all the influences which our senses are capable of responding to.

It is characteristic, as is popularly known, that memory can be intensified by means of special occasions. It is Höfler's opinion that the Spartan boys were whipped at the boundary stones of their country in order that they might recall their position, and even nowadays our peasants have the custom, when setting up new boundary stones, of grasping small boys by the ears and hair in order that they shall the better remember the position of the new boundary mark when, as grown men, they will be questioned about it. This being the case, it is safer to believe a witness when he can demonstrate some intensely influential event which was contemporaneous with the situation under discussion, and which reminds him of that situation.

(c) *The Peculiarities of Reproduction.* The differences in memory which men exhibit are not, among their other human qualities, the least. As is well known, this difference is expressed not only in the vigor, reliability, and promptness of their memory, but also in the field of memory, in the accompaniment of rapid prehensivity by rapid forgetfulness, or slow prehensivity and slow forgetfulness, or in the contrast between narrow, but intense memory, and broad but approximate memory.

Certain special considerations arise with regard to the field of *greatest memory*. As a rule, it may be presupposed that a memory which has developed with especial vigor in one direction has generally done this at the cost of memory in another direction. Thus, as a rule, memory for numbers and memory for names exclude each other. My father had so bad a memory for names that very frequently he could not quickly recall my Christian name, and I was his own son. Frequently he had to repeat the names of his four brothers until he hit upon mine, and that was not always a successful way. When he undertook an introduction it was always: "My honored m — m — m," — "The dear friend of my youth m — m — m." On the other hand, his memory for figures was astounding. He noted and remembered not only figures that interested him for one reason or another, but also those that had not the slightest connection with him, and that he had read merely by accident. He could recall instantaneously the population of countries and cities, and I remember that once, in the course of an accidental conversation, he mentioned the production of beetroots in a certain country for the last ten years, or the factory number of my watch that he had given me fifteen years before and had never since held in his hand.

Such various developments are numerous and of importance for us, because we frequently are unwilling to believe the witness testifying in a certain field for the reason that his memory in another field had shown itself to be unreliable. . . . These fields seem to be of a remarkably narrow extent. Besides specialists (numismatists, zoologists, botanists, heralds, etc.) who, apart from their stupendous memory for their particular matters, appear

to have no memory for other things, there are people who can remember only rhymes, melodies, shapes, forms, titles, modes, service, relationships, etc. . . .

It is a matter of experience that the *semi-idiotic* have an excellent memory and can accurately reproduce events which are really impressive or alarming, and which have left effects upon them. Many a thing which normal people have barely noticed, or which they have set aside in their memory and have forgotten, is remembered by the semi-idiotic and reproduced. On the contrary, the latter do not remember things which normal people do, and which in the latter frequently have a disturbing influence on the important point they may be considering. Thus the semi-idiotic may be able to describe important things better than normal people. . . .

Similar experiences are yielded in the case of the memory of *children*. Children and animals live only in the present, because they have no historically organic ideas in mind. They react directly upon stimuli, without any disturbance of their idea of the past. This is valid, however, only for very small children. At a later age children make good witnesses, and a well-brought-up boy is the best witness in the world. We have only to keep in mind that later events tend in the child's mind to wipe out earlier ones of the same kind. . . . Bolton, who has made a systematic study of the memory of children, comes to the familiar conclusion that the scope of memory is measured by the child's capacity of concentrating its attention.

That *aged* persons have, as is well known, a good memory for what is long past, and a poor one for recent occurrences is not remarkable. It is to be explained by the fact that age seems to be accompanied with a decrease of energy in the brain, so that it no longer assimilates influences, and the imagination becomes dark and the judgment of facts incorrect. . . .

(d) *Illusions of Memory*. Memory illusion, or *paramnesia*, consists in the illusory opinion of having experienced, seen, or heard something, although there has been no such experience, vision, or sound. It is the more important in criminal law because it enters unobtrusively and unnoticed into the circle of observation, and not directly by means of a demonstrated mistake. Hence, it is the more difficult to discover and has a disturbing influence which makes it very hard to perceive the mistakes that have occurred in consequence of it.

Everybody is familiar with the phenomenon in which the sudden impression occurs, that what is experienced has already been met with before so that the future might be predicted. . . . Sully, in his book on illusions, has examined the problem most thoroughly and he draws simple conclusions. He finds that vivacious children often think they have experienced what is told them. This, however, is retained in the memory of the adult, who continues to think that he has actually experienced it. . . . Dickens has dealt with this dream life in "David Copperfield." Sully adds, that we also generate illusions of memory when we assign to experiences false dates, and believe ourselves to have felt, as children, something we experienced later and merely set back into our childhood.

So, again, he reduces much supposed to have been heard, to things that have been read. Novels may make such an impression that what has been read or described there appears to have been really experienced. A name or region then seems to be familiar because we have read of something similar. It will perhaps be proper not to reduce all the phenomena of param-

nesia to the same conditions. Only a limited number of them seem to be so reducible. Impressions often occur which one is inclined to attribute to illusory memory, merely to discover later that they were real but unconscious memory; the things had been actually experienced and the events had been forgotten. Aside from these unreal illusions of memory, many, if not all, others, are explicable, as Sully indicates, by the fact that something similar to what has been experienced, has been read or heard, while the fact that it has been read or heard is half forgotten or has sunk into the subconsciousness. Only the sensation has remained, not the recollection that it was read, etc. Another part of this phenomenon may possibly be explained by vivid dreams, which also leave strong impressions without leaving the memory of their having been dreams. All this may happen to anybody, well or ill, nervous or stolid. Indeed, Kräpelin asserts that paramnesia occurs only under normal circumstances. It may also be generally assumed that a certain fatigued condition of the mind or of the body renders this occurrence more likely, if it does not altogether determine it.

240. G. F. ARNOLD. *Psychology of Legal Evidence*. (1906. pp. 105, 403.) . . . In Memory there is necessarily some contrast of past and present, in Retentiveness nothing but the persistence of the old. Again, though Memory includes Recognition, Recognition as such does not include Memory in which there is also remembrance of the time and circumstance in which an impression, piece of knowledge, etc., was acquired. When we find ourselves suddenly reminded by what is happening of a preceding experience exactly like it, if we are unable to assign to such representation a place in the past, instead of a belief that it happened there arises bewilderment. We distinguish Imagination from Memory because in the former there is no Recognition, and because of the fixed order and position of the ideas of what is remembered or expected as contrasted with the liberty of the imagination to transpose and change its ideas: at the same time the machinery of memory must be largely determined by men's powers of imagining which differ greatly, as will be explained later. . . . In the present chapter, unless it seems specially called for, no precise distinction will be observed between Memory and Recognition, and Retentiveness will be treated as the basis of Memory.

A man's native *retentiveness* depends on the brain tissue, and is *unchangeable*. "No amount of culture," says Professor James, "would seem capable of modifying a man's 'general retentiveness.' This is a physiological quality, given once for all with his organization and which he can never hope to change. It differs no doubt in disease and health. . . . It is better in fresh and vigorous hours than when we are fagged or ill." At the same time retentiveness is affected in other ways, which we shall now proceed to consider as the conditions of memory.

The following are some of the *mental conditions of memory*: Firstly, as regards the circumstances of the moment of the *original appearance*, it depends on (a) the degree of impressiveness of the original experience, i.e. the amount of interest it awakened and of attention it excited. But (b) the absence of impressiveness may be made good by a repetition of the actual experience or by the fact of previous mnemonic revivals. Time and repetition are required for memory to be established. (c) Our state of

health and general vital power affects our ability to take in impressions. (d) The presentative element must have intensity and distinctness and also sufficient duration.

Secondly, as regards the moment of the *reappearance*: here the preëxisting mental conditions and association of ideas are the important matters. Every recollection is determined by some link of association, which may be either of contiguity or similarity, *i.e.* the original experience may have occurred at the same time or in close succession, or the sight of one place or person recalls that of another place or person. Again, a fresh and healthy brain is also required for reproduction, and we are also influenced by our emotional states, while much depends on the nature of the memories themselves. The more simple and less complex easily disappear, and those which have many strongly marked and distinctive sides are better retained. We are further aided by the recency of the occurrence and our own powers of imagination. The above is a mere summary and not intended to be exhaustive: it will be both amplified and supplemented in the course of the following pages under various heads.

No one will probably dispute that different men have different powers of memory, but the point to which we now wish to draw attention is that there are *different kinds of memory*. For we conceive that there cannot be a greater mistake than to assume that we can judge offhand of the possibility of an alleged act of remembrance, either by reference to our own powers or to a supposed average power of recollection, or again that we can be at all sure of how much any man can be reasonably expected to remember under any particular circumstances. We are aware that such estimates are confidently made by judges and advocates in spite of the statements of witnesses that they do actually recollect more or less than is supposed to be possible or reasonable; and the more we have studied memory and all that affects it, the less we feel disposed to accept the skeptical views of the law courts concerning it.

The varieties which we are about to speak of are pure *individual differences of memory*. "Idiosyncracies are frequent," says Dr. Ward, "thus we find one person has an exceptional memory for sounds, another for color, another for forms." The kinds of images employed in memory are as numerous as the different kinds of sensations, *viz.* visual, auditory, tactile, motor, etc.: we may use them singly or cumulatively, but each has his own habits and according as visual or auditory images predominate with him, he will have a good memory for sights or sounds. The indifferent kind are those in whom one type of memory is equal to another. "The statistical investigations of Mr. F. Galton," says Professor Sully, "into the nature of visual representation, or what he calls 'visualization,' go to show that this power varies greatly among individuals (of the same race), that many persons have very little ability to call up distinct mental pictures of such familiar objects as the breakfast table." It also varies with race, sex, and age. It seems to us plain that the power of recollecting a scene will depend very much on a man's power of visualization, and if one who has got this power judges one who has not, or vice versa, his estimate of the truth of the latter's statements is likely to be very erroneous, unless he has some psychological knowledge of memory. . . . We recollect to have seen it stated more than once that an uneducated villager could not possibly have

remembered all he stated in court and has clearly been taught by the police or the headman of the village or by whoever can conveniently be made the villain of the piece: we would therefore warn the reader that there are no valid grounds for attributing bad memory to uneducated persons. We do not suppose that a similar dictum would be accepted if the witness were a philosopher or a mathematician, yet it is a psychological fact that savages and uneducated persons have more powers of visualizing than persons whose interests are rather in the abstract: but there is also another reason. Where the range of interest is narrow, it is concentrated, and, as pointed out in the case of the idiot, the memory is therefore likely to be exact within the limits of observation. Good memory is partly due to the interest we take in a matter and partly mechanical, and the educated rarely have the latter kind because they have developed the former at its expense: high mental power is seldom combined with good mechanical memory. You may see sometimes how well ponies remember a road, because they do not think as they go along and so the landmarks are the only things impressed on them: the savage is a modified instance of the same kind. That he should have an excellent memory of the mechanical kind might have been suggested by the way that Homer's poems and other long epics have been handed down correctly by quite uneducated persons. As the mechanical memory depends on the juxtaposition of events in space and time as opposed to the memory which depends on intelligent interest, there is nothing surprising in the fact that a Burman villager remembers whether he went to the right or left or whether this or that person was facing north or south, for these are the kinds of questions which many advocates ask, although he may be relating events which happened long ago.

Allusion has already been made to *emotion as influencing memory*. There is a mistaken impression that fear prevents attention to what is going on and therefore hinders memory, and it has been argued before the writer more than once that a narrative or an identification is not reliable because the witness being frightened at the time could not have noticed or recollected what she states. This is a frequent incident of a dacoity or robbery case. It is well, therefore, to state exactly what the effect of fear is. It may be that the fear is so great as to totally paralyze the mind, as *e.g.* when the serpent fascinates its prey, and in such cases the argument would have foundation: but this is rarely so, and usually a person under its influence observes better and remembers clearly. Nor is this strange if we realize the character of emotion. "Fear," says Darwin, "is often preceded by astonishment, and is so far akin to it that both lead to the sense of sight and hearing being instantly aroused. It leads us to attend minutely to everything around us because we are then specially interested in them, as they are likely to intimately concern us." . . . To the same effect again Professor Sully says: "The essential element in interest is feeling, and any marked accompaniment of feeling, whether pleasurable or painful, is, as we all know, a great aid to retention. Thus the events of our early childhood which we permanently retain commonly show an accompaniment of strong feeling, more particularly perhaps that of childish wonder at something new and marvelous, whether delightful or terrible. The effect of disagreeable feeling in fixing impression is illustrated in the retention of the image of an ugly or malevolent-looking face, of words in a foreign language which have

disagreeable sensations," etc. . . . He then points out that great emotion tends to color or give a particular direction to the ideas of the time, a fact also noted by Professor James as follows: "When any strong emotional state whatever is upon us the tendency is for no images, but such as are congruous with it to come up. If others by chance offer themselves, they are instantly smothered and crowded out." There is then this danger, for it will equally affect our recollection of events. But apart from this, the effect of fear, so far from hindering recollection, is to aid it by giving exceptional vividness, distinctness, and persistence to the images called up at the time.

Exceptional memory is also displayed in certain *pathological states* which are akin to emotion, especially the hypnotic: instances are given by Binet and Féré (authors of "Animal Magnetism"), who further remark "the acuteness of the memory during somnambulism without absolutely justifying those who assert that nothing is lost to memory yet shows that its conservative power is much greater than is supposed, when measured by the capacity of reproduction or recollection. It proves that in many cases in which we believe that a certain fact is completely effaced from the memory, this is by no means the case; the trace of it is there, but the power of recalling it is wanting; and it is probable that under the influence of hypnotism or of some excitement to which we are sensitive, it would be possible to revive the apparently extinct memory of the fact in question." . . . Professor Sully's remarks on the same point also deserve quoting: "The stage of complete obliviscence is supposed to be reached when no effort of will and no available aid from suggestive forces succeed in effecting the reproduction. In order, however, to determine that a fact is thus irrecoverably forgotten, we ought first to have tried the maximum force of the reproductive agencies and this is often out of our power. The addition of the stimuli of locality, sound of voice, and so forth, might serve to recall images of persons which are now apparently irrecoverable. The remarkable revival of remote and seemingly lost impressions in dreams and in certain forms of brain derangement suggest that much which we suppose to be forgotten might, under the most favorable conjunction of conditions, be recovered." Some readers will remember that such an experiment was made in Wilkie Collins's story, "The Moonstone." We wish we had space to quote here some of the pathological evidence in question, as it would certainly convince doubters that abnormal powers of memory have been displayed under such conditions; and, if this be so, in view of the fact that we cannot, in the present state of our knowledge, define the conditions of its display, we should have more hesitation in classing as impossible what appear to be abnormal recollections under ordinary circumstances.

Nor, again, because a witness once says that he cannot recollect a person or an event, does it follow that he will *not do so afterwards under other circumstances*: according to the author's experience, as evidence is at present received, it is quite sufficient for a man to have failed once to recollect, to be instantly discredited if he subsequently professes to remember; yet the inference that he is not speaking the truth in such a case, may clearly in the light of the above facts be quite erroneous. It is not necessary, however, to appeal to pathological evidence to explain sometimes how it can be that a man may honestly recollect after stating his inability to do so; for we are often able to identify an object, as a face, when we actually

see it, without having any corresponding power of imaging it when he is absent. The lower animals which have at best only a rudimentary power of imaging, often display a marvelous power of recognizing. This important point is not sufficiently understood: it is a common practice to ask a witness to describe a person, an article of jewelry or clothing, etc., before he or it is shown to him, and, if he fails to give an accurate description beforehand, to regard it as a proof that the identification is not genuine. No doubt such a description would be a valuable confirmation of his statement; but the failure to give one may plainly be no proof of its falsity, being simply due to the lack of power to visualize, concerning which we have already spoken. In the absence of such power it is not plain how such a description could be expected, and indeed the expectation seems to betray some ignorance of the process of memory, which is also illustrated by the following examples. The writer remembers a High Court judge remarking in a dacoity case in which a woman professed to have identified one of the dacoits who was previously a stranger to her, that he did not believe her, for one reason because she had not said at the time of the dacoity that she would be able to recognize any of them: and yet had she made the statement he desired it would have been quite worthless. For in memory we only know retention through the fact of revival: what this woman perceived at the time was subsequently reproduced under the new form of an image, and the immediate conditions of the appearance of the image was the recurrence in some form of that mode of central excitation which conditioned the original impression. But this learned judge wished the poor woman to say beforehand what she would not know until the cause capable of exciting the image had been presented to her. In a second case, viz. one of kidnapping, in which a mother was testifying as to the age of her daughter, the advocate for the defense questioned her as to whether she could remember the names of any other children who were born in her village in the same year, which she could not do. Now in the first place we remember what we are interested in, and the woman was presumably not interested in the other children; but, apart from this, the cross-examination was conducted on a totally wrong principle so far as memory was concerned: for the woman's daughter was present in court, and she was thus an exciting cause to revive the impressions in the mother's brain, whereas the advocate neither produced any other woman from the village nor even mentioned her name, so that there was no reason why the witness should remember anything about any one else. He simply ignored the fact that there is needed in ordinary cases the presence of something to remind us of the object, or to suggest it to our minds. . . . To the magistrate, because there are no associations of ideas connected with these things in his mind, they cannot be identified in the absence of some distinct mark, and he has not sufficient imagination to put himself in the villager's place.

Since so much importance is usually attached to the existence of *marks as aids to memory*, we must devote a few words to this subject. Psychologically considered such marks are merely reasons for the recollection, and it seems a legitimate question. Why do we always want a reason, *i.e.* something intermediate, as an explanation of memory? If a man recognizes a coat, he must mention a mark; if he recollects a date, he must mention some approximate event to prove it, etc. But why again does not the same

feeling recur as to the mark, event, etc., and so on, ad infinitum? To understand this it is necessary to grasp the theory of association of ideas by similarity and contiguity, and the explanation of what is known as the feeling of Recognition. There are two fundamental forms of connection between ideational elements, connection by likeness, and connection by contiguity, and both are concerned in every case of actual association. There is a direct connection of like elements of different ideas, one recalls the other, and then a connection attaches itself immediately to this of such elements of previous ideas as have been externally contiguous to those like constituents: if, as we look at the total result, the connections of the like elements are predominant, we speak of a similarity association, if the external connections are the stronger, of a contiguity association.<sup>1</sup> In cognition the presented and the memorial elements combine at once to a single idea, referred to the actual impression, and from cognition Recognition is developed as follows. In immediate recognition we are either unconscious or but obscurely conscious of the connecting links by whose aid recognition is effected: we may be merely conscious that we have had the idea before without there being any recollection of the attendant circumstances, or, although the recognition is immediate, we may also recall the temporal relations and spatial surroundings in which we previously made the acquaintance of the recognized object. Now it is only when we consciously localize the recognized idea in time and space that we get the feeling of recognition; the act of recognition requires these contiguity connections for its completion. Immediate recognition furnishes the transition to mediate recognition, where we are clearly conscious that recognition is brought about by the mediation of secondary ideas, such as the marks, events, etc., spoken of above. On this point we will quote Wundt's words: "Think how often you meet a person whom at first sight you take to be an absolute stranger. But he tells you his name, and on a sudden the face that was so unfamiliar shows you the features of an old acquaintance. Or there may be other mediating circumstances. You see a third person whom you have often noticed in his company, and your eyes chance to fall on a coat or a traveling bag that awaken your memory. Here again there is a special feeling regularly associated with the act of recognition. This feeling comes later and arises more gradually than the immediate recognition feeling. At the same time you will find that it may be very vivid even when the apprehension of the agreement between the present idea and previous is still quite indefinite." Now Wundt's view is that in every case of recognition, mediate or immediate, secondary or auxiliary ideas are in fact employed, but in the former case they are perceived first and the agreement of the two principals afterwards, while in the latter they are perceived at the same time only as the agreement of the principals or even later: but in every instance the *feeling* of recognition depends upon the excitation of auxiliary ideas. Professor Sully gives the physiological explanation of this feeling thus: "when a particular central element or cluster of elements is reëxcited to a functional activity similar to that of a previous excitation, this new excitation is somehow modified by the residuum of its previous activity or surviving 'psychological

<sup>1</sup> Wundt, *Human and Animal Psychology*, pp. 296, 297. (The writer is aware that there are other explanations of association of ideas, but he cannot discuss them in a work like the present.)



disposition.' This modification is the only assignable nervous substrate of the consciousness of familiarity or recognition." The importance of marks, proximate events, etc., as auxiliary ideas producing the feeling of recognition is thus plain, and it is not necessary to go back and seek again further marks or events to confirm these, because as soon as we have by their aid consciously localized the past impression in time and space, we have got the feeling of recognition that we require and are satisfied. . . .

But we must insist that reasons for recollecting events cannot always be given, and it is dangerous to press native witnesses for them, as it only results in their inventing some transparently fictitious explanation, which tends to discredit them unnecessarily. There is nothing strange, as some advocates seem to think, in witnesses recollecting some events and not others, for our memories restore to us only fragments of our past life and often what now seems to us only insignificant details of a scene or incident. Sully says: "It seems quite impossible to account for these particular revivals, they appear to be so capricious. When a little time has elapsed after an event and the attendant circumstances fade away from memory, it is often difficult to say why we were impressed with it as we afterwards prove to have been. It is no doubt possible to see that many recollections of our childhood owe their vividness to the fact of the exceptional character of the events; but this cannot always be recognized. Some of them seem to our mature minds very oddly selected, although no doubt there are in every case good reasons, if we could only discover them, why those particular incidents rather than any others should have been retained." . . .

We have spoken above of mediate and immediate recognition, and we shall now discuss further the *relation of memory to inference*. With reference to this we should like to quote the following passage: "A witness may give the substance of conversations or writings, but he will not be permitted to say what is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences."<sup>1</sup> Those authors apparently hold that recollection does not involve inference, an opinion which we believe to be erroneous, as will appear in the course of this discussion. Professor Sully, speaking of immediate knowledge, says: "It will be found that even with respect to memory, when the remembered event is at all remote, the process of cognition approximates to a mediate operation, viz. one of inference." Binet after stating that there is no well-defined distinction between a perception recollection and a perception reasoning, quotes Professor Sully, that "in both cases there is a reinstatement of the past, a reproduction of earlier experience, a process of adding to a present impression, a product of imagination taking this word in its widest sense. In both cases the same laws of reproduction or association are illustrated; that is to say, an association of resemblance followed by an association of contiguity; . . . our state of mind in recognizing an object or person is commonly an alternative between these two acts of separating the mnemonic image from the percept and so recalling or recollecting the past, and fusing the image and the percept in what is specially marked off as recognition." He then proceeds: "In what respect does a recollection differ from a reasoning? This is difficult to determine. We grasp the analogies between these two acts much more easily than their differences.

<sup>1</sup> Ameer Ali and Woodroffe's *Indian Evidence Act*, 2d ed. p. 948.

All that the most attentive observation teaches us is that sometimes the suggested image is projected and localized in the panorama of the past, of which it appears to be a fragment, and sometimes it is referred to a present object, and throws off the character of oldness, so as to appear actual."<sup>1</sup> When, therefore, we say a witness is guessing and does not really recollect, can we truly distinguish? Are not both processes alike, in following out association of ideas? . . . It would seem then that it is impossible to distinguish recollection from inference in the way desired; and any one who will swear that the impression left on him by a conversation was a recollection and not an inference, will in our opinion swear to a great deal.

But this is not our only objection to the passage in question; there appears to lie at the root of it a fallacious idea that impressions are not to be accepted as evidence because less trustworthy than statements of recollection of facts. Yet we never do under any circumstance reproduce all that has happened, and we intentionally forget much that we see and hear, for it is only by omitting some details that we can recall what we want. What memory gives us is always an impression, or, as Professor Stout calls it, a generic image: "We simply make an outline sketch, in which the salient characters of things and events and actions appear, without their individualizing details. . . . It is possible for me to recall the whole event of taking breakfast, which occupied half an hour, in the fraction of a minute, and then pass on to something else."<sup>2</sup> It is thus idle in the sphere of memory to seek for anything better than impressions, and if we are to discredit these, we must discredit all.

There are various ways in which the *memory can be assisted*. When an actual impression cannot be repeated, its reproduction will to some extent have the same result; thus we can keep the images of remote experiences from disappearing by periodically reviving them, as when children talk with their parents about common experiences of the past. . . . Now, looked at as a revival of memory, it may be a valuable thing for witnesses to talk over their experiences with one another before giving evidence; but this aspect of it is entirely left out of account in the view which is usually taken of it. Its sole object is always taken to be to concoct together a story which each will tell consistently; if a witness admits in the box that he has talked over the matter with another witness before entering the court, he is as often as not considered unreliable merely on that account. We do not wish to maintain that no evidence is concocted, or that it is never concocted in this manner; but we do protest against such a view being invariably taken. We suggest as an alternative that talking over the occurrences beforehand may sometimes by reviving the memory render the evidence given, not less, but more reliable. . . .

It has no doubt been frequently noticed that it is easier to recall events in the order in which they occurred, and that witnesses, if left to themselves, habitually narrate occurrences in chronological order; it has always struck the writer that the method usually adopted by public prosecutors of *asking questions*, though it may be useful in excluding irrelevant matter, *is certainly calculated to hinder memory*. What may appear to be irrelevant, according to the Evidence Act, may in fact be a necessary link in the association of

<sup>1</sup> Binet, *Psychology of Reasoning*, p. 176.

<sup>2</sup> Stout, *Analytical Psychology*, Vol. II, pp. 184-185.

ideas of the witness, and if closely examined will often be admissible under § 6 or one of the following sections of the Act. Dr. J. Ward has explained the order of recall as follows: "In a series of associated presentations, A, B, C, D, E, such as the movements made in writing, the words of a poem learned by heart, or the simple letters of the alphabet themselves, we find that each member recalls its successor but not its predecessor. . . . B recalls C; why does not C recall B? We have seen that any reproduction at all of A or B or C depends primarily upon its having been the object of special attention so as to occupy at least momentarily the focus of consciousness. Now we can in the first instance only surmise that the order in which they are reproduced is determined by the order in which they were thus attended to when first presented." . . .

It is highly important to allow a witness *time* when giving his evidence, not merely because hurry causes him to say what he may not really intend, but because of the actual process by which we recall a forgotten thing. Professor James describes it thus: "We recollect the general subject to which the thought relates; the thing is a gap in the midst of other things. We then think over the details and from each detail there radiates lines of association forming so many tentative guesses. Many at once are seen to be irrelevant. These added associations arise independently of the will by a spontaneous process, and our will lingers over those which seem pertinent and ignores the rest. Then the accumulation of associates becomes so great that the combined tensions of their neural processes break through the bar, and the nervous wave pours into the tract which has so long been awaiting its advent."

*Memoranda for the purpose of refreshing memory* are of course admissible both in the English and the Indian law under certain circumstances. . . . The legal writers above quoted have this to say: "It is further to be observed that the committing of a statement to writing calls forth unavoidably a greater degree of attention than the exhibition of it *viva voce* in the way of ordinary conversation. If this be done honestly, at the time of the occurrence which forms the subject of the statement, or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth, more reliable indeed than simple memory itself." This is somewhat loosely expressed. If it is intended to say that the writing calls forth a greater degree of attention to the occurrence itself, the statement is in the nature of a "*hysteron proteron*." For the writing does not in any way *cause* the attention, which must be prior to it, but it is the attention given which aids retention and so facilitates the subsequent commitment to writing, the writing being merely the mode of expressing the conscious thought. If, however, all that is meant is that the committing to writing calls forth greater attention *to the writing* than the speaking of the occurrence does to the speaking, this may or may not be so, we should say, according to the circumstances, but we do not quite understand either the value or the application of such a statement here. If we may conjecture, perhaps the passage was intended to assert that writing causes reflection on the occurrence, and this reflection, while the occurrence is recent, impresses it on the memory better than the mere act of speaking it. This is doubtless true; when we, so to speak, objectify anything, it involves care and attention to the process, *i.e.* here

disagreeable sensations," etc. . . . He then points out that great emotion tends to color or give a particular direction to the ideas of the time, a fact also noted by Professor James as follows: "When any strong emotional state whatever is upon us the tendency is for no images, but such as are congruous with it to come up. If others by chance offer themselves, they are instantly smothered and crowded out." There is then this danger, for it will equally affect our recollection of events. But apart from this, the effect of fear, so far from hindering recollection, is to aid it by giving exceptional vividness, distinctness, and persistence to the images called up at the time.

Exceptional memory is also displayed in certain *pathological states* which are akin to emotion, especially the hypnotic: instances are given by Binet and Féré (authors of "Animal Magnetism"), who further remark "the acuteness of the memory during somnambulism without absolutely justifying those who assert that nothing is lost to memory yet shows that its conservative power is much greater than is supposed, when measured by the capacity of reproduction or recollection. It proves that in many cases in which we believe that a certain fact is completely effaced from the memory, this is by no means the case; the trace of it is there, but the power of recalling it is wanting; and it is probable that under the influence of hypnosis or of some excitement to which we are sensitive, it would be possible to revive the apparently extinct memory of the fact in question." . . . Professor Sully's remarks on the same point also deserve quoting: "The stage of complete obliscence is supposed to be reached when no effort of will and no available aid from suggestive forces succeed in effecting the reproduction. In order, however, to determine that a fact is thus irrecoverably forgotten, we ought first to have tried the maximum force of the reproductive agencies and this is often out of our power. The addition of the stimuli of locality, sound of voice, and so forth, might serve to recall images of persons which are now apparently irrecoverable. The remarkable revival of remote and seemingly lost impressions in dreams and in certain forms of brain derangement suggest that much which we suppose to be forgotten might, under the most favorable conjunction of conditions, be recovered." Some readers will remember that such an experiment was made in Wilkie Collins's story, "The Moonstone." We wish we had space to quote here some of the pathological evidence in question, as it would certainly convince doubters that abnormal powers of memory have been displayed under such conditions; and, if this be so, in view of the fact that we cannot, in the present state of our knowledge, define the conditions of its display, we should have more hesitation in classing as impossible what appear to be abnormal recollections under ordinary circumstances.

Nor, again, because a witness once says that he cannot recollect a person or an event, does it follow that he will *not do so afterwards under other circumstances*: according to the author's experience, as evidence is at present received, it is quite sufficient for a man to have failed once to recollect, to be instantly discredited if he subsequently professes to remember; yet the inference that he is not speaking the truth in such a case, may clearly in the light of the above facts be quite erroneous. It is not necessary, however, to appeal to pathological evidence to explain sometimes how it can be that a man may honestly recollect after stating his inability to do so; for we are often able to identify an object, as a face, when we actually

see it, without having any corresponding power of imaging it when he is absent. The lower animals which have at best only a rudimentary power of imaging, often display a marvelous power of recognizing. This important point is not sufficiently understood: it is a common practice to ask a witness to describe a person, an article of jewelry or clothing, etc., before he or it is shown to him, and, if he fails to give an accurate description beforehand, to regard it as a proof that the identification is not genuine. No doubt such a description would be a valuable confirmation of his statement; but the failure to give one may plainly be no proof of its falsity, being simply due to the lack of power to visualize, concerning which we have already spoken. In the absence of such power it is not plain how such a description could be expected, and indeed the expectation seems to betray some ignorance of the process of memory, which is also illustrated by the following examples. The writer remembers a High Court judge remarking in a dacoity case in which a woman professed to have identified one of the dacoits who was previously a stranger to her, that he did not believe her, for one reason because she had not said at the time of the dacoity that she would be able to recognize any of them: and yet had she made the statement he desired it would have been quite worthless. For in memory we only know retention through the fact of revival: what this woman perceived at the time was subsequently reproduced under the new form of an image, and the immediate conditions of the appearance of the image was the recurrence in some form of that mode of central excitation which conditioned the original impression. But this learned judge wished the poor woman to say beforehand what she would not know until the cause capable of exciting the image had been presented to her. In a second case, viz. one of kidnapping, in which a mother was testifying as to the age of her daughter, the advocate for the defense questioned her as to whether she could remember the names of any other children who were born in her village in the same year, which she could not do. Now in the first place we remember what we are interested in, and the woman was presumably not interested in the other children; but, apart from this, the cross-examination was conducted on a totally wrong principle so far as memory was concerned: for the woman's daughter was present in court, and she was thus an exciting cause to revive the impressions in the mother's brain, whereas the advocate neither produced any other woman from the village nor even mentioned her name, so that there was no reason why the witness should remember anything about any one else. He simply ignored the fact that there is needed in ordinary cases the presence of something to remind us of the object, or to suggest it to our minds. . . . To the magistrate, because there are no associations of ideas connected with these things in his mind, they cannot be identified in the absence of some distinct mark, and he has not sufficient imagination to put himself in the villager's place.

Since so much importance is usually attached to the existence of *marks as aids to memory*, we must devote a few words to this subject. Psychologically considered such marks are merely reasons for the recollection, and it seems a legitimate question. Why do we always want a reason, *i.e.* something intermediate, as an explanation of memory? If a man recognizes a coat, he must mention a mark; if he recollects a date, he must mention some approximate event to prove it, etc. But why again does not the same

that I had dealings with the other person about the same time. Similarly, when we manage to join an event to a wrong place, we may find it is because we heard of the occurrence when staying at the particular locality, or in some other way had the image of the place closely associated in our minds with the event. But often we are wholly unable to explain the displacement."<sup>1</sup> Such fallacies depend on the adulteration of pure observation with inference and conjecture. There are others due to a rather different cause, which has been termed, by Professor Stout, coalescence. Coalescence or overlapping is where an old combination or new combination is relatively so powerful as to overbear the tendency opposed to it without a struggle. . . . The gradual transformation of a story as it passes from one person to another is in part due to coalescence. Each hearer unconsciously modifies it according to his preconceived ideas and transmits it to his neighbors with this added modification.<sup>2</sup> It is of course largely to guard against this that hearsay evidence is prohibited in law. Professor James describes this as one great source of the fallibility of testimony meant to be quite honest: "The most frequent source of false memory is the accounts we give to others of our experience. Such accounts we almost always make both more simple and more interesting than the truth. We quote what we should have said or done rather than what we really said or did; and in the first telling we may be fully aware of the distinction. But ere long the fiction expels the reality from memory and reigns in its stead alone."

Enough perhaps has been now said to make clear the chief sources of error in memory and what in consequence must be looked for in weighing evidence.

241. F. W. COLEGROVE. *Memory: An Inductive Study*. (1900. p. 264.) Many helpful pedagogical suggestions were received from high school, normal, and college students in reply to question 11 [in a list of inquiries made on the subject of Memory].

"Question 11. Describe fully any aids to memory which you have found useful. How do you fix in mind and recall (a) figures, dates, dimensions; (b) forms of faces, microscopic structures, leaves, crystals, patterns, figures on the wall, carpet, or dress, phrases in music, and the cut of the dresses? (c) How do you fix and recall passages of prose and poetry, declamations, and recitations? Why and how do you memorize fine passages? In learning foreign languages, describe devices for fixing new forms and phrases. Describe your system of keeping appointments. What memorandum do you keep, what book is used, and how do you make entries? As a student, how full notes do you take in the classroom? How would you teach a boy to remember things on time? Do you store up facts and dates, with no definite idea of how you will use them?" [Among the replies may be noted the following:]

Figures are mentally represented as clearly as possible, — a "picture of them as they look printed or written." A child thought of the figures to be carried in division as "gone up in the attic"; he would "call up attic to see if anything was there." One "locates them on a certain page of a book." Several "write them a few times." Three visualize in colored terms. Female, age 19, recalls the letter A as black on a red background. Female,

<sup>1</sup> Sully, *Illusions*, p. 266.

<sup>2</sup> Stout, *Analytical Psychology*, Vol. I, pp. 286-287.

age 21: "Words seemed colored. My name is red, my sister's is yellow. I often remember by color." Male, age 18: "I remember figures by color." Association helps; a college student writes: "I associate figures with what is familiar. If I hear that Mr. A. receives \$5000 salary, I say to myself that is five times as much as my old school teacher got. After this the salary is easily recalled." Place-localization, and association, are chiefly relied upon. Some have a kind of mnemonic system, and group or reverse the numbers. One associates the figure 8 with a doughnut. Faces are recalled by types. After fixing the type to which it belongs, the eyes, hair, nose, cheek bones, complexion, and scars are noted. A college student writes: "I try to trace a resemblance between a strange face and one I know." A middle-aged woman takes careful notice of the hand; she has a poor memory for faces, but can often locate the person by the hand. A normal student writes the initial of the person or place on the left hand; after it has been erased, she still visualizes it there. One analyzes the features; "if any feature resembles a well-known face, it is easily recalled." . . . Phrases in music are recalled by playing, or by attempting to play, or by humming the tune. College student, m., age 22: "I recall the time intervals and note the first part of the theme; I recall the rest by association." Female, age 17, normal student: "I remember phrases in music by thinking if they are similar to phrases in any selections that I have heard." . . . It is worthy of note that some excellent musicians recall music better after an interval. They cannot immediately reproduce it, if they have enjoyed it intensely. Sometimes an interval of a day or two is necessary in order to recall it well. It is quite possible that there is a modification of the basilar membrane which serves as a basis for subsequent recall.

Furthermore, it is true that many people find that a time interval is necessary to recall well any experience. E. C., f., age 17, recalls better now what happened in all school grades than when she was younger. Male, age 20: "I can define and locate my former experiences better now than I could a year or so after they happened." Female, age 19: "I can recall now things that happened 8 or 10 years ago, which I could not recall 4 years ago." Apart from a maturer mind, perspective seems to be necessary to many in order that they may have a good memory. . . .

Passages of prose and declamations are memorized by paying attention to the thought. After the thought is fixed, it easily clothes itself in language. Not a few, however, memorize mechanically, attention being paid especially to the beginnings and endings of sentences. Repetition and reading aloud are frequently mentioned. Clear mental representation and a purely local memory are of service. Male, 17: "I usually memorize by imprinting the object and its surroundings on my mind like a negative. In memorizing Lew Wallace's 'Chariot Race,' comprising 16 pages, I read it through twelve times. I imprinted the photograph of the page on my mind, and then read what I saw." . . .

A large number of devices are given for keeping appointments. Females change rings, insert paper under a ring, pin paper on dress, etc. There are other favorite mechanical devices. Chairs are turned over, and other furniture disarranged. A middle-aged man hid his hat to remind him of an appointment. Next morning he hunted up another hat, but did not recall

why the one usually worn was gone. One associates appointments with the hands of the clock at the hour fixed. Not a few find it necessary to repeat the appointment again and again. Others are aided by a memorandum. As a rule those who say their memories are utterly untrustworthy do not use notes. Yet W., m., age 26, writes that the only appointment he has missed for years is one which he noted down. Female, age 16, writes: "To keep an appointment I write the first letter of the person or place connected with the appointment on my left hand. Even if it be erased, I still imagine it there." Clear mental representation is the great help in such cases.

There is a wide diversity of opinion as to how full notes a student should take, and almost all degrees of copiousness are indicated. Female, age 37, believes her memory was injured by taking full notes at the normal school. Again, "too many notes make the general idea of the lecture indistinct." One writes that the state of his health determines how full notes he takes; if the physical tone is low, he is obliged to take more copious notes. Some are best aided by jotting down the headings and by giving attention unreservedly to the lecture. A normal student writes out very full notes, and never thinks of the contents of the lecture until she leaves the lecture room. Some take "key" words with which the rest is associated. Concentration of attention and "hand and arm" memory are acquired as a rule by taking quite copious notes. To take few notes is a work of art, and the essentials must be seized upon. The consensus of opinions received would seem to favor few notes. Where full notes are taken, they are not often reviewed. . . .

The request made under heading 13 of the syllabus called forth a wealth of material. "13. Describe cases of exceptional forgetfulness in old and young, stating whether it was due to distraction, abstraction, loss of mental power, or heredity. As a rule, does defect in memory in children appear in the field of things done, known, or felt?" Certain cases due to abstraction are as follows: A young lady went to telegraph for an umbrella left on a car; she had been holding it over her head for thirty minutes. A lady walked into the parlor with a \$10 bill in one hand, a match in the other; she put the bill in the stove and saved the match. A college professor forgets to eat his meals. A boy broke his ribs, and forgot all about it in two days. A man picked up a pebble and put it in his pocket; took out his watch and threw it into the ocean. A lady tried to tie her horse with the blanket and cover him with the line. A boy returned from the store three times to find out what his mother wanted. A lady who was called away by an important message, before breakfast, forgot until late in the day that she had eaten neither breakfast nor dinner. A gentleman, age 50, came down from his study and asked his wife if she knew where his pen was; he thought the children had mislaid it; she told him if he would take it out of his mouth, he would talk more plainly. A boy, age 9, sent to store for extract of peppermint, brought paregoric; sent back with a bottle labeled peppermint, brought vanilla; third time sent he brought the peppermint. A college professor, expert in numbers, is frequently seen with one black and one tan shoe on. A minister became absorbed in a book and forgot that it was Sunday. A man walked home and left his horse in the village all night. The same man drove home from church and left his wife.



A great share of cases of lack of memory are due to abstraction, or to absent-mindedness, which Mach terms "present-mindedness." It often characterizes people of great ability along narrow lines of thought. The following is an instance of lack of memory due to fatigue: Female, age 22: "At the age of 16 I had been traveling all day; I went to the ticket office at the last change of cars, but could not think where I was going; yet I had lived in the town sixteen years." There are a few instances given in which loss of memory is due to distraction. A middle-aged woman heard of her son's death by drowning; she could not remember her husband's address in order to telegraph him, although she had written there hundreds of times. "Aunt recalls nothing that happens since her husband's death." Defective memory in children is ascribed to things known. There are many instances reported in which forgetting occurred in the field of things done; many of these cases, however, are evidently cases of temporary forgetfulness due to abstraction. All of the Indians, with a single exception, state that things known are most easily forgotten. As to abstraction, no period of life is free from its influence. Not a few draw comfort from the facts, frequently cited, that Samuel Johnson when he had stepped from the sidewalk would continue for a long distance with one foot in the gutter and one on the walk; that Pestalozzi did not know enough to put up his umbrella when it rained; that Sir Isaac Newton supposed he had eaten when he saw the chicken bones on his plate; and that Edison forgot his wedding day. The fact is that no period of life is free from noticeable abstraction. The boy with book in hand forgets to go to dinner after he has rung the bell; the young woman goes to different parts of the house, she knows not why; middle age hunts for the thimble on its finger, or the pen in its mouth; while old age is troubled that it cannot find the glasses on its nose.

242. WM. C. ROBINSON. *Forensic Oratory; a Manual for Advocates*. (1893. p. 193.) . . . It is not easy to define in what a faithful memory consists. Some persons are endowed with excellent general memories, recalling the minutest details of events or conversations after the lapse of many years. Others remember with precision and completeness only certain classes of facts, — localities, dates, faces, names, or abstract processes of thought. Still others are without distinct recollections of any kind, their memories apparently preserving some faint, uncertain traces of almost every incident of their whole lives, but with no clear and definite impression in regard to any. In persons of the first description, the memory may always be considered good. In persons of the second, it is good whenever the thing remembered is of that class which their memories are accustomed to preserve, and bad, at least for all the purposes of evidence, when the fact belongs to that class which their memories do not retain. In persons of the third description, the memory is always bad, and on their uncorroborated evidence no question of importance ought to be decided. Were these distinctions generally understood, or if understood, were they remembered and considered by the jury, the cross-examination as a test of memory should properly be limited to the power of the witness to retain impressions concerning the class of objects to which the evidence relates. When the inquiry is as to the identity of persons, the ability of the witness to distinguish and remember faces, forms, and voices is the only faculty in question, and

whether or not localities and dates are easily recollected by him is of no consequence whatever. In actual practice, however, the law permits the jury to infer a general want of recollection from a special one, and the cross-examiner to expose defects in memory by testing it with facts of any class that he desires.

*Defective Memory: how Detected.* The direct examination of the witness in most instances informs the advocate as to the true condition of his memory. If he speaks positively and exhaustively concerning one class of facts, and hesitatingly or inaccurately concerning others, it may well be concluded where his weakness lies, and with what questions it may best be tested and exposed. If it be generally deficient, the whole field of the past is open to the advocate, and the more varied and disassociated are the topics it embraces, the more thoroughly are his defects revealed. On the other hand, if his memory appears generally perfect, and able to recall events of every kind with equal ease, the cross-examiner must discover a deficiency in reference to some class of facts as yet unnoticed, or his attempt will but corroborate the credibility it was intended to destroy. The tests applied to the memory of a witness by the cross-examiner must be fully and immediately apparent, as such, to the jury. If the subject he employs is not one which the jury realize that they themselves would easily remember, the failure of the witness to recall it will create no surprise. If it is so far outside of their sphere of information that, when he misremembers, or, not remembering at all, invents, they do not instantly detect him, they can draw no conclusion as to the strength or weakness of his memory. These tests must, therefore, be such as the jury are conscious that they could endure, and also such as they can see that the witness does not successfully sustain. Questions relating to important epochs in the life of the witness, to such facts in the cause as, if he tells the truth in reference to his knowledge of them, must have impressed him deeply, to those public events of which no man can be ignorant, to any striking occurrences in the court room during the trial of the cause, to matters fully demonstrated in his presence by the testimony of preceding witnesses, or to objects to which the attention of the witness is directed and which after a few moments he may be requested to describe, answer these two requisites. With an honest witness this method of examination is short and easy; with a cunning and dishonest witness its success depends mainly on the judgment with which the subject for these tests has been selected.

243. ARTHUR C. TRAIN. *The Prisoner at the Bar*. (2d ed. 1908. p. 228.) Almost all cases are stronger in court than they give the impression of being when the witnesses are first examined in the private office. . . .

The reason is not far to seek. Witnesses to the events leading up to a crime are acquainted with a thousand details which are as vivid, and probably more vivid, to them than the occurrence in regard to which their testimony is actually desired. It may well be that the immaterial facts are the only ones which have interested them at all, while their knowledge of the criminal act is relatively slight. For example, they *know*, of course, that they were in the saloon; are *positive* that the complainant and defendant were playing cards, even remembering some of the hands dealt; are *sure* that the complainant arose and walked away; *have a very vivid*

*recollection* that in a few moments the defendant got up and followed him across the room; are *pretty clear*, although their attention was still upon the game, that the two men had an argument; and *have a strong impression* that the defendant hit the complainant. In point of fact, their evidence is really of far *less* value, if of any at all, in regard to the *actual striking* than in regard to the events leading up to it, for at the time of the blow their attention was being given less to the participants in the quarrel than to something else. Their ideas are in truth very hazy as to the latter part of the transaction. However, they become witnesses, pronouncing themselves ready to swear that they saw the blow struck, which is perhaps the fact. Their evidence is practically of no value on the question of justification or self-defense. But finding, on being examined, that their testimony is wanted principally on that aspect of the case, they naturally tell their entire story as if they were as clear in their own minds upon one part of it as another. Being able to give details as to the earlier aspect of the quarrel, they feel obliged to be equally definite as to all of it. If they have an idea that the striking was without excuse, they gradually imagine details to fit their point of view. This is done quite unconsciously. Before long they are as glib with their description of the assault as they are about the game of cards. They get hazy on what occurred before, and overwhelmingly positive as to what occurred towards and at the last, and on the witness stand swear convincingly that they *saw* the defendant strike the complainant, exactly how he did it, the words he said, and that the complainant made no offer of any sort to strike the defendant. From allowing their minds to dwell on their own conception of what *must* have occurred, they are soon convinced that it *did* occur in that way, and their account flows forth with a circumstantiality that carries with it an irresistible impression of veracity.

The witness remembers in a large proportion of cases what he *wants* to remember, or believes occurred. The liar with his prepared lie is far less dangerous than the honest, but mistaken witness, or the witness who draws inadvertently upon his imagination. Most juries instinctively know a liar when they see and hear one, but few of them can determine in the case of an honestly intentioned witness how much of his evidence should be discarded as unreliable, and how much accepted as true.

The greatest difficulty in the trial of jury cases so far as the evidence is concerned lies in the fallibility of the human mind, and not in the inventive genius of the devil. An old man who combines a venerable appearance with a failing memory is the witness most to be feared by either side.

Both men and women habitually testify to facts as actually occurring on a specific occasion because they occurred on most occasions: Q. "Did your husband *lock* the door?" A. "Of course he did." Q. "How do you know?" A. "He *always* locks the door."

Witness after witness will take the stand and testify positively that certain events took place, or certain acts were done, when in point of fact all they can really swear to is that they usually took place or usually were done: Q. "Did he put on his hat?" A. "Certainly he did." Q. "Did you *see* him?" A. "No, but he *must* have put on his hat *if he went* out."

And the probability is that the whole question to be determined was whether or not "*he*" *did go out* or stay in.

The layman chancing to listen to a criminal trial finds himself gasping with

astonishment at the deluge of minute facts which pour from the witnesses' mouths in regard to the happenings of some particular day a year or so before. He knows that it is humanly impossible actually to *remember* any such facts, even had they occurred the day before yesterday. He may ask himself what he did that very morning and be unable to give any satisfactory reply. And yet the jury believe this testimony, and because the witness swears to it it goes upon the record as evidence of actual knowledge. In ninety-nine cases out of a hundred, counsel's only recourse is to argue to the jury that such a memory is impossible. But in the same proportion of cases the jury will take the oath of the witness against the lawyer's reasoning and their own common sense. This is because of the fictitious value given to the witness's oath by talesmen who attach little significance to their own. "He *swears* to it," says the jurymen, rubbing his forehead. "Well, he *must* remember it or he wouldn't swear to it!" And the witness probably thinks he *does* remember it. . . .

#### SUBTITLE C: NARRATION

244. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> The third element forming an essential part of all testimony (*ante*, No. 163) is the process of laying before the tribunal the witness's results of his Observation or Perception, and his Recollection, *i.e.* the process of Narration or Communication. In this element, as in the other two, there are many opportunities for defects fatal to testimonial trustworthiness. As with the elements of Perception and of Recollection, so here also, experience has shown that certain dangers are to be looked for, and that certain restrictions should be imposed in order to prevent them. What these dangers and defects are depends upon the specific virtue which this element of Narration or Communication ought to possess.

Its office is to make intelligible to the tribunal the knowledge and recollection of the witness, whatever that may amount to, affirmative or negative, useful or trivial. Its prime and essential virtue, then, consists in *accurately reproducing and expressing the actual and sincere Recollection*. Assuming that the witness's Recollection fairly represents and corresponds to his Perception; then, if his Narration or Communication fairly represents and corresponds to his Recollection, and is intelligible by the tribunal, the elements of testimonial value are complete; but not otherwise. So far as the statement is found plainly or probably lacking in either of these respects, namely, in correspondence to recollected knowledge or in intelligibility, then its value diminishes accordingly. Most of the usual defects occur in the former respect, *i.e.* an absence, actual or probable, of this correspondence between the witness's uttered statement and his conscious recollection which he ought to be stating. In the other respect, *i.e.* intelligibility to the tribunal of the witness's utterance, comparatively few questions arise.

The *simplest* form of testimonial statement (from which others may be conceived of as deviations) is an (1) uninterrupted narrative (2) expressed in words (3) uttered orally (4) and intelligible directly by the tribunal. In

<sup>1</sup>[Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 766.)]

any one of these features, there may be a variation from this simple and natural type; the inquiry therefore concerns not only the inherent dangers of this simplest form, but also the added ones introduced by a variance in one or another of the four respects. That is to say, testimony may be (1) furnished upon systematic *interrogations*, and not as a spontaneous utterance; or (2) it may be non-verbal, *i.e.* expressed *dramatically*, in conduct or gestures; or (3) it may be furnished in *writing*, not orally; or, finally, (4) its language may require *interpretation*, before it becomes intelligible to the tribunal.

#### Topic 1. Language and Demeanor as a Means of Expression

245. WILLIAM JAMES. *The Principles of Psychology*. (1889. Vol. I, pp. 37, 53.) . . . One of the most instructive proofs of motor localization in the cortex is that furnished by the disease now called aphemia, or *motor aphasia*. Motor aphasia is neither loss of voice nor paralysis of the tongue or lips. The patient's voice is as strong as ever, and all the innervations of his hypoglossal and facial nerves, except those necessary for speaking, may go on perfectly well. He can laugh and cry, and even sing; but he either is unable to utter any words at all; or a few meaningless stock phrases form his only speech; or else he speaks incoherently and confusedly, mispronouncing, misplacing, and misusing his words in various degrees. Sometimes his speech is a mere broth of unintelligible syllables. In cases of pure motor aphasia the patient recognizes his mistakes and suffers acutely from them. Now whenever a patient dies in such a condition as this, and an examination of his brain is permitted, it is found that the lowest frontal gyrus is the seat of injury. Broca first noticed this fact in 1861 and since then the gyrus has gone by the name of Broca's convolution. The injury in right-handed people is found on the left hemisphere, and in left-handed people on the right hemisphere. Most people, in fact, are left-brained, that is, all their delicate and specialized movements are handed over to the charge of the left hemisphere. The ordinary right-handedness for such movements is only a consequence of that fact, a consequence which shows outwardly on account of that extensive decussation of the fibers whereby most of those from the left hemisphere pass to the right half of the body only. But the left-brainedness might exist in equal measure and not show outwardly. This would happen wherever organs on *both* sides of the body could be governed by the left hemisphere; and just such a case seems offered by the vocal organs, in that highly delicate and special motor service which we call speech. Either hemisphere *can* innervate them bilaterally, just as either seems able to innervate bilaterally the muscles of the trunk, ribs, and diaphragm. Of the special movements of speech, however, it would appear (from the facts of aphasia) that the left hemisphere in most persons habitually takes exclusive charge. With that hemisphere thrown out of gear, speech is undone; even though the opposite hemisphere still be there for the performance of less specialized acts, such as the various movements required in eating. . . .

In man the temporal lobe is unquestionably the seat of the hearing function, and the superior convolution adjacent to the sylvian fissure is its most important part. The phenomena of aphasia show this. We studied motor aphasia a few pages back; we must now consider *sensory aphasia*. Our knowledge of this disease has had three stages: we may talk of the

period of Broca, the period of Wernicke, and the period of Charcot. What Broca's discovery was we have seen. Wernicke was the first to discriminate those cases in which the patient cannot even understand speech from those in which he can understand, only not talk; and to ascribe the former condition to lesion of the temporal lobe. The condition in question is *word deafness*, and the disease is *auditory aphasia*. The latest statistical survey of the subject is that by Dr. Allen Starr. In the seven cases of pure word deafness which he has collected, cases in which the patient could read, talk, and write, but not understand what was said to him, the lesion was limited to the first and second temporal convolutions in their posterior two thirds. The lesion (in right-handed, *i.e.* left-brained, persons) is always on the left side, like the lesion in motor aphasia. Crude hearing would not be abolished, even were the left center for it utterly destroyed; the right center would still provide for that. But the *linguistic use* of hearing appears bound up with the integrity of the left center more or less exclusively. Here it must be that words heard enter into association with the things which they represent, on the one hand, and with the movements necessary for pronouncing them, on the other. In a large majority of Dr. Starr's fifty cases, the power either to name objects or to talk coherently was impaired. This shows that in most of us (as Wernicke said) speech must go on from auditory cues; that is, it must be that our ideas do not innervate our motor centers directly, but only after first arousing the mental sound of the words. This is the immediate stimulus to articulation; and where the possibility of this is abolished by the destruction of its usual channel in the left temporal lobe, the articulation must suffer. . . .

It is the minuter analysis of the facts in the light of such individual differences as these which constitute Charcot's contribution towards clearing up the subject. Every namable thing, act, or relation has numerous properties, qualities, or aspects. In our minds the properties of each thing, together with its name, form an associated group. If different parts of the brain are severally concerned with the several properties, and a farther part with the hearing, and still another with the uttering, of the name, there must inevitably be brought about (through the law of association which we shall later study) such a dynamic connection amongst all these brain parts that the activity of any one of them will be likely to awaken the activity of all the rest. When we are talking as we think, the *ultimate* process is that of utterance. If the brain part for *that* be injured, speech is impossible or disorderly, even though all the other brain parts be intact: and this is just the condition of things which we found to be brought about by limited lesion of the left inferior frontal convolution. But back of that last act various orders of succession are possible in the associations of a talking man's ideas. The more usual order seems to be from the tactile, visual, or other properties of the things thought about to the sound of their names, and then to the latter's utterance. But if in a certain individual the thought of the *look* of an object or of the look of its printed name be the process which habitually precedes articulation, then the loss of the *hearing* center will pro tanto not affect that individual's speech. He will be mentally deaf, *i.e.* his understanding of speech will suffer, but he will not be aphasic. In this way it is possible to explain the seven cases of pure word deafness which figure in Dr. Starr's table. . . .

Thus, *there is no "center of Speech" in the brain any more than there is a faculty of Speech in the mind. The entire brain, more or less, is at work in a man who uses language.*

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246. WM. D. WHITNEY. *Oriental and Linguistic Studies* (1873. p. 353); and *Language and the Study of Language* (1869. pp. 405, 102). . . . That men have willed language, as language, into existence, or, in its production, have labored consciously for the enrichment of their mental working, we do not believe. The first man who, on being attacked by a wolf, seized a club or a stone and with it crushed his adversary's head, was not conscious that he was commencing a series of acts which would lead finally to rifles and engine, would make man the master (comparatively speaking) instead of the slave of nature, would call out and train some of his noblest powers, and be an essential element in his advancement to culture. He knew nothing either of the laws of association and the creative forces in his own mind that prompted the act, or of the laws of matter which made the weapon accomplish what his fist alone could not. The psychologist and the physicist, between them, can trace out now and state with exactness those laws and forces; can formulate the perceptions and apperceptions and reflex actions on the one hand; can put in terms of *a* and *b* and *x* and *y* the additional power conferred, on the other hand; and can even maintain, as we infer, that those laws and forces and formulas produced the man's act; while all that he himself knew was that he was defending himself in a sudden emergency. . . .

Our view of the history of origination and development of language is closely akin with what we have just laid down respecting that of mechanical invention. Men have not, in truth, produced language reflectively, or even with consciousness of what they were doing; they do not, in general, even so use it after it is produced. The great majority of the human race have no more idea that they are in the habit of "using language" than M. Jourdain had that he "spoke prose"; all they know is that they can and do talk. That is to say, language exists to them for the purpose of communication simply; of its value to the operations of their own minds, of its importance as an element in human culture, of its wonderful intricacy and regularity of structure, nay, even of the distinction of the parts of speech, they have not so much as a faint conception, and would stare in stupid astonishment if you set it forth to them.

And we claim that all the other uses and values of language come as *unforeseen consequences* of its use as a means of communication. The desire of communication is a real living force, to the impelling action of which every human being, in every stage of culture, is accessible; and, so far as we can see, it is the only force that was equal to initiating the process of language making, as it is also the one that has kept up the process to the present time. It works both consciously and unconsciously; consciously, as regards the immediate end to be attained; unconsciously, as regards the further consequences of the act. When two men of different speech meet, they fall to trying simply to understand one another; so far as this goes, they know well enough what they are about; that they are thus making language they do not know; that is to say, they do not think of it in that light. The man who

beckons to his friend across a crowded room, or coughs, or *hems* to attract his attention, commits, consciously and yet unconsciously, a rude and rudimentary act of language making — one analogous doubtless with innumerable acts that preceded the successful initiation of the spoken speech which we have. No one consciously makes language, save he who uses it most reflectively. . . . And so men have gone on from the beginning, always finding a sign for the next idea, stereotyping the conception by a word, and working with it till the call for another came; and the result, at any stage of the process, is the language of that stage. . . .

Language, then, is the spoken means whereby thought is communicated, and it is only that. Language is not thought, nor is thought language; nor is there a mysterious and indissoluble connection between the two, as there is between soul and body, so that the one cannot exist and manifest itself without the other. There can hardly be a greater and more pernicious error, in linguistics or in metaphysics, than the doctrine that language and thought are identical. It is, unfortunately, an error often committed, both by linguists and by metaphysicians. "Man speaks because he thinks" is the dictum out of which more than one scholar has proceeded to develop his system of linguistic philosophy. . . .

That thought and speech are not the same is a direct and necessary inference, I believe, from more than one of the truths respecting language which our discussions have already established; but the high importance attaching to a right understanding of the point will justify us in a brief review of those truths in their application to it. In the first place, we have often had our attention directed to the *imperfection of language* as a full representation of thought. Words and phrases are but the skeleton of expression, hints of meaning, light touches of a skillful sketcher's pencil, to which the appreciative sense and sympathetic mind must supply the filling up and coloring. Our own mental acts and states we can review in our consciousness in minute detail, but we can never perfectly disclose them to another by speech; nor will words alone, with whatever sincerity and candor they may be uttered, put us in possession of another's consciousness. In anything but the most objective scientific description, or the driest reasoning on subjects the most plain and obvious, we want more or less knowledge of the individuality of the speaker or writer, ere we can understand him intimately; his style of thought and sentiment must be gathered from the totality of our intercourse with him, to make us sure that we penetrate to the central meaning of any word he utters; and such study may enable us to find deeper and deeper significance in expressions that once seemed trivial or commonplace. A look or tone often sheds more light upon character or intent than a flood of words could do. Humor, banter, irony are illustrations of what tone, or style, or perceived incongruity can accomplish in the way of impressing upon words a different meaning from that which they of themselves would wear.

That language is impotent to express our feelings, though often, perhaps, pleaded as a form merely, is also a frequent genuine experience. Nor is it for our feelings alone that the ordinary conventional phrases, weakened in their force by insincere and hyperbolic use, are found insufficient: apprehensions, distinctions, opinions, of every kind, elude our efforts at description, definition, intimation. How often must we labor, by painful



circumlocution, by gradual approach and limitation, to place before the minds of others a conception which is clearly present to our own consciousness! How often, when we have the expression nearly complete, we miss a single word that we need, and must search for it, in our memories or our dictionaries, perhaps not finding it in either! How different is the capacity of ready and distinct expression in men whose power of thought is not unlike! . . . How often we understand what one says better than he himself says it, and correct his expression, to his own gratification and acceptance. And if all the resources of expression are not equally at the command of all men of equal mental force and training, so neither are they, at their best, adequate to the wealth of conception of him who wields them; that would be but a poorly stored and infertile mind which did not sometimes feel the limited capacity of language, and long for fuller means of expression. . . .

Moreover, there is no internal and necessary connection between a word and the idea designated by it, no tie save a mental association binds the two together. Conventional usage, the mutual understanding of speakers and hearers, allots to each vocable its significance, and the same authority which makes is able to change, and to change as it will, in whatever way, and to whatever extent. . . .

Hence the impossibility that one should ever apprehend with absolute truth what another, even with the nicest use of language, endeavors to communicate to him. This incapacity of speech to reveal all that the mind contains meets us at every point. The soul of each man is a mystery which no other man can fathom: the most perfect system of signs, the most richly developed language, leads only to a partial comprehension, a mutual intelligence, whose degree of completeness depends upon the nature of the subject treated, and the acquaintance of the hearer with the mental and moral character of the speaker.

247. WM. C. ROBINSON. *Forensic Oratory, a Manual for Advocates*. (1893. p. 126.) . . . The oral testimony of a prepossessing witness, if skillfully arranged and agreeably and forcibly delivered, is itself a true oration. It conciliates the hearer toward the witness, and also toward the cause for which his evidence is given. It produces faith in the correctness of his assertions, and awakens sympathy with him in his apparent interest in those who call him. It engenders a conviction that the party for whom he appears is in the right, and a disposition to express this conviction by a favorable verdict. It often has more influence than the utterances of the advocate himself, since no suspicion that he acts a part attaches to a witness, and his disinterestedness, if not established, is generally presumed. . . . The reliability of a witness as a source of knowledge is also measured by his power of expressing accurately and intelligibly the ideas which he has received and still retains. The real evidence — that which convinces — is the idea conveyed by the words of the witness to the mind of the jury, and whether this idea corresponds with the facts as they actually occurred depends no less on the propriety of the language in which they are expressed than on the fullness and precision with which they were observed and remembered. Faults of expression in the witness thus become faults of opinion in the jury, and scarcely less prejudicial to the interests of the cause than the utterances of ignorance or falsehood.

Among uncultivated persons habitual errors of expression are not uncommon. They use words in an improper or provincial sense. They employ exaggerating epithets and adjectives. They describe objects, not by delineating their characteristic features, but in fragmentary outlines, or by portraying their most universal indistinctive attributes. They reproduce events, not in their proper order and relations, but with whatever sequence and connection the inspiration of the moment may direct. They do not lead, but mislead, the deductions of their hearers, with the best intentions and sufficient knowledge unwittingly producing false impressions on the minds of those whose mistake originates in the assumption that the words are spoken in the same sense in which they are understood.

248. HANS GROSS. *Criminal Psychology*. (transl. Kallen. 1911. § 59, p. 287.) *The Forms of Giving Testimony*. Wherever we turn we face the absolute importance of language for our work. Whatever we hear or read concerning a crime is expressed in words, and everything perceived with the eye, or any other sense, must be clothed in words before it can be put to use. . . . Yet, who needs this knowledge? The lawyer. Other disciplines can find in it only a scientific interest, but it is practically and absolutely valuable only for us lawyers, who must, by means of language, take evidence, remember it, and variously interpret it. A failure in a proper understanding of language may give rise to false conceptions and the most serious of mistakes. Hence, nobody is so bound as the criminal lawyer to study the general character of language, and to familiarize himself with its force, nature, and development. Without this knowledge the lawyer may be able to make use of language, but, failing to understand it, will slip up before the slightest difficulty. . . .

(a) *Variety in Forms of Expression*. Men being different in nature and bringing-up on the one hand, and language, being on the other, a living organism which varies with its soil, *i.e.* with the human individual who makes use of it, it is inevitable that each man should have especial and private forms of expression. These forms, if the man comes before us as witness or prisoner, we must study, each by itself. Fortunately, this study must be combined with another that it implies, *i.e.* the character and nature of the individual. The one without the other is unthinkable. Whoever aims to study a man's character must first of all attend to his ways of expression, inasmuch as these are most significant of a man's qualities, and most illuminating. . . .

The especial use of certain forms is individual as well as social. Every person has his private usage. One makes use of "certainly," another of "yes, indeed;" one prefers "dark," another "darkish." . . . Even when it is simple to bring out what is intended by an expression, it is still quite as simple to overlook the fact that people use peculiar expressions for ordinary things. . . . Numerous examples may develop with comparative speed in each individual speaker, and, if the development is not traced, may lead, in the law court, to very serious misunderstandings. People who nowadays name abstract things, conceive, according to their intelligence, now this and now that phenomenon by means of it. Then they wonder at the other fellow's not understanding them. . . .

(b) *Conditions Affecting the Mode of Expression*. As a rule it must be maintained that time, even a little time, makes an essential difference in the conception of any object. Mittermaier, and indeed Bentham, have shown

what an influence the interval between observation and announcement exercises on the form of exposition. The witness who is immediately examined may, perhaps, say the same thing that he would say several weeks after — but his presentation is different, he uses different words, he understands by the different words different concepts, and so his testimony becomes altered.

A similar effect may be brought about by the *surrounding circumstances* under which the evidence is given. Every one of us knows what surprising differences occur between the statements of the witness made in the silent office of the examining justice and his secretary, and what he says in the open trial before the jury. There is frequently an inclination to attack angrily the witnesses who make such divergent statements. Yet more accurate observation would show that the testimony is essentially the same as the former, but that the manner of giving it is different, and hence the apparently different story. The difference between the members of the audience has a powerful influence. It is generally true that reproductive construction is intensified by the sight of a larger number of attentive hearers, . . . but only when the speaker is certain of his subject and of the favor of his auditors. . . . The interest belongs only to the subject, and the speaker himself receives, perhaps, the undivided antipathy, hatred, disgust, or scorn, of all the listeners. Nevertheless, attention is intense and strained, and inasmuch as the speaker knows that this does not pertain to him or his merits, it confuses and depresses him. It is for this reason that so many criminal trials turn out quite contrary to expectation. Those who have seen the trial only, and were not at the prior examination, understand the result still less when they are told that “nothing has altered” since the prior examination — and yet much has altered; the witnesses, excited or frightened by the crowd of listeners, have spoken and expressed themselves otherwise than before, until, in this manner, the whole case has become different.

In a similar fashion, some fact may be shown in another light by the *manner of narration* used by a particular witness. Take, as example, some energetically influential quality like humor. It is self-evident that joke, witticism, comedy, are excluded from the court room, but if somebody has actually introduced real, genuine humor by way of the dry form of his testimony, without having crossed in a single word the permissible limit, he may, not rarely, narrate a very serious story so as to reduce its dangerous aspect to a minimum. Frequently the testimony of some funny witness makes the rounds of all the newspapers for the pleasure of their readers. Everybody knows how a really humorous person may so narrate experiences, doubtful situations of his student days, unpleasant traveling experiences, difficult positions in quarrels, etc., that every listener must laugh. At the same time, the events told of were troublesome, difficult, even quite dangerous. The narrator does not in the least lie, but he manages to give his story the twist that even the victim of the situation is glad to laugh at.

249. ARTHUR C. TRAIN. *The Prisoner at the Bar*. (2d ed. 1908. p. 236.) The final question to be determined by the juror in regard to the testimony of any witness is how far the latter has succeeded in conveying his actual recollections through the medium of speech and gesture. This necessarily depends upon a variety of considerations. Among these are his familiarity

with the English language; inadvertent accentuation of wrong words or of the less important features of his testimony; his physical condition, which in nine cases out of ten is one of extreme nervousness and timidity, if not of actual fear; and a hundred other trifling, but, in the aggregate, material matters.

The most effective testimony is that which is given with what the jury regard as the evidences of candor. It is a familiar fact that the surer a person is of anything, particularly among the laboring classes, the more loudly will he assert its truth. This is so well known to the jury as ordinarily constituted that unless testimony is given with positiveness it might as well not be given at all. Much as it is to be deprecated, an assertive lie is of much more weight with a jury than an anemic statement of the truth. The juror imagines himself telling the story, and feels that if he were doing so and his testimony were true, he would be so convincing that the jury could have no doubt about it at all. Ofttimes a witness leads the jury to suspect that he is a liar simply because he has too strong a sense of the proprieties of his position vehemently to resent a suggestion of untruthfulness. The gentleman who mildly replies "That is not so" to a challenge of his veracity, makes far less impression on the jury than the coal heaver who leans forward and shakes his fist in the shyster's face, exclaiming: "If ye said that outside, ye little spalpeen, I'd knock yer head off." "Ah," say the jury, "there's a *man* for you." Just as your puritan is at a disadvantage in an alehouse, and your dandy in a mob, so are the hyperconscientious and the oversensitive and refined before a jury. The most effective witness is he whom the general run of jurors can understand, who speaks their own language, feels about the same emotions, and is not so morbidly conscientious about details that in qualifying testimony he finds himself entangled and rendered helpless in his own refinements. A distinguished lawyer testifying in a recent case was so careful to qualify every statement and refine every bit of his evidence that the jury took the word of a perjured loafer and a street-walker in preference. This kind of thing happens again and again, and the wily witness who thinks himself clever in appearing overdisinterested is "hoist by his own petard." The jury at once distrust him. They feel either that he is making it all up, or is in fact not sure of his evidence, else, they argue, he would be more positive in giving it.

Most witnesses in the general run of criminal cases have no comprehension of the meaning of words of more than three syllables. It is hopeless to make use of even such modest members of our national vocabulary as "preceding," "subsequent," "various," etc. A negro when asked if certain shots were "simultaneous" replied: "Yas, boss. Dat's it! 'Zactly simultaneous! One *right after* de odder."

The ordinary witness usually says "minutes" when he means "seconds." He will testify without hesitation that the defendant drew his revolver and immediately shot the complainant, illustrating on the stand the rapidity of the movement. When asked how long it took, he will answer: "Oh, about two or three minutes."

A proper medium in which to converse between the lawyer and witness is sometimes difficult to find, and invariably much tact is required in handling witnesses of limited education. The writer remembers one witness who was completely disconcerted by the use of the word "cravat," and at the precise

moment the attorney was so confused as not to be able to remember any synonym. The Tenderloin and the Bowery have a vocabulary of their own differing somewhat from that of beggars and professional criminals. The language of the ordinary policeman is a polyglot of all three. Popular writers on the "powers that prey," and dabblers in criminology in general, are apt to become the victims of self-alleged "ex-convicts" and "criminals" who are anxious to sell unreliable information for honest liquor. A large part of the lingo in realistic treatises on prison life and "life among the burglars," originates in the doped imagination of whatever fanciful "reformed" thief happens to be the personal gold mine of that particular author. Thieves, like any distinct class, make use of slang, some of which is peculiar to them alone. But for the most part the "tough" elements in the community make themselves easily understood either in the office or on the witness stand.

Where the witness speaks a foreign language, the task of discovering exactly what he knows, or even what he actually says, is herculean. In the first place interpreters, as a rule, give the substance — as they understand it — of the witness's testimony rather than his exact words. It is also practically impossible to cross-examine through an interpreter, for the whole psychological significance of the answer is destroyed, ample opportunity being given for the witness to collect his wits and carefully to frame his reply. One could cross-examine a deaf mute by means of the finger alphabet about as effectively as an Italian through a court interpreter, who probably speaks (defectively) seventeen languages.

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250. G. L. DUPRAT. *Le Mensonge: étude de psychosociologie*. (1909. 2d ed. pp. 15, 120.) *Kinds of Lies*. "Some liars add to a true statement by adorning facts, by giving to people, acts, or things non-existent qualities; or by exaggerating the extent, value, etc., of a fact or a relation; or by inventing new facts. They are like the artists, who sometimes simplify or "purify" nature, idealizing it while preserving its essentials, but also sometimes enrich the data of experience by combining them in a new order to make new forms. Thus there are lies (1) of attribution, (2) of addition, (3) of exaggeration, (4) of recombination, (5) of pure fiction. Lies applying to personal qualities or acts include slander, false prosecution, false witnessing. Lies applying to external facts include false representations, fraud in general, and (when a prior oath to deal honestly has been taken) disloyalty. They thus pass beyond mere expressions of the speaker's own thought and include statements of external fact, and it is not possible to draw a boundary between false testimony and fraud. There is an intermediate type, simulation, in which a mendacious assertion combines with false conduct adapted to give it credence. . . .

But the lie of dissimulation must also be included, — the lie by suppressing facts, even without express negation in words or conduct. The false witness, by his words or by his silence, may deny the existence of a fact; the false historian may deny the existence of persons or events which would embarrass his proof of the view to which he is committed; . . . the smuggler is typically a dissimulator, who conceals a part of the truth. Dissimulation, in short, is a negative or inhibitive suggestion, in contrast to simulation or lie in the ordinary sense, which is a positive suggestion.

The two extreme types of lie are therefore the *positive*, which creates a complete fiction, interpolated by imagination in the world of reality, and the *negative*, which removes from outward expression whatever might furnish a clew to the truth. Between these two extremes may be arranged the other types, in the order of their affinities; thus:

*Classification of Lies (or, Modes of Suggesting Error)*

A. Positive Suggestion		contrasted with	B. Negative Suggestion	
Invention (slander, fraud, false prosecution, false witness)	}	. . . . .	{	Complete dissimulation; denegation; suppression of testimony.
Fiction, simulation				
Addition . . . . .				Omission
Deformation . . . . .				Mutilation
Exaggeration . . . . .				Attenuation

To this classification of lies would correspond that of liars. Those who make positive suggestions exhibit capacity of invention; those who make negative suggestions are frequently lacking in imagination. . . . Of course, many lies are mixed in character, partaking both of positive and of negative suggestion. Moreover, every lie in so far as it creates a new form for some supposed fact is deformative, and thus is in a sense a positive suggestion; so that every liar to this extent uses imagination. Nevertheless there is always, within the same group, a relative contrast between the liar who needs more or less mental activity to construct or amplify, and the one who needs merely deny, suppress, or mutilate, without having to invent anything but what is furnished him in the very experience which he desires to impress falsely on the other person. . . .

The lie, then, may be thus defined: A psychosociologic fact of suggestion, oral or otherwise, by means of which one tends, more or less intentionally, to introduce into another's mind a belief, positive or negative, not in harmony with what the actor supposes to be the truth.

*Neuromuscular phenomena of the lie.* Does the liar's mental state manifest itself by any biologic modifications? As to persons of strong character, skillful to the point of dissimulating the very sentiment which they experience in the act itself of dissimulation, it is certainly difficult to discover in them the traces of the lie. On the other hand, children usually betray themselves readily enough.<sup>1</sup> Some children are reported as lying "with apparent candor"; but these are the scarcely conscious lies, for young beings are rare who dissimulate to the point of giving every appearance of candor. Many are embarrassed; they are uneasy under the inquirer's gaze; their eyes will not meet yours; and they show a haste to escape from further scrutiny, by making involuntary movements to get away or to elude attention or to take up some new activity. Some, in spite of an apparent coolness, cannot avoid contracting the muscles, tapping the sole of the foot in a certain rhythm, crunching something in their fingers, or plunging their hands in their pockets and then taking them out in alternate movements. Others

<sup>1</sup> The investigations of the Society for the Psychological Study of Children will here yield still other valuable results.

show their uneasiness by an excitement, an exaggerated boldness amounting to insolence; in their emotion they go beyond all moderation in the passionate expression of their assertions, in the volubility of their language, in the quickness of their answers, or in the audacity of their questions; a sudden release of control seems to give vent to a flow of words which threaten to become incoherent, as in lunatics afflicted with acute mania. In some children, while speech becomes copious, the voice is low, yet with others it is high pitched with outbursts like spasms. The excitement may induce only vasomotor modifications, blushes, or paleness, or each alternatively. Sometimes the only perceptible mark is a trembling of the hand, or a winking of the eyes, or a rapid dilation of the nostrils, or a slight creasing of the hairy skin, or an odd smile either fugitive or lasting and then almost inscrutable. The protrusion of the lips, or their contraction with discoloration of the mucus, sometimes replaces the smile. In some instances, the liar tosses his head; sometimes he watches for some sign of acquiescence; sometimes he fluctuates between boldness and confusion.

This diversity of physiologic manifestations of the mental state of lying demonstrates plainly that it involves an affective (emotional) condition. As William James has shown, affective phenomena consist essentially, from the physiological point of view, in a greater or less number of muscular and vasomotor reflexes, forming combinations so varied that any classification of the emotions is impossible. In the state of lying there are phenomena either of excitation or of depression or of the one alternating with the other.

Nevertheless, we must not confuse affective phenomena, strictly so-called, with the phenomena of expressive mimicry due to simulation and aimed at producing or increasing the confidence of a watching auditor. . . . For example, a liar may simulate laughter; and when the simulation is a poor one, we have the "forced laugh," in which only facial displacements occur without the expression of a true geniality; the lips are merely parted, the nasolabial furrow is bent convexly inward for most of its length, the creased skin radiates in wrinkles around the eyes towards the temples.

After allowing for these physiologic modifications which may accompany the lie without being an intrinsic mark of it, we may still concede that *no intentional derogation from the truth can take place without a tendency to muscular contractions or expansions*, — phenomena of inhibition or excitation. The reason for this must be sought in that cerebral physiology which is the basis for a psychological explanation of the lie.

*Psychology of the lie.* We have seen that the lie is either a positive, more or less complex invention, or a negative invention. But throughout all it includes an act of imagination. Lying invention shows all the species of imagination so well classified and described by Ribot in his great work on "The Creative Imagination." . . . There is the plastic imagination, the diffuent imagination, the mystical imagination, the scientific imagination, the practical imagination, the commercial imagination, the utopian imagination. We may safely assert — a truism, to be sure, but a necessary one — that all species of imagination may serve, not only to discover truths, but to invent lies. But what seems to be the peculiarity of imagination used in lying is that it can go to the length of completely negating the existence of the object in question. . . . In contrast with the other species, it alone can be

simply negative. In certain cases, then, we have *inhibition*, rather than production.

Among the neuromuscular phenomena characteristic of a psycho-physiologic lying state, we have often above noted acts of contradiction, of repression of incipient movements, — in short, of inhibition. The liar must keep from expressing aloud his thought. He is not merely imagining; he is at the same moment conceiving something which he ought truly to express and something different which he is to succeed in suggesting to others. The process is thus more complex than in merely creative imagination. Now if there is any law of psychopathology that is well established by experiment or observation, it is this,<sup>1</sup> that *every clear and living idea engenders the corresponding movement*. Hence it must be conceded that a very clear mental representation of something which one ought to be telling — and it is very clear in many instances of derogation from the truth, and clearer in proportion as the sense of duty may be prompting obedience — engenders a strong tendency to pronounce the suitable words and to make the gestures or postures naturally accompanying that thought. Thence occurs often a violent antagonism between this natural propensity and the other inclination (casual or habitual) to disguise the truth by affirming something different. Before this antagonism can attenuate to the point where dissimulation becomes easy, the habit of telling the thing contrary to what one ought to tell must have become a strong one. Hence we come to a distinction between the casual liar and the habitual liar, — the liar who promptly confounds himself, and the tenacious liar who persists in his lie.

The *casual* liar may be a person having a vivid imagination or experiencing a lively emotion, who impulsively affirms or denies without precise reflection on his erroneous assertion and the distance between it and the truth. It is only when he receives some check that he definitely conceives the truth. Then he may either persist in his falsity, through vanity, pride, self-esteem, or shame; or may hasten to some other topic; or may recant. If he recants, one may perhaps detect slight symptoms of lack of frankness; if he hastens to leave the subject, he usually betrays himself by his precipitateness or worried air; if he persists, he tends to become the habitual liar and needs now a great power of inhibition.

With the *tenacious* liar, the lie is generally habitual. Fatigue, worry, uneasiness, recur as infrequently as the inhibition has been frequent. The physiological marks of lying are less apparent, the muscular contractions less forcible and particularly less spasmodic. He is more at home in supporting his assertions by a persuasive mimicry, — facial expressions appropriate to frankness, smiles less false, intonations less artificial, etc. Mendacious invention here tends to free itself from almost all the shackles customarily provided by a consciousness of the truth.

251. A. C. PLOWDEN. *Grain or Chaff; the Autobiography of a Police Magistrate*. (1903. p. 225.) . . . It would be unreasonable, however, to turn your eyes away altogether. Indeed, it is not possible to do it. You cannot watch a face too closely, provided you can trust yourself not to be led away by too hasty inferences. Much of the interest of my work I feel to lie in a close scrutiny of the human countenance, whether in the dock or the witness

<sup>1</sup> See P. Janet, *L'automatisme psychologique*.



box. I make a mental note if a prisoner has abnormal ears. They are often significant. And if I am doubtful about a witness speaking the truth, I direct my attention to his mouth and to his hands. The mouth is perhaps the most expressive feature, and the hands of a liar are seldom at rest. But where I often think much is to be learned from a witness is *after* he has given his evidence and left the box. I continue to watch him as he sits unsuspectingly in his place in the court, while other witnesses, especially those that are opposed to him, are examined. The expressions that pass over his face on these occasions are often very instructive.

252. AMOS C. MILLER. *Examination of Witnesses*. (Illinois Law Review. 1907. Vol. II, p. 257.) It is, of course, of the greatest importance to be able to determine whether a witness is willfully falsifying or whether he is honestly mistaken. Of course, there are all degrees between an honest mistake and a willful lie. How to correctly measure the elements of this honesty in a witness's testimony is largely a matter of experience which each man is compelled to gain for himself. But there are a few suggestions which may be of assistance. A witness who is testifying falsely will, as a rule, try to evade, on cross-examination, questions on collateral matters; this, of course, in order to avoid the danger of being entrapped. He will frequently ask the cross-examiner to repeat plain, simple questions in order to give him a chance to think up a consistent reply. He will often carefully and slowly repeat over a question on cross-examination for the purpose of giving him time to think; or he will answer irresponsively in order to steer the cross-examiner off the track. I have also observed that the witness who is swearing to a clear-cut lie will, while so doing, throw back his head with an indifferent air and close his eyes or blink. My experience has taught me to believe that that is an almost certain sign of deliberate dishonesty.

#### Topic 2. Narration as affected by Interrogation and Suggestion

253. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. p. 29).

I. One of the most important branches of advocacy is the examination of a witness *in chief*. . . . One fact should be remembered to start with, and it is this: the witness whom he has to examine has probably a plain, straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury, and their consequent verdict. If it were to be told amid a social circle of friends, it would be narrated with more or less circumlocution and considerable exactness. But *all the facts would come out*; and that is the first thing to insure, if the case be, as I must all along assume it to be, an honest one. I have often known half a story told, and that the worst half, too, the rest having to be got out by the leader in re-examination, if he have the opportunity. If the story were being told as I have suggested, in private, all the company would understand it, and if the narrator were known as a man of truth, all would believe him. It would require no advocate to elicit the facts or to confuse the dates; the events would flow pretty much in their natural order. Now change the audience; let the same man attempt to tell the same story in a court of justice. His first feeling is that he must not tell it in his own way. He is going to be *examined* upon it; he

is to have it dragged out of him piecemeal, disjointedly, by a series of questions—in fact, he is to be interrupted at every point in a worse manner than if everybody in the room, one after another, had questioned him about what he was going to tell, instead of waiting till he had told it. It is not unlike a post mortem; only the witness is alive, and keenly sensitive to the painful operation. He knows that every word will be disputed, if not flatly contradicted. He has never had his veracity questioned, perhaps, but now it is very likely to be suggested that he is committing rank perjury.

This is pretty nearly the state of mind of many a witness, when for the first time he enters the box to be examined. In the first place, then, he is in the worst possible frame of mind to be *examined*—he is agitated, confused, and bewildered. Now put to examine him an agitated, confused, and bewildered young advocate, and you have got the worst of all elements together for the production of what is wanted, namely *evidence*. First of all, the man is asked his name, as if he were going to say his catechism, and much confusion there often is about that, the witness feeling that the judge is surprised, if not angry, at his not having a more agreeable one, or for having a name at all. He blushes, feels humiliated, but escaping a reprimand thinks he has got off remarkably well so far. Then he faces the young counsel, and wonders what he will be asked next.

Now the best thing the advocate can do under these circumstances is to remember that the witness has something to tell, and that but for him, the advocate, would probably tell it very well, “in his own way.” *The fewer interruptions, therefore, the better; and the fewer questions, the less questions will be needed.* Watching should be the chief work; especially to see that the story be not confused with extraneous and irrelevant matter. . . . The most useful questions for eliciting facts are the most commonplace, “What took place next?” being infinitely better than putting a question from the narrative in your brief, which leads the witness to contradict you. The interrogative “Yes?” as it asks nothing and yet everything is better than a rigmorole praise, such as, “Do you remember what the defendant did or said upon that?” The witness after such a question is generally puzzled, as if you were asking him a conundrum which is to be passed on to the next person after he has given it up.

Judges frequently rebuke juniors for putting a question in this form: “Do you remember the 29th of February last?” In the first place, it is not the *day* that has to be remembered at all, and whether the witness recollects it or not is immaterial. It is generally the *facts* that took place about that time you want deposed to, and if the date is at all material, you are putting the question in the worst possible form to get it. A witness so interrogated begins to wonder whether he remembers the day, or whether he does not, and becomes puzzled. We don’t remember *days*. You might just as well ask if he remembers the 1st of May, 1816, the day on which he was born, instead of asking him the date of his birth. This is one of the commonest, and at the same time one of the stupidest blunders that can be made. I will, therefore, at the risk of repetition, give one more illustration. Suppose you ask a witness if he remembers the 10th of June, 1874; he probably does not, and both he and you are bewildered, and think you are at cross-purposes; but ask him if he was at Niagara in that year, and you will get the

answer without hesitation; inquire when it was, and he will tell you the 10th of June. In this way you will avoid taxing a witness's memory; always a dangerous proceeding.

Another common error is worth noting, and that is the not permitting a witness to finish his answer, or tell all he knows on a material matter. In the very midst of an important answer a witness is very often interrupted by a frivolous question upon something utterly immaterial. This seems so absurd on paper that it needs an example. A witness is giving an answer when some such question as this is interposed! "What time was this?" or, "Had you seen Mr. Smith before this?" A question is often left half answered by such interruptions, the better half perhaps being untold. "He never asked me about that," says the witness after the case is over; or, "I could have explained that if he had let me." . . . All unnecessary interruptions produce confusion in the mind of the witness and jury and tend to the damage of your case.

But although it is by far the best to let a witness tell his story in his own way as much as possible, it is absolutely necessary to prevent him from rambling into irrelevant matter. Most uneducated witnesses begin a story with some utterly irrelevant observation, such as, if they are going to tell what took place at a fire, they will say, "I was just fastening up my back door, when I heard a shout." Get him as soon as you can at the fire and the evidence will come with little trouble.

Every question should not only be intelligible and relevant in itself, but it should be put in such a form that its relevancy to the case may be apparent to *him*. A question, without being leading, should be a *reminder* of events rather than a test of the witness's recollection. I will give an illustration which will show how easy it is to blunder, and how necessary it is to avoid blundering. A man brings an action against a railway company for false imprisonment. The facts are these: He lost his ticket and refused to pay; the porter on the platform called the inspector, who sent for a policeman, and then gave him into custody. The best way *not* to get the facts out is to examine him in the following manner:—

"Were you asked for your ticket?—Yes."

"Did you produce it?—No."

"Why not?—I had lost it."

"Are you sure you took it?—Quite."

"Positive? (This is a good opening for the wedge of cross-examination—a doubt thrown on your own witness.)—I am quite sure."

"What did the defendants say then; I mean the porter?" (This blunder ought not to have been made.) At this point the witness is in a hopeless muddle, and says: "I was given into custody."

The story is not half told, although it is one of the simplest to tell.

Now the counsel contradicts by way of explanation, and says, "No, no; do attend." Witness strokes his chin as though about to be shaved. Judge glances at him, and wonders if he's lying. Counsel for the defendants (sure to be eminent) smile, and the jury look knowingly at one another, and begin to think it's a trumped-up attorney's action.

Now start again with another question.

"When the train stopped you got out?—I didn't get out afore it stopped, sir."

"Did any one ask you for your ticket? — They did;" emphatically, as though he knows now where he is.

"Who? — I'm sure I don't know who he is; never seen the man before in my life."

"Well, well, did he *do* anything? — No, sir; he didn't do nothin' as I knows of;" evidently puzzled, as if he had forgotten some important event upon which the whole case turns.

This looks so ridiculous on paper that it is possible some readers will doubt if it ever happened. I can only say there are many much more ridiculous incidents that occur in courts of justice when young counsel have what is called a "stupid" witness in the box. In court the stupidity always seems to be that of the witness; on paper it looks as if the learned counsel could establish a better title to it.

This leads me to notice a cardinal rule in examination in chief. It is seldom regarded as such by beginners, and only seems to be observed as the result of experience. Why it should not be learned at once and implicitly obeyed I do not know, except it be that it has never been written down. The rule is this, that in examining a witness *the order of time ought always to be observed*. Stated in writing, it looks simple enough, and everybody says "of course." Plain as one of the ten commandments, and as often violated by young advocates.

In putting questions *long-drawn sentences should be avoided*. The following is an almost verbatim report. The advocate was experienced, but he was anxious to get as much as he could into a question; and whenever your question is too large the answer will be worthless:

"Were you present at the meeting of the trustees when an agreement was entered into between them and the plaintiff?" Answer, "Yes."

Q. "Will you be kind enough to tell us what took place between the parties with reference to the agreement that was then entered into between them?"

The more neatly a question is put, the better, as it has to be understood not only by the witness, but by the jury. All that was necessary to be asked might have been put in the following words: "Was an agreement entered into between the trustees and the plaintiff?" — "Yes." "What was it?" It will appear even more strange that after the answer was given by one witness, which was all that was necessary to prove that part of the case, the question was repeated to another with additional verbiage.

"Will you be good enough to inform us what took place upon that occasion between the parties, as nearly as you can, with reference to the agreement that was then, as you have stated, entered into between them. Please tell us, not exactly, but as nearly as you can in your own way what his exact words were?"

II. Next to examination-in-chief nothing is more important or difficult in advocacy than *cross-examination*. It is infinitely the most dangerous branch, inasmuch as its errors are almost always irremediable. It is in advocacy very like what "cutting out" is in naval warfare, and you require a good many of the same qualities; courage with caution, boldness with dexterity, as well as judgment and discrimination. . . . Cross-examination may almost be regarded as a mental duel between advocate and witness. The first requisite therefore on the part of the attacking party (namely, the

advocate) is a knowledge of human character. This is the first requisite, and it is an indispensable one. But I suppose almost everybody conceives himself to be a master of this science.

With respect to style, as before remarked, every man has his own, or should have. . . . With regard to manner, a man should imitate the best. The most eminent are as a rule the most unaffected, and the quiet, moderate manner is generally the most effective. I do not intend to imply that bluster and a high tone will not sometimes unnerve a timid witness, but this is not cross-examination or true advocacy. It is not art, but bullying — not intellectual power, but mere physical momentum. Nor would I say that an advocate should at all times treat a witness with the gentleness of a dove. Severity of tone and manner, compatible with self-respect, is frequently necessary to keep a witness in check, and to draw or drive the truth out of him if he have any. But the severity will lose none of its force, nay, it will receive an increase of it, by being furnished with the polish of courtesy instead of roughened with the language of uncompromising rudeness. Instances of the latter kind are extremely rare at the English bar. But they do occasionally appear, and are usually followed by a public outcry against them; they do not, however, cast discredit on the great body of a profession which is as jealous of its high reputation for courtesy and honor as it is deserving of it.

I make these observations because I am about to quote a passage from Archbishop's Whateley's "Elements of Rhetoric" on Cross-examination, wherein he passes a severe stricture upon advocates generally, and which, I am sure, so far as my own experience and observation go, is utterly undeserved. At page 165, he says: "In oral examination of witnesses a skillful cross-examiner will often elicit from a reluctant witness most important truths which the witness is desirous of concealing or disguising. There is another kind of skill, which consists in so alarming, misleading, or bewildering an *honest* witness as to throw discredit on his testimony or prevent the effect of it. On this kind of art, which may be characterized as the most, or one of the most, base and depraved of all possible employments of intellectual power, I shall only make one further observation." I pause here for a moment to say that so far as my experience of the bar is concerned, and I think it must be greater than that of the Right Reverend Father in God who penned these words, a more undeserved slander against a body of honorable men was never penned even by a Churchman. He proceeds to say: "I am convinced that the most effectual mode of eliciting truth is quite different from that by which an honest, simple-minded witness is most easily baffled and confused. I have seen the experiment tried of subjecting a witness to such a kind of cross-examination by a practiced lawyer as would have been, I am convinced, the most likely to alarm and perplex many an honest witness without any effect in shaking his testimony. . . . And afterwards, by a totally opposite mode of examination, such as would not have at all perplexed one who was honestly telling the truth" (nothing, it seems, will perplex an honest witness but an alarming style) — "that same witness was drawn on step by step to acknowledge the utter falsity of the whole. Generally speaking, I believe that a quiet, gentle, and straightforward — though full and careful — examination, will be the most adapted to elicit truth, and that the manoeuvres and the browbeating which are the most adapted to

confuse an honest witness are just what the dishonest one is the best prepared for." When I read those wordy sentences I could not help thinking it was a pity that the Archbishop did not confine himself to theology. He seems to think an honest witness easily baffled and frightened into telling a lie, and to imagine that a brutal liar is best induced to tell the truth by wooing him with sweet words, and by a *straightforward, full, and careful* examination. I can only say his acquaintance with truthful witnesses must have been small indeed, and the hypocrisy practiced upon his gentle questioning must have misled him into the falsest views of human nature ever formed even by those who assume to be the best acquainted with man's spiritual existence.

254. **BARDELL v. PICKWICK.** (CHARLES DICKENS. *The Pickwick Club*. 1837. c. XXIV.)

"Nathaniel Winkle!" said Mr. Skimpin. "Here!" replied a feeble voice. Mr. Winkle entered the witness box, and having been duly sworn, bowed to the judge with considerable deference. "Don't look at me, sir," said the judge,<sup>1</sup> sharply, in acknowledgment of the salute; "look at the jury." Mr. Winkle obeyed the mandate, and looked at the place where he thought it most probable the jury might be; for seeing anything in his then state of intellectual complication was wholly out of the question. Mr. Winkle was then examined by Mr. Skimpin, who, being a promising young man of two or three and forty, was of course anxious to confuse a witness who was notoriously predisposed in favor of the other side, as much as he could. "Now, sir," said Mr. Skimpin, "have the goodness to let his Lordship and the jury know what your name is, will you?" And Mr. Skimpin inclined his head on one side to listen with great sharpness to the answer, and glanced at the jury meanwhile, as if to imply that he rather expected Mr. Winkle's natural taste for perjury would induce him to give some name which did not belong to him. "Winkle," replied the witness. "What's your Christian name, sir?" angrily inquired the little judge. "Nathaniel, sir." "Daniel,—any other name?"

"Nathaniel, sir — my Lord, I mean." "Nathaniel Daniel, or Daniel Nathaniel?" "No, my Lord, only Nathaniel — not Daniel at all." "What did you tell me it was Daniel for then, sir?" inquired the judge. "I didn't, my Lord," replied Mr. Winkle. "You did, sir," replied the judge, with a severe frown. "How could I have got Daniel on my notes, unless you told me so, sir?" This argument was, of course, unanswerable. "Mr. Winkle has rather a short memory, my Lord," interposed Mr. Skimpin, with another glance at the jury. "We shall find means to refresh it before we have quite done with him, I dare say." "You had better be careful, sir," said the little judge, with a sinister look at the witness. Poor Mr. Winkle bowed, and endeavored to feign an easiness of manner, which, in his then state of confusion, gave him rather the air of a disconcerted pickpocket. "Now, Mr. Winkle," said Mr. Skimpin, "attend to me, if you please, sir; and let me recommend you, for your own sake, to bear in mind his Lordship's injunctions to be careful. I believe you are a particular friend of Pickwick, the defendant, are you not?" "I have known Mr. Pickwick now, as well as I recollect at this moment, nearly" — "Pray, Mr. Winkle, do not evade

<sup>1</sup> The name "Stareleigh," given by the novelist to this judge, is supposed to have signified Mr. J. Gaselee.

the question. Are you, or are you not, a particular friend of the defendant's?" "I was just about to say, that" — "Will you, or will you not, answer my question, sir?" "If you don't answer the question, you'll be committed, sir," interposed the little judge, looking over his notebook. "Come, sir," said Mr. Skimpin, "yes or no, if you please." "Yes, I am." "Yes, you are. And why couldn't you say that at once, sir? Perhaps you know the plaintiff too — eh, Mr. Winkle?" "I don't know her; I've seen her." "Oh, you don't know her, but you've seen her? Now, have the goodness to tell the gentlemen of the jury what you mean by *that*, Mr. Winkle." "I mean that I am not intimate with her, but that I have seen her when I went to call on Mr. Pickwick, in Goswell Street." "How often have you seen her, sir?" "How often?" "Yes, Mr. Winkle, how often? I'll repeat the question for you a dozen times, if you require it, sir." And the learned gentleman, with a firm and steady frown, placed his hands on his hips, and smiled suspiciously at

the jury. On this question there arose the edifying browbeating, customary on such points. First of all, Mr. Winkle said it was quite impossible for him to say how many times he had seen Mrs. Bardell. Then he was asked if he had seen her twenty times, to which he replied, "Certainly, — more than that." Then he was asked whether he hadn't seen her a hundred times — whether he couldn't swear that he had seen her more than fifty times — whether he didn't know that he had seen her at least seventy-five times — and so forth; the satisfactory conclusion which was arrived at, at last, being, that he had better take care of himself, and mind what he was about. The witness having been by these means reduced to the requisite ebb of nervous perplexity, the examination was continued. . . . Tracy Tupman and Augustus Snodgrass were severally called into the box; both corroborated the testimony of their unhappy friend; and each was driven to the verge of desperation by excessive badgering.

255. JOHN C. REED. *Conduct of Lawsuits*. (2d ed. 1912. § 90.) . . . I note that the wary veterans of the courts cross-examine less and less as they grow older in practice. By the multitude, cross-examination is as much overrated as advocacy. Sometimes a great speech bears down the adversary, and sometimes a searching cross-examination turns a witness inside out and shows him up to be a perjured villain. But ordinarily cases are not won by either speaking or cross-examining. The tyro's conception of the purpose of the latter is that it is to involve every adverse witness in an inconsistency or self-contradiction. But you will often see a dozen consecutive cases tried wherein no witness who is game for the cross-examiner makes his appearance. It is only the profligate who swears falsely; and if not the profligate, it is the extremely heedless who make such glaring blunders and mistakes as to destroy the credit of their testimony.

These cautions are placed in the forefront of the chapter, to be meditated before the student comes to the places farther on, where copious use is made of the writings of Mr. Cox and Mr. Harris, who, while giving very valuable instructions, yet hurtfully exaggerate what can be effected by cross-examination. Mr. Cox says, "There is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination." In Mr. Harris's "Hints," it is implied in a few passages that there are witnesses who cannot be shaken, yet the bulk of what

he says and his chief stress are in dealing with those whose direct testimony is overturned by the questions of the adverse counsel; and consequently the most careful reader infers that he thinks cross-examination can be made to do wonders in almost every case. Long ago, Quintilian gave the subject a somewhat better treatment, which has been highly applauded by different English and American writers. But the doctrine of the current books of the day lags behind the prevailing practice of the best lawyers. This doctrine is that of Mr. Cox and Mr. Harris, as indicated above. It is utterly misleading; for it is generalized from exceptional instances, and takes hardly any account of the kind of witnesses whose testimony wins more than three fourths of the verdicts in our courts. . . . The practice and judgment of Scarlett, the great English lawyer who lost fewer cases than he ought to have won and won more than he ought to have lost than any other hero of legal biography, outweigh the opinions of the authors mentioned. . . . It was his custom, rarely departed from, merely to probe his adversary's witnesses for further proof of his own case, scorning to waste his time in badgering them by an examination more entertaining to visitors than effective with the jury. He says in his Autobiography: ". . . I cross-examined in general very little, and more with a view to enforce the facts I meant to rely upon, than to affect the witness's credit, — for the most part a vain attempt."

Having premised as above in order to protect the student against prevalent errors and to foreshadow to him the main end of cross-examination, we will now pursue our subject. And we adopt the plan followed in the last chapter; that is, we begin with average witnesses, and we award due prominence to the methods most common in actual practice. . . . You cross-examine these three classes: (1) The witness whose version you accept so far as it goes. (2) The witness whom you show to be mistaken, or the force of whose testimony you take off by other means, not however attacking his veracity. (3) The witness whom you show to be unworthy of credit. We add that there are really but two kinds of witnesses, the truthful and the untruthful; and consequently there are at bottom but two kinds of cross-examination, the one intended to elicit friendly evidence, and the other to show the unreliability of the witness. We wish to impress it upon our student that the first kind is *in general use in every sort of case*, while the second is only of *occasional* importance.

We now take up the witness mentioned in the first class of our enumeration, that is, he whose version you accept as far as it goes. Your objects with him are but two, (a) the first to have him complete what the direct examiner has incompletely presented through such partial questions as will be explained in a moment, and (b) the second to make him, if you can, reënforce your own proofs.

(a) The examiner in chief is privileged to ask such relevant questions as he pleases, and to keep the witness from answering anything more. He generally culls from what the latter knows of the matter in controversy such parts only as are favorable. . . . If you observe the trial of issues of fact, you will note that nearly every witness is made to suppress some important parts of a transaction while replying to the direct examiner; and that often, where he is given free range by being told to make his statement in his own way, he omits some details which would aid the other side should they be



proved. To make the witness give a *complete* narrative, if what has been kept back is favorable to your side, may be regarded as the point where cross-examination should generally begin. . . .

(b) We now come to what is practically the most effective and most widely useful of all the different sorts of cross-examination. In it you have the opposite witness to prove *independent facts* in your favor. . . . A person may have been present when a sum of money was borrowed, and he may also have seen the money repaid afterwards to one who is claimed to have been the agent of the lender to receive it. If this witness testifies for the plaintiff on the trial of a suit for the money, his counsel will ask nothing about the repayment. He may not even know of it. But you have been told of it by your client, and you therefore will draw it out when you take the witness. . . . Note the usual cross-examinations by good practitioners, and you will find that in a large proportion they ask hardly any questions except such as are now our special subject. In most cases they see intuitively that there is no very distorted statement to be rectified, and that there are no serious mistakes to be corrected ; and they only make the witness reënforce their side as to some detail. . . . While the kind of cross-examination now in hand is the most important of all, it is also the most easy. It requires no great skill. It will generally be well done if with patience you have had your client and his following to tell you all that the witnesses for the other side know in his favor, and you then question accordingly.

As we leave this branch of the subject, we must ask you not to fall into the error of rating its place in practice by the short notice it has received from us. It is too simple to need much explanation. But if you stay at the bar, you will have increasing use for it, and after a while you will, as a general rule, prepare no other sort of cross-examination for the average witness. It is a larger field for your powers than appears at first. The cross-examiner requires much attention and assiduity to collect from the opposite witnesses all the help possible. It is not only such important facts as we used for illustration in the last section that he must search for. They would be overlooked by only a very dull man. He is to exhaust many details ; such as strengthening one of his own witnesses stoutly attacked by having the witness under examination to concur with him in even a small matter ; the conduct, expression, or language of the adverse party on some occasion which the latter has probably forgotten ; minute circumstances, such as the shapes and positions of marks ; in short, the details relevant here are as varied and extensive as the entire possibilities of proof.

256. AMOS C. MILLER. *Examination of Witnesses*. (Illinois Law Review. 1907. Vol. II, p. 257.) . . . I have said above that it is necessary to treat a witness who is honestly mistaken very differently from the way you treat a witness who is lying. The truth of this is manifest. If the witness who is honestly mistaken is treated harshly or in a manner which shows to him that his cross-examiner believes him to be lying or wants his hearers to so believe, he will quickly resent it and strengthen his testimony upon the very points on which it is desired to weaken him. If, on the contrary, the honestly mistaken witness has his attention called to collateral matters inconsistent with his testimony, and the truth of which he is likely to recognize, and if he at the same time is treated courteously and considerately, he is quite

likely either to change his testimony or modify it or become so uncertain as to make his testimony utterly worthless to the party calling him. He may gain so favorable an impression of the cross-examining counsel, and of his superior knowledge of the facts in the case, that he will suddenly develop an extreme conscientiousness about testifying to things of which he is not perfectly certain.

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257. G. M. WHIPPLE. *Manual of Mental and Physical Tests*.<sup>1</sup> (1910. p. 404.) *Tests of Suggestibility*. The term "suggestion" has found different usages in psychology. Four different usages at least may be distinguished. (1) Suggestion is equivalent to association, *e.g.* the idea "horse" suggests the idea "Black Beauty." (2) Suggestion is the conveyance of an idea by hint, intimation, or insinuation, *e.g.* the orator suggests an idea by an appropriate gesture. (3) Suggestion is a method of creating and controlling hypnosis. (4) Suggestion is a method of creating belief or affecting judgment, usually an erroneous belief or false judgment, in the normal consciousness.

The tests which follow all purport to measure susceptibility to suggestion in this last-named sense. In them, the experimenter seeks by suitable arrangement of the test material or of the instructions, to induce the subject to judge otherwise than he naturally would — to induce him, for example, to judge equal lines or equal weights to be unequal, or to perceive warmth when there is no warmth, etc. If the attempt is successful, the subject is said to have yielded, or to have "accepted" the suggestion. The degree of his suggestibility is indicated by the quickness or frequency of his "yields."

Efficiency in observation, attention, memory, and the like has been shown to be specific, not general in character. For this reason, suggestibility must be tested by more than one method. . . .

*Test 42. Suggestion by Progressive Lines.* . . . Arrange the kymograph drum so that it may lie horizontally and be revolved freely by hand. . . . On the strip of white paper, draw with a ruling pen 20 parallel, straight black lines, 2 cm. apart and each 1 mm. wide. . . . Seat S<sup>2</sup> 50 cm. from the screen and provide him with a sheet of cross-section paper. The instructions should take the following form: "I want to try a test to see how good your 'eye' is. I'll show you a line, say an inch or two long, and I want you to reproduce it right afterwards from memory. Some persons make bad mistakes; they may make a line 2 inches long when I show them one 3 inches long; others make one 4 or 5 inches long. Let's see how well you can do. I shall show the line to you through this slit. Take just one look at it, then make a mark on this paper (cross-section paper) just the distance from this edge (left-hand margin) that the line is long. When that is done, I shall show you the second line, then the third, and so on. . . . E then turns the drum to bring the first, or shortest, line into view. As soon as S turns his attention to the recording of his estimate on the paper, the drum is moved forward slightly to conceal the line so that further comparison is impossible. As soon as S has placed his mark, then, and not before, the next line is exposed. This precaution serves to maintain the impression that a new, and hence probably a longer, line is exposed. . . . If S has ceased to respond to the

<sup>1</sup> Published at Baltimore, by the Warwick & Yorke Co.

<sup>2</sup> [S = Subject, *i.e.* person to be experimented upon. — Ed.]

suggestion of progressive augmentation at the 20th exposure, the test ends at that point. . . . For a measure of suggestibility, E may take the number of lines out of the last 10 lines that are drawn longer than the 5th line was drawn. . . .

*Results.* . . . (3) Inspection of the records of individual pupils shows that in some cases the force of suggestion was steady and persistent, while in others it reached a maximum, and then declined. (4) Extremely suggestible S's may make their "estimate" of the line without even looking at it when exposed; their minds are so completely dominated by the suggestion of uniform augmentation that they do not trouble to observe the stimulus. . . . (6) In either form of test, the 1st line is apt to be overestimated. The 5th line is almost invariably underestimated. Generally speaking, this underestimation is less pronounced in those S's that least prove least suggestible.

*Test 43. Suggestion of line lengths.* . . . [Two forms of suggestion may be used]; the first Binet terms "contradictory suggestion," the second "directive suggestion" ("suggestion directrice"): in the former E makes certain statements that are intended to interrupt or modify a judgment that S has just made; in the latter, statements that are intended to control or influence a judgment that S is just about to make.

*A. Contradictory Suggestion. Materials.* Drawing utensils. A sheet of cardboard upon which are drawn in ink 24 parallel, straight black lines, ranging in length from 12 to 104 mm., by increments of 4 mm. The lines all begin at the same distance from the left-hand margin, are 7 mm. apart, and are numbered in order of their length, from 1 to 24. These rectangular pieces of cardboard, about 12 × 20 cm., on each of which is drawn a single straight line. These three stimulus lines correspond to numbers 6, 12, and 18 of the 24 comparison lines, and are, accordingly, 32, 56, and 80 mm. long, respectively.

*Method.* Show S the card of comparison lines, and explain their numbering. Replace this by the first stimulus line (32 mm.), saying: "Look carefully at this line." After 4 sec., remove the stimulus card, present the comparison card, and say: "Tell me the number of the line that is just the length of the one I showed you." At the moment that S gives his judgment, E says: "Are you sure? Isn't it the —th?"—indicating always the next longer line. If S answers "No," E repeats the question in exactly the same form. If S still answers "No," the attempt to produce suggestion is suspended, and the case is recorded as one "resistance." The second and the third stimulus lines are presented and the same procedure is followed in each case. If, in any of the trials, S answers "Yes," E then inquires: "Isn't it this one?"—indicating the next longer line and this inquiry is carried on from line to line until S has twice resisted the suggestion, *i.e.* has twice answered "No" to the same question. . . .

*Results.* . . . (2) Of 25 children, aged 8–10 years, Binet found 6 who resisted suggestion completely, 6 who "yielded" once, 5 twice, 2 three times, 2 four times, and 1 each six, seven, and more than seven times. . . . (4) S's who have selected the correct line are less apt to change their designation under suggestion than are S's who have selected the wrong line: thus Binet and Henri found that 56 per cent changed their selection when it was actually right, but 88 per cent when it was wrong. Moreover, of the latter, 81 per cent made the change in the proper direction.

*B. Directive Suggestion. Apparatus.* As in Test 42, save that only 60 mm. lines are used.

*Method.* Seat S 50 cm. from the cardboard screen and provide him with a sheet of cross-section paper. Instruct him as follows: "I'm going to show you a number of lines. You will see them appear through this slit, one at a time. When I show you a line, take a good look at it; then make a mark on this paper at just the distance from this edge (left-hand) that the line is long. When that is done, I shall show you the second, then the third, and so on. You will make the mark for the length of the second line on the second line of your paper, for the third on the next line, and so on." E now displays the 5th, *i.e.* the first 60 mm. line of the series, with the remark: "Here is the first one." When S is ready for the second line, *i.e.* 7-10 sec. later, E remarks, as he exposes it: "Here is a longer one." When the third is exposed he remarks, "Here is a shorter one," and he continues to use these remarks, alternately, at the moment of exposure of each line, until 15 lines have been exposed, the first without suggestion, the remainder coupled with 14 suggestions — 7 of shorter, 7 of longer. These suggestions must be given just before the line is exposed, in a quiet tone, without looking at S. S should see the disk turn and the new line appear at the moment that he receives the suggestion. . . .

*Results.* (1) . . . Sixteen of 23 pupils tested by Binet submitted completely to the suggestion, and no one resisted every suggestion. . . . (4) There are marked individual differences in the suggestibility of school children under the conditions of this test. Binet found that in 18 trials the number of resistances to suggestion ranged from 0 to 14. . . .

[Reverting to the effect of suggestion on the correctness of reports in general, as observed in experiments with a colored picture [*post*, No. 290], the following generalizations have been made:]

(11) *Dependence on Form of Report.* All authorities agree that the use of the interrogatory,<sup>1</sup> whether the complete or incomplete form, increases the range and decreases the accuracy of the report.<sup>1</sup> Thus, in comparison with the narrative,<sup>1</sup> the range of the interrogatory may be 50 per cent greater, while the inaccuracy (of the incomplete interrogatory) may be as much as 550 per cent greater. In general terms we may say that about one tenth of the narrative is inexact, but about one quarter of the interrogatory. . . .

(12) *Dependence on the Type of Question.* The introduction of leading or suggestive questions very noticeably decreases the accuracy of report for children, and, unless the conditions of report are quite favorable, even for adults. The greater suggestibility of children is shown by Stern's results, in which the inaccuracy of boys and girls aged 7 to 14 was from 32 to 39 per cent, as against 10 per cent inaccuracy for young men aged 16 to 19 years.

258. JAMES RAM. *On Facts as Subjects of Inquiry by a Jury.* (3d Amer. ed. 1873. p. 134.) A witness about to narrate facts may be left to tell his story in his own way, or it may be drawn from him by questions put to him.

The former method of telling the story is open to these objections: The witness may not think enough to call to mind all he can relate; from care-

<sup>1</sup> [For the technical meaning of these terms with this author, see *post*, No. 290. — Ed.]

lessness or oversight he may omit to mention some circumstances; he may think or fancy the circumstances he withholds are not material to a proper understanding of his story; indeed, he may think or fancy that his story will be best understood, if it be not loaded with matters which he views as redundant, but which nevertheless are essential to see the facts in their proper proportions and color. . . . Supposing, besides, the witness does not wish to speak the whole truth, it is obvious his wish will be promoted, by leaving him to tell his tale in his own way. . . .

In the other method of obtaining a relation of facts, the one by question and answer, the object of the interrogator is, to get from the witness all he himself saw, heard, said, and did, excluding all hearsay, and other irrelevant matter. And the questions being framed with a view to this exclusion, if the witness confines himself strictly to the questions addressed to him, his answers will contain no hearsay nor other irrelevant matter. But as, according to this method, the witness's narrative consists solely of his answers to the questions put to him, this obvious inconvenience attends it, that if all the questions required to bring out the witness's whole story are not put to him, he may in his evidence leave out circumstances important to be known. . . .

The basis of interrogation of a witness is something of which his examiner desires to be informed, and which he knows, thinks, assumes, or hopes, the witness will be able to tell him. There are two ways of questioning: one where the words made use of in the question suggest or prompt a particular answer, and which is called a *leading* question; the other, where the question does not so lead, but is put in general terms, without at all pointing to a particular reply. This may be called an *open* question; it is open to any answer. "Did not you see this?" or "Did not you hear that?" are leading questions. In them the person questioned is in a manner prompted to answer, he did see or hear this or that particular thing. "It is a good point of cunning for a man to shape the answer he would have in his own words and propositions: for it makes the other party stick the less."<sup>1</sup> "Ye will, therefore (addressing Morris), please tell Mr. Justice Inglewood, whether we did not travel several miles together on the road, in consequence of your own anxious request and suggestion, reiterated once and again, baith on the evening that we were at Northallerton, and there declined by me, but afterward accepted, when I overtook ye on the road near Cloberry Allers, and was prevailed on by you to resign my ain intentions of proceeding to Rothbury; and, for my misfortune, to accompany you on your proposed route. 'It's a melancholy truth,' answered Morris, holding down his head, as he gave this general assent to the long and leading question which Campbell put to him."<sup>2</sup> Assuming that the person questioned honestly desires to speak the truth, and that his memory is not defective, a strong probability is that, whether the question be open or leading, he will return precisely the same answer to it.

Each kind of question has, however, its advantages and disadvantages. If the witness be dishonest, and there be connivance between him and his interrogator; or supposing the former honest, and the latter not to be so; it is plain that a leading question may tend to bring out the answer which the interrogator desires. And assuming that both the witness and the

<sup>1</sup> Bacon's *Essays: Of Cunning*.

<sup>2</sup> *Rob Roy*.

interrogator are honest, both wishing the truth to be spoken; here, if the witness remembers little or nothing, or if he be dull, or heedless, or be confused, or embarrassed by timidity or any other cause, there is danger that, if he is addressed by a leading question, he may, without thought or consideration, echo in his reply the words put in the question, and so fail to speak the truth.

An open question imposes on an honest witness the necessity of thought, a consideration of both the question and reply. It forces him to resort to, and, if need be, to ransack his memory, and obliges him to utter only what he remembers. On the other hand, it is very possible, in many cases probable, that from sickness, old age, or other cause, his memory may be so infirm that he cannot be brought to a correct answer, except by a leading question. All open questions, every question short of a leading one, may fail to quicken his memory, and bring him to express the fact of which he has knowledge. Nothing, for instance, is more common, than to forget a person's name, and, without hearing it again, to be quite unable to call it to mind. We constantly hear people say, "If I heard his name, I should know it directly." If the name be pronounced, the hearing of it refreshes the power of recollection, and the name is instantly remembered.

259. CHARLES C. MOORE. *A Treatise on Facts, or the Weight and Value of Evidence*. (1908. Vol. II, §§ 699, 814, etc.) . . . *Leading Questions*. Lord Bacon said: "It is a good point of cunning for a man to shape the answer he would have in his own words, for it makes the other party stick the less." A leading question propounded to a witness may, by creating an inference in his mind, cause him to testify in accordance with the suggestion conveyed by the question; his answer may be "rather an echo to the question" than a genuine recollection of events, and in some cases may alone be inadequate to support a verdict or decree. Professor Kuhlmann gives the results of some laboratory experiments by Lipmann, and says they "leave no doubt that memory illusion is greater when the statements made are answers to particular questions, than when the statements are made spontaneously on the part of the subject without special questioning." In an article elsewhere cited Professor Claparède says: "In the giving of evidence suggestion plays a most important part. The simple fact of questioning a witness, of pressing him to answer, enormously increases the risk of errors in his evidence. The form of the question also influences the value of the reply that is made to it. Let us suppose, for instance, that some persons are questioned about the color of a certain dog. The replies are likely to be much more correct if we ask the witnesses, 'What is (was) the color of the dog?' than if we were to say to them, 'Was the dog white, or was it brown?' The question will be positively suggestive if we ask, 'Was the dog white?' To such a question the answer is probably of no value. In questioning witnesses — that is to say, in pressing them and forcing their memory — we may obtain, it is true, a much more extensive deposition than if we leave them free to answer spontaneously. Any advantage thus obtained, however, is problematical, since we lose in fidelity whatever we may gain in extent of information." . . .

Leading questions do, however, often stimulate genuine recollection. But if counsel are permitted to so frame a question put to their own witness as

to suggest the answer desired, there is always imminent danger of getting before the jury the phrases and ideas not really those of the witness. Comparatively small weight, in any case, is due to testimony as to critical facts, elicited from a friendly witness under strenuous pressure of leading questions by counsel for the party on whose behalf he testifies. . . .

260. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> *Assuming a Controverted Fact*. A question which in part assumes the truth of a controverted fact may lead a witness to reply without taking care to specify that his answer is based on that assumption, and may thus commit him to an assertion of the assumed fact, though in fact he may not desire or be able to do so. This is obviously a danger to be prevented:

1888. *Parnell Commission's Proceedings*. 19th day, *Times' Rep.*, pt. 5, p. 221; the "Times" having charged the Irish Land League with complicity in crime and outrage, a constable testifying to outrages was cross-examined by the opponents as to his partisan employment by the "Times" in procuring its evidence; Mr. Lockwood: "How long have you been engaged in getting up the case for 'The Times'?" Sir H. James: "What I object to is that Mr. Lockwood, without having any foundation for it, should ask the witness 'How long have you been engaged in getting up the case for 'The Times'?' " Mr. Lockwood: "I will not argue with my learned friend as to the exact form of the question, but I submit that it is perfectly proper and regular. If the man has not been engaged in getting up the case for 'The Times,' he can say so;" Sir H. James: "I submit that my learned friend has no right to put this question without foundation. Counsel has no right to say 'When did you murder A. B.?' unless there is some foundation for the question. In this same way he has no right to ask 'How long have you been engaged in getting up this case?' for it assumes the fact." . . . President Hannen: "I do not consider that Mr. Lockwood was entitled to put the question in that form and to assume that the witness has been employed by 'The Times.'" <sup>2</sup>

261. FRANCIS L. WELLMAN. *Day in Court*. (1910. p. 79.) The rule against leading questions (with few exceptions) is strictly adhered to, and very properly so. Some lawyers put the clearly inadmissible question which suggests the answer, and though it is ruled out, perhaps with a rebuke from the court, the witness nevertheless has caught the idea. This is disreputable practice. . . . Every advocate is in honor bound not to transgress the rule against "leading questions" when it really comes to important matters.

But it is sometimes extremely difficult. Indeed, there are cases in which the Court, in its discretion, may permit him to ask leading questions in the interests of justice, so that important testimony may not be lost. Suppose, for instance, a witness is giving his memory of a long conversation he overheard between the parties to an action, and, as often happens, leaves out of his narrative perhaps what, in law, amounts to the most important part. In vain the advocate tries not to lead him. He asks, "Have you given all

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 771.)]

<sup>2</sup> The following anecdote neatly illustrates this trick of a "loaded" or "forked" question: "Sir Frank Lockwood was once engaged in a case in which Sir Charles Russell (the late Lord Chief Justice of England) was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, 'Yes,' or 'No.' 'You can answer *any* question yes or no,' declared Sir Charles. 'Oh, can you?' retorted Lockwood. 'May I ask if you have left off beating your wife?'" (*Green Bag*, Vol. XII, p. 671.)

the conversation?" "Was that all that was said?" The witness remembers no more. The memory of the witness had been exhausted by direct questions, and then the Court may properly permit him to lead the witness so far as to ask the witness whether anything was said about so and so (without suggesting what was said), and thus call his attention to the matter which the witness had inadvertently overlooked, and thus save very important testimony which should otherwise be lost.

So, too, when it is discovered that a witness is *hostile*, the Court, as already intimated, may permit leading questions to be put, because the reason for the rule against them no longer exists. In other words, the rule against putting leading questions to your own witness is based upon the tendency of the human mind to adopt the suggestion of the person or side that it desires to aid and to quickly respond to any hint of what is wanted to assist the party making the suggestion. Hence, in the case of a hostile witness obviously the reason for the rule is gone.

**262. PAT HOGAN'S CASE.** (J. RODERICK O'FLANAGAN. *The Irish Bar*. 1879. p. 238.)

... O'Connell defended a man named Hogan, charged with murder. A hat, believed to be the prisoner's, was found close to the body of the murdered man, and this was the principal ground for supposing Hogan was the perpetrator of the foul deed. That the deceased came by his death by violence, the state of the body clearly showed; and O'Connell felt the case for the prisoner required the exercise of his utmost powers. The Crown counsel made a strong point on the hat, which was produced in court. O'Connell cross-examined the neighbor of the prisoner, who identified it.

"It is not different from other hats," said O'Connell.

A. "Well, seemingly, but I know the hat."

"Are you perfectly sure that this was the hat found near the body?"

A. "Sartin sure."

O'Connell proceeded to inspect the caubeen, and turned up the lining as he peered into the interior.

Q. "Was the prisoner's name PAT HOGAN" (he spelled each letter slowly) "in it at the time you found it?"

A. "'Twas, of coorse."

Q. "You could not be mistaken?"

A. "No, sir."

Q. "And all you swore is as true as that?"

A. "Quite."

"Then go off the table this minute!" cried O'Connell, triumphantly. Addressing the Judge, he said, "My Lord, there can be no conviction here. *There is no name in the hat!*"

The prisoner was at once acquitted.

**263. JOHN H. WIGMORE.** *Principles of Judicial Proof*. (1913.)<sup>1</sup> Repeating precisely the *same question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, after an *original false answer or refusal to answer* is a process which not only savors of intimidation and browbeating, but also tends to waste time. Accordingly, it is not doubtful that the trial Court has discretion to refuse or to allow this, as seems best under the circumstances. Nevertheless, when used sparingly

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 782.)]



and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference; for there is perhaps none of the lesser expedients (that is, ranking after Cross-examination and Sequestration) which has so keen and striking an efficacy, when employed by skillful hands, in extracting the truth and exposing a lie. Simple as this expedient seems, it rests on a deep moral basis; and the annals of our trials demonstrate its power. In the following passages, ranging over three centuries, some of the most notable illustrations will be found:

*Count Coningsmark's Trial.* (1682. 9 How. St. Tr. 1, 55.) [The Count, charged with murder, was said to have absconded in disguise; and a Swedish fellow countryman of his, at whose house he had changed his clothes, was called:] Q. "Pray, what did the Count say to you about his coming in disguise to your house?" A. "He said nothing, but that he was desirous to go to Gravesend; . . . I helped him to a coat, stocking, and shoes." Q. "Then I ask you, what did he declare to you?" A. "Why, he did desire to have those clothes." Q. "You are an honest man, tell the truth." A. "He declared nothing to me." Q. "Did he desire you to let him have your clothes because he was in trouble?" A. "He desired a coat of me, and a pair of stockings to keep his legs warm." Q. "I do ask you, did he declare the reason why he would have those cloaths was because he would not be known?" A. "*He said he was afraid of coming into trouble.*" Q. "Why were you unwilling to tell this?"

*Lord Baltimore's Trial.* (1768. Gurney's Rep. 77.) [Abduction and rape of Sarah Woodcock; the testimony showed plainly that the case was in truth one of willing seduction, although the complainant testified flatly to the use of force and coercion; her evidence was suspiciously inconsistent, and, on her cross-examination by the accused himself, the following answers were elicited:] Q. "How old are you?" A. "I am twenty-seven." Q. "Will you swear you are no older?" A. "I will swear I am twenty-eight." Q. "Will you swear you are no older?" A. "I will swear I am that." Q. "Will you swear you are no older?" A. "I do not know I need tell; I am twenty-nine, and that is my age; I cannot exactly tell." Q. "To the best of your belief, how old are you?" A. "*I believe I am thirty next July; I cannot be sure of that, whether I am or no.*"

*Horton's Trial.* (1784. Sel. Crim. Trials at Old Bailey, I, 456.) [The accused, aged 11, was indicted for felonious larceny; and one Isaac Barney, a patrolman, swore to a confession by the boy when under arrest that he had watched while two men entered the house; the following comprised the entire cross-examination of this witness:] Counsel: "You had frightened this poor child out of his senses?" Witness: "I do not think he was afraid." Counsel: "Do you know what reward there is for the conviction of this poor infant?" Witness: "Upon my oath I do not know." Counsel: "Do you mean to say that you, a patrol, do not know?" Witness: "I am sure it is a thing I never had." Counsel: "You shall not slip through my fingers so." Witness: "Upon my word and honor I do not know." Counsel: "Upon your oath, sir?" Witness: "I do not." Counsel: "Did you never hear that there was a reward of forty pounds upon the conviction of that child?" Witness: "I never knew any such thing." Counsel: "But you have heard it?" Witness: "I never heard any such thing." Counsel: "Come, come, sir, it is a fair question, and the jury see and hear you. Upon your oath, did you never hear that you would be entitled to forty pounds as the price of that poor infant's blood?" Witness: "Your honor, I cannot say." Counsel: "But you *shall* say before you leave that place." Witness: "*I have heard other people talking about such things.*" Counsel: "So I thought; and with that answer I leave your testimony with the jury."

*Queen Caroline's Trial.* (1820. Linn's ed., I, 48, 78.) [In attempting to prove an act of adultery at Naples, between the Queen and her servant Bergami, one of the material facts alleged by the prosecution was that the Queen's sleeping room adjoined

Bergami's, with only a corridor and a cabinet intervening, and that there was no access from the Queen's room to Bergami's except by that passage; to this the servant *Majocchi*, who for a time slept in the cabinet mentioned, testified as follows, on being asked by Mr. Solicitor-General *Copley* (afterwards L. C. Lyndhurst) whether there was no other intervening passage]: "There was nothing else. One was obliged to pass through the corridor, from the corridor to the cabinet, and from the cabinet into the room of Bergami. There was nothing else." Then, on his cross-examination, Mr. *Brougham* asked as follows: "Will you swear there was no passage by which her Royal Highness could enter Bergami's room, when he was confined with his illness, except going through the room [*i.e.* cabinet] where you slept?" *Majocchi*: "I have seen that passage; other passages I have not seen." Mr. *Brougham*: "Will you swear there was no other passage?" *Majocchi*: "There was a great saloon, after which there came the room of her Royal Highness, after which there was a little corridor, and so you passed into the cabinet. I have seen no other passage." Mr. *Brougham*: "Will you swear there was no other passage?" *Majocchi*: "I cannot swear; I have seen no other but this; and I cannot say there was any other but this." Mr. *Brougham*: "Will you swear that there was no other way by which any person going into Bergami's room could go, except by passing through the cabinet?" *Majocchi*: "I cannot swear that there is another; I have seen but that; there might have been, but I have not seen any, and I cannot assert but that alone." Mr. *Brougham*: "Will you swear that if a person wished to go from the Princess's [*i.e.* Queen's] room to Bergami's room, he or she could not go any other way than through the cabinet in which you slept?" *Majocchi*: "There was another passage to go into the room of Bergami." Mr. *Brougham*: "Without passing through the cabinet where you slept?" *Majocchi*: "Yes."

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264. CHARLES C. MOORE. *A Treatise on Facts, or The Weight and Value of Evidence*. (1908. Vol. II, §§ 699, 814, etc.) *Memory Refreshed or Revived by Memorandum*. . . . We have elsewhere seen how readily imagination and inference produce false recollection. This facility often makes it extremely difficult for judges to arrive at satisfactory conclusions, because, in many cases, witnesses do really, by attentive and careful recollection, recall the memory of facts which had faded away, and were not, when first questioned, present to their minds. . . . A memorandum, however, may exert an improper control over the recollection of a witness, instead of merely refreshing his memory. We have already seen that the memory of an interested witness tends to favor himself. . . . Where a party testified in his own interest to a transaction of remote date, and the written evidence thereof favored his statement, the Court observed that "the witness would naturally rely more on the written papers as to what the transaction really was, than on any obscure or imperfect recollections of anything differing from them;" for example, it would not be singular if, looking at a deed to himself, absolute on its face, he should forget or deny a contemporaneous understanding that it was a mortgage. In a collision case between vessels some of the seamen testified, several months after the collision, as to the direction of the wind, their testimony in that regard agreeing with an entry in the log kept by the master. But it was found that the original entry had been obliterated by another entry in a different ink. The Court said it was most reasonable to believe that the altered log had been shown to the witnesses, and had led their recollection into the error committed in the fabricated entry.

265. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> *Prepared Deposition*. Since the witness' statement must correspond spontaneously to his actual recollection, it is plain that to permit him to *commit to writing beforehand* certain statements and then to read them or hand them in as his testimony would be to abandon all safeguard against fabrication and to make possible any manner of pretended testimony. This mode of furnishing testimony is universally prohibited. It is of course to be distinguished from the use of writings which genuinely revive a present recollection or record a past recollection. Indeed the object of the restrictions placed upon those two uses of writing is chiefly to insure that they are not writings of the prohibited and improper sort. The distinction is a clear one, namely, between writings which frankly purport to be used to aid memory (in which they are to be tested by the appropriate restrictions) and writings which do not purport to be so used; the latter falling within the present prohibition:

ELDON, L. C., in *Shaw v. Lindsey*. (1808. 15 Ves. Jr. 380, 381): "Upon general principals nothing is more clear than that a witness before commissioners cannot be examined in such a manner that the effect is, not his testimony given in answer to interrogatories, but (as it is termed) filing an affidavit. . . . All courts of justice are extremely anxious to secure the pure examination of witnesses by not permitting that mode of examination which could lead to infinite mischief. Many instances have occurred of a witness coming into court holding in his hand an answer which he has conscientiously framed as his answer to interrogatories, with the substance of which he may be acquainted, — the answer of an honest, conscientious man, and the value of his testimony perhaps not diminished by his anxiety to be correct. Yet courts of law and equity, with the view of excluding general mischief, concur in refusing to allow it. . . . The habitual practice of law, upon an examination *viva voce* is not to permit any suggestion to the witness by the attorney, counsel, or any other person; the same strictness prevails in this court, where the extent of mischievous management that would ensue, if a witness should be permitted to go before commissioners with a prepared deposition, is obvious."

KENT, C., in *Underhill v. Van Cortlandt*. (1817. 2 Johns. Ch. 339, 346): "He went before the examiner with a prepared deposition. This is against the course and policy of the court, and it would lead to the most dangerous practices. The witness should go before the examiner, as Lord Coke observes, 'untaught and without instruction.' He should be free to answer the sifting interrogatories that are framed for the issue in that case, instead of merely filing an affidavit ready drawn."

266. BROWN v. BRAMBLE. (PETER HARVEY. *Reminiscences of Daniel Webster*. 1901. p. 67.)

One Brown had taken from one Bramble a bond to pay said Brown \$100 a year for life. After a while Bramble began to persuade Brown to cancel said bond for a definite sum, but Brown would always refuse. It was Bramble's custom to indorse the annual payments on the bond. At next payment Bramble indorsed, not \$100, but \$1000 as paid on the bond, adding,

"in full consideration of and canceling this bond." Brown, not being able to read or write, signed the indorsement by making his mark, and the bond was kept by him. When Brown demanded payment the following year, the other contended that he owed nothing, citing the indorsement of the previous year. Brown consulted Mason, but finding him retained by

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. I, § 787.)]

Bramble, went with his story to Webster, who, putting faith in his story, entered into the fight, which came on at Exeter, New Hampshire. There was at that trial a witness for Bramble by the name of Lovejoy, who, it appears, was a "chronic" witness, appearing in nearly every case held in the neighborhood. A friend of Brown, seeing Bramble in conversation with Lovejoy, noticed that the former gave to Lovejoy a paper, and informed Webster of the fact just before the trial. Lovejoy's testimony seeming to Webster somewhat unnatural, Webster came to the conclusion that said paper given by Bramble must contain the evidence, or rather testimony, which

Lovejoy was supposed to give. Webster says: "There sat Mason, full of assurance, and for a moment I hesitated. Now, I thought, I will make a spoon or spoil a horn. I took the pen from behind my ear, drew myself up, and marched outside of the box to the witness stand. 'Sir,' I exclaimed to Lovejoy, 'give me the paper from which you are testifying!' In an instant he pulled it out of his pocket; but before he had it quite out he hesitated, and attempted to put it back. I seized it in triumph. *There was his testimony in Bramble's handwriting!*"

The end was that the case was settled on terms dictated by Webster.

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267. CHARLES C. MOORE. *A Treatise on Facts, or The Weight and Value of Evidence*. (1908. Vol. II, §§ 699, 814, 828, 836, 838, 1268.) *Prepossession [Autosuggestion] causing Error in Observation*. . . . Froude says: "In certain conditions of mind the distinction between objective and subjective truth has no existence. An impression is created that it is fit, right, or likely that certain things should take place, and the outward fact is assumed to correspond with that impression." The effect of prepossession, of which interesting illustrations relating to both observation and memory are found in various places in this work, was strikingly stated by Mr. Justice Grier. "Tell a man that a person's name with which he is acquainted has been forged," said he, "and nine cases out of ten, he will be astute enough to fancy he discovers some marks of it." Belief that there were such creatures as witches, which obsessed the witnesses for the prosecution in the old witchcraft cases, undoubtedly caused frightful errors in their testimony to what they had seen. An observer's false preconceived conclusion may cause him to testify erroneously to the identity of persons or objects that he has seen. If a man believed that another man introduced to him by a woman was her husband, it would not be strange if he failed to notice that the man was not introduced as her husband, and if he subsequently testified erroneously on that point. . . . In New York City instances scandalously numerous have occurred where ambulance surgeons, judging from a man's environment or other circumstances, have erroneously diagnosed insensibility caused by a fracture of the skull as a case of alcoholism. In a case in Canada where the plaintiff was severely injured by walking off a sidewalk, the defendant city contended that he was under the influence of liquor at the time; the attendants at a hospital to which he had been immediately taken made such an entry in their records. "Instances of such mistakes are not rare," said Chief Justice Mulock, of Ontario. "The plaintiff a short time before had had a glass of whisky, which, doubtless, would be observable by a person dressing his wounds. He arrived at the hospital in an excited state, doubtless resulting largely, if not wholly, from the accident. His

face was covered with blood, and he was in the company of a policeman. On such evidence the attendants concluded that he was under the influence of liquor. The evidence does not, I think, support such a conclusion." . . .

*Witness influenced by hearing Others Testify.* The lawyer who has practiced long in jury causes cannot have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice. Human nature is frail, and that frailty is as often illustrated in the witness box as elsewhere. The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. His solicitude in the cause, and his anxiety to win the verdict, are often no less than those of his friend and summoner, whose life, liberty, or property may depend upon that verdict. He comes to regard the adverse party and the adverse witnesses as his adversaries, and often, with scarce a consciousness of the serious obligation that is upon him, lapses into the conviction that the scene before him is a mere tilt and tourney in which he enters to overturn and countervail the testimony of the adverse party. He has heard the evidence of his own party in regard to the transaction, and perhaps he remembers it somewhat differently; but a conflict would be fatal; and he often reasons his flexible conscience into the opinion that his own memory is at fault, and the statement of his confederate is the true version, and he therefore corroborates it. He has heard the testimony of the adverse party, and his ingenuity is taxed at once to strike it where it is vulnerable, and to destroy it. . . . The purpose to be subserved in putting witnesses "under the rule" [by separating them during each other's testimony] is that they may not be able to strengthen or color their own testimony, or to testify to greater advantage in line with their bias, or to have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses. . . .

*Tutored Witnesses.* The mere fact that attorneys at law, in preparing their case for trial, have talked with a witness, should not be presented to the jury as ground for discrediting such witness, for it is the duty of the attorney to learn from witnesses what testimony they can give, in order to enable him to conduct the trial on his part with expedition. To endeavor to learn from a witness, for the first time, on the witness stand, whether he knows anything of the facts at issue, would involve a needless waste of the time of the court. Nevertheless, the substance of conversation had before the trial, between the witness and the attorney or others, in relation to the testimony to be given, is proper subject of inquiry and within the field of legitimate cross-examination, and it may be that the trier of facts will receive a strong impression that the vague and indistinct recollection of a witness has been pointed for the purposes of the case by the suggestions of counsel — that the latter controlled and mastered the memory of the witness. . . . Courts look with great suspicion upon the testimony of witnesses when there is reason to believe that they have been willing pupils diligently instructed by interested parties how to make their several testimonies fit in with each other so as to give united support to the cause and yet avoid the appearance of confederacy. For example, in considering the course followed to get together a host of witnesses to prove testamentary incapacity in a will case, Sir John Nicholl, who was not only a celebrated jurist, but a magistrate of transcendent sagacity in estimating the value of testimony,

spoke as follows: "A room is taken at 'The Ship in Distress,' a tavern at Horsleydown; there the witnesses attend and are entertained; they talk the matter over, a long bill is incurred, the landlord and landlady are two of the witnesses; Mr. Alderson (an interested party) goes there frequently, and carries his own claret there. How is the court to estimate the degree of reliance to be placed on witnesses so got together and so brought forward?" . . .

268. JOHN C. REED. *Conduct of Lawsuits*. (2d. ed. 1912. § 101). . . . It is also an advantage that [at an early interview] you commit and fasten the witness to his narrative. For sometimes a witness is wavering. When the transaction is fresh, he is full of nothing but its actual details, but frequently he is disposed afterwards to alter his first report. He may begin to recoil from the effect of his testimony upon the interest or feelings of the opposite party and his relatives and friends, and he is usually influenced by their appeals and solicitations. All of us have observed that the testimony of good men is shaped and colored by their associates. You will sometimes find that the others, while testifying to the same facts, repeat many particulars of the first witness, although they may have been excluded from court during his examination. This is because they have talked over the matter together, each desiring to avoid being contradicted by the rest. Many times the others labor to reproduce the narrative of the one of most intelligence and standing; and he may be strongly biased, for all of his seeming frankness. You have a multitude of reasons for being in haste to make your slippery witness sure and steadfast.

269. FRANCIS L. WELLMAN. *Day in Court*. (1910. p. 79). . . . The advocate should get his client to bring his witnesses to him at once; should take their stories in detail, squeeze them dry of information; and be careful not to suggest any answers by his questions. He should always bear in mind that the same witness in the quiet of a lawyer's office, where he may want to appear important as well as obliging, is apt to tell an entirely different story from the one he will stick to when he takes his oath in a court room in the presence of the judge, jury, and audience, especially if he has heard other witnesses broken down by cross-examination. Unless an advocate is careful, therefore, when he takes a witness's statement in his office, he will be entirely deceived by him. Nearly every witness is prone to exaggeration and can be easily encouraged to state as facts matters that are merely hearsay or his own inference. Lawyers themselves are in a large measure to blame for this state of things because they lead and push a witness too far. . . .

There is a great difference between "coaching" a witness and preparing him for the witness stand. If a witness is "coached," he is apt to be led to perjury, but if he is merely prepared, then, in my judgment, the cause of truth is advanced. Why should a timid, nervous witness be left to the tender mercies of the opposing lawyer without a word of advice? . . . There is nothing so annoying as a fool in the witness box, especially when the examiner knows the man who is making a fool of himself is really telling the literal truth. Why not remind a witness to keep his temper, to speak slowly and distinctly, to be respectful to the court and the opposing lawyer? Why

not caution him not to try to be "smart" or flippant in his replies? Why not caution him that he should carefully understand a question before he attempts to answer it; to try to make his answers short and responsive, and not volunteer matters about which he is not questioned? . . . Why should not an advocate test his own witnesses by cross-examination beforehand in his office? It often relieves their minds very much, because they not infrequently are afraid that when they mount the witness stand, their whole past will be raked up by the cross-examiner, and this fear often makes them hesitate to tell all they really know. Such a rehearsal is good for the examining counsel as well. It teaches him how to manage and handle his own witnesses when he reaches the court room, and if he is careful to confine these rehearsals to the manner only and not the matter of the testimony, he will find them of the greatest service at the trial, both to himself as well as the cause he represents. . . .

270. ARTHUR C. TRAIN. *The Prisoner at the Bar*. (2ded. 1908. p.233.) What the witness frequently does is to discuss the matter with his friends who were present on the occasion in question, and, as it were, form a sort of "pool" of their common recollections, impressions, and beliefs. One suggestion corrects or modifies another until a comparatively lucid and logical story is evoked. When this has been accomplished the witness mentally exclaims: "Of course! That was just the way it was! Now I remember it all!" The time is so distant that whatever the final crystallization of the matter may be, it is far from likely that it will thereafter be shown to be inaccurate by any piece of evidence which will present itself to the witness and his friends. The account thus developed by mutual questions and "refreshing" of each other's recollection becomes, so far as the parties to it are concerned, *the fact*. The witness is now positive that he did and said exactly so and so, and nothing will swerve him from it, for inherently there is nothing in the story or its make-up that affords any reason for questioning its accuracy. This story repeated from time to time becomes one of the most vivid things in the witness's mental experience. He repeats it over and over, is cross-examined by his own attorney upon it, incorporates it in an affidavit to which he swears, and when he takes the stand recounts these ancient happenings with an aggressiveness and enthusiasm that bring dismay to the other side.

But what a farce to call this recollection! What is this circumstantial romance when it comes to be analyzed? Jones, a friend of Smith the prospective witness, is anxious to establish an alibi, and asks Smith if he doesn't remember meeting him in the club on February 12, two years before. Smith has no recollection of it at all, but Jones says: "Oh, yes, you were going to the theater with Robinson." Of course, if Jones is so sure, Smith naturally begins to think it is probably the fact, and he does remember vaguely that he and Robinson spent an evening together. So he consults his diary and finds it recorded there that he did attend the theater on the day in question with Robinson. He does not remember the play, but Robinson recalls that it was "The Chinese Honeymoon," and believes that they dined together first at the club. Smith now thinks he remembers this himself. Then Robinson suggests that they probably went to the theater in a cab. They look in a file of old papers and find that it was raining. That settles

it — of course, they went in a cab. The next question is the hour. They have no recollection of being late, so they must have arrived on time. Well, the paper says the play commenced at eight, and it takes a cab about twenty minutes to get from the club to Daly's Theater, so it is reasonably clear that they must have started a little before eight. Smith unconsciously is persuaded to believe that if Jones was right about their going to the theater, he *must* also have been in the club at the time he says he was there. Both he and Robinson recall that Jones was always hanging round the club two years ago, and as neither can remember an evening when he wasn't there, they decide he must have been there *that* night. Robinson has a dim recollection that they had a drink together. That is a pretty safe guess and has all the air of verisimilitude. In an hour or two Smith is ready to swear positively from *recollection* that he dined with Robinson at the club on February 12, two years ago, met Jones, had a drink with him, that this occurred at seven fifty-five, that it was raining, that they took a cab, etc. In its elements this testimony is entirely hearsay upon the only vital point, *i.e.* Jones's presence in the club at that time, and the immaterial remainder is made up of equal parts of diary, newspaper, playbill, weather report, usual custom, reliance on Robinson's alleged recollection, and belief in Jones's innocence. He has practically no actual memory of the facts at all, and the only thing he really does remember is that a long time ago he did attend some theater with Robinson.

271. THE HOSPITAL CASE. (FRANCIS L. WELLMAN. *Day in Court*. 1910. p. 79.)

... One of the most remarkable cases of suggestive evidence came under my own observation some years ago when I was defending one of the nurses of the Mills Training School — a most estimable young man — who had been indicted for deliberately choking to death a patient in the Insane Ward at Bellevue Hospital. A reporter of the *Journal* had made a contract with his newspaper for \$150 to feign insanity and get himself committed to the insane ward at Bellevue Hospital for the purpose of writing an article upon the treatment of the insane for publication in the *Journal*. During his first night in the hospital one of its patients died, and the reporter conceived the idea of weaving around this occurrence a tragic (though false) story of the abuse of the insane, resulting in death. In his article he claimed to have seen two trained nurses (one of whom was this young man) strangle this patient to death because he would not eat

his supper. He graphically described how these nurses had wound a towel around the insane man's throat and had twisted it until the patient was strangled to death. Newspaper pictures, occupying a full page of the *Journal*, were published, purporting to show all the details of the alleged process, in vogue at the hospital, of strangulation by means of a towel. The indictment of this young man for murder followed the *Journal* exposure of these alleged hospital abuses. The whole community was wrought up to a high pitch of excitement. At the trial the perjuring reporter, as a witness for the prosecution, told the same story, but was so thoroughly discredited and brought to bay on the second day of his lengthy cross-examination that he fled the town, writing from Philadelphia to his mother in this city that he dare not ever return to New York. This fact, however, could not be communicated to the



jury, during the trial, still unfinished, and the greatest difficulty to overcome was the fact that *three insane patients* were brought from the same hospital by the Assistant District Attorney, and called as witnesses, and (being found by the court to have sufficient intelligence) were allowed to testify to all the alleged details of the murder as they themselves had witnessed.

All three of these insane patients had seen and studied the pictures and descriptions published in the *Journal*, and these pictorial reproductions of occurrences alleged to have taken place in their own wards at the asylum, had served as such vivid, though false suggestions to their diseased minds (already naturally antagonistic to their keepers and nurses) that they afterwards honestly believed and felt warranted in taking an oath that they themselves had actually witnessed these very occurrences that had also been sworn to by the reporter. These three witnesses — as many people suffering from certain forms of insanity are quite capable of doing

— gave their testimony in the most remarkably graphic and convincing manner, and it made such a profound impression upon the court and jury, and the prosecution was so bitter and determined, that it seemed almost impossible to prevent the conviction of my client. The jurors, however (having been carefully chosen by both sides from a "special panel"), were unusually intelligent and competent to weigh carefully the false (though honest) testimony of these three witnesses against certain scientific and medical testimony offered in behalf of the defense which conclusively showed that the deceased could not have been strangled to death, and this very long trial ended in a prompt acquittal of the defendant. This case is a striking illustration of the dangerous effect of leading and false suggestions upon minds susceptible of such influences, and in this instance came very near resulting in the conviction and possible execution of an entirely innocent and very worthy young man.

**272. PUYENBROECK'S CASE.** (GUY M. WHIPPLE. *Journal of American Institute of Criminal Law and Criminology*, 1913, Vol. III; summarizing *Les Témoignages d'Enfants dans un Procès Retentissant*, by J. VARENDONCK, in *Archives de Psychologie*, XI; July, 1911, pp. 129-171.)

The district in Belgium in which the crime occurred had been aroused by three previous similar crimes — violation and murder of young girls — committed within a single month. When the 9-year-old Cecile De Bruycker (*C*) was killed on Sunday, June 12, 1910, in daylight and within a short distance of her home, the countryside was in consternation and rage. The child's movements were known up to 4 o'clock, when she was playing with two other little girls, and the crime was committed between 4 and 5 o'clock. On her failure to return home, her mother, after futile search, went to the homes of her playmates, Louise Van de Stuyft (*L*), aged 10, and

Louisa Van Puyenbroeck (*L. V. P.*), aged 8. These girls were awakened from sleep and stated: "*C* played with us, but *we haven't seen her since.*" This declaration constitutes, in the opinion of the author, the only correct statement made by these children. The village was roused, the police summoned. At 3 in the morning, the police commissioner arrived, woke *L* again from sleep and questioned her at length (no record being made of this examination). *L* then conducted him to the place where she last played with *C*. Soon after they discovered *C*'s body a short distance away. So soon as the body was discovered, *L*'s declarations were

extended and amplified: she now stated that "a tall, dark man, with black mustache" had offered *C* a penny to go with him. She (*L*) followed, and soon afterward found *C* dead in the ditch. She ran home, afraid, went to bed that night without mentioning the occurrence, because she was afraid to tell what had happened.

On Wednesday, the police received an anonymous letter asserting that Amand Van Puyenbroeck (*V. P.*) must be the assassin. Thursday the examining magistrate interviewed him and put him under arrest. He was taken by train to the prison in a neighboring town, but at some risk of his life at the hands of an infuriated mob. From this moment, declarations implicating *V. P.* succeeded with striking rapidity and yielded a large amount of circumstantial and hearsay evidence against him.

*L*, as already noted, was submitted to two examinations by the police commissioner, one just before, and one shortly after the discovery of the body. The next day, June 13th, both *L* and *L. V. P.* were subjected to a third examination, this time at the hands of the examining magistrate. Both children showed glaring discrepancies and alterations from their first and their second declarations. The questions propounded by the magistrate were couched in a highly suggestive form and were based upon the assumption that the first statements of the girls (expressing entire ignorance of the murder) were incorrect. Thus the magistrate said: "You certainly know the assassin, tell me who it was." "I do not know him," replied the child. To which the magistrate said: "Didn't *C* mention the miscreant's name — as Dick, Jan, Francois, or Jules?" The child then evidently chose one of these names to relieve herself from the pressure put upon her, for she made the round-about statement: "Elvire Van Puyenbroeck told me

that *C* had said that the man's name was Jan." Now, later, when Elvire was examined, she asserted that she knew nothing about the affair. "But you must," retorted the magistrate, "for you told *L* that you heard *C* call him Jan."

It was not until after this name had been thus lugged into discussion that the anonymous letter appeared. It must be explained, further, that the accused, Amand *V. P.*, was sometimes known as Jan. Also that he was the father of *L. V. P.*, whose testimony helped to involve him. Rather extraordinary was the fact that the subsequent testimony included the assertion that the "man" stood within 2 meters of the girls when he offered the penny and yet was not recognized by his own daughter or by a neighbor's child. Almost equally extraordinary was the circumstance that, if the later evidence is to be believed, these children, after witnessing the outrageous death of their playmate at the hands of a man they knew, ran away and played for an hour in the street before his house, and then went to bed without mentioning the crime, because they forgot it or because they were afraid (both explanations were made).

Despite these seemingly impossible obstacles in the acceptance of the guilt of *V. P.*, the intense social pressure for the conviction of some one was now focused upon the definite attempt to convict him. The sudden flood of clew and bits of "evidence" which appeared as soon as he was arrested, and which were plainly the product of rumor, imagination, and general excitement, was explained on the ground that "now tongues were released from their previous fear of *V. P.*"

Again, acting on this belief, which was soon universal, that the little girls knew every detail of the crime, there appears on the scene a woman named Dierens, who had semi-official oversight over certain phases

of their religious life. On June 13th, this woman asked *L* who killed *C*, and obtained the response that *L* was then giving, viz.: "A dark man with black mustache," etc. On June 19th, after *V. P.*'s arrest, the woman, after some exhortation, asked this terribly suggestive question: "Now, wasn't it really *V. P.* who killed *C*?" *L* nodded her head faintly. Again the same question, and again *L* nodded her head, but added: "All the boys say so." A third time the question and the same response. Then the woman hastened to report her "success" to the authorities, saying: "*She is weakening and on the point of confessing all.*" It does not need a psychologist to anticipate what followed. The commissioner repaired again to *L*'s house and armed with the woman's statement, proceeded to secure from *L* (and from *L. V. P.*, who had, it may be added, ample opportunity to discuss the testimony with *L*) all the "evidence" desired.

In the trial, which followed in January, 1911, the circumstantial evidence against *V. P.* was successfully met by counterevidence, so that the chief reliance of the prosecution was upon the testimony of the two little girls aforesaid. Counsel for the defense thereupon engaged a number of psychologists to testify to the unreliability of this juvenile testimony. The chief part of this expert testimony was presented by Varendonck, the author of the present article. He had examined, line by line, the voluminous record (nearly 1000 pages) secured in the preliminary hearings and had conducted a series of experiments upon school children, in which, so far as feasible, the nature and form of the questions propounded by the authorities to the girls was reproduced. This he sought to put before the court, together with a general account of the work that had been done by experts in the study of the psychology of testi-

mony. He concluded that the girls had positively not seen the murder or the murderer, and that their testimony was worthless. Varendonck's testimony was the occasion of several violent outbursts of wrath on the part of the court officials, who publicly ridiculed the pretensions of psychologists to dictate to them how questions should be asked or what evidence was reliable. Despite numerous sensational passages-at-arms between the court and the psychologists, the jury was impressed by the arguments and the accused was acquitted.

It remains to cite briefly some of the experimental evidence offered on this occasion. Eighteen 7-year-old pupils were asked the color of the beard of one of the teachers in their building: 16 answered "black"; 2 did not answer; the man has no beard. Of 20 8-year-old pupils who replied to a similar query, 19 reported a color; only one said the man had no beard (which was correct). Similar results were obtained from older pupils. In one class, a pupil laughed aloud at the query and exclaimed: "He hasn't any beard." Nevertheless, 12 of the 22 reported a definite color. Again, a teacher of a certain class visited another class, stood before them for 5 minutes, talking and gesticulating, but keeping his hat on. Directly after he left, the teacher of the class obtained, in response to the query: "In which hand did Mr. — hold his hat?" 17 answers of "right," 7 of "left," and only 3 correct answers. Other experiments showed that suggestions of odor or temperature could be easily evoked in school children. Finally, to duplicate the strongly suggestive questions of the magistrate, another experiment was tried with 8-year-old pupils, who gave written answers to the following: "When you were standing in line in the yard, a man came up to me, didn't he? You surely know who it was. Write his name on your

paper." Though no one had approached the teacher, 7 of the 22 pupils gave a man's name. The experimenter then continued the test by saying: "Was it not Mr. M——?" to which 17 pupils now answered "Yes." Before a number of lawyers, individual pupils were then subjected to oral examination and gave complete descriptions of the "man's" dress and personal appearance.

It is not surprising that this experimental demonstration of the complete failure of children to withstand the lure of suggestive questions produced a profound effect upon the jury. It is perhaps as little surprising that the legal authorities did not take kindly to the testimony of the psychologists. There is, however, the satisfaction that the study of the psychology of testimony has saved a man from the gallows.

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273. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. p. 344.) . . . There is nothing really wonderful in hypnotism: the hypnotic subject is not governed by special psychological laws, but the germs of all his symptoms can be traced in the normal state: the physical disturbance also caused by suggestion has many characters in common with the spontaneous disturbance found in an insane person, and the hallucination of hypnotism does not essentially differ from the ordinary forms of hallucination. The phenomena are only an exaggeration and pathological deviation. The fact that hypnotic patients have displayed extraordinary powers of memory, sensation, and discrimination has tended to give hypnotism an air of the marvelous which has led some people to discredit what they hear of it. Those, however, who have studied the subject explain this by a simple hypothesis which is known as "the principle of *compensation* of functions," according to which the inhibition of the activity of one region is always connected with an increase in the activity of the other interrelated areas.

This interrelation may be either direct (neurodynamic), or indirect (vasomotoric). The first is probably due to the fact that energy which accumulates in one region, as the result of inhibition, is discharged through the connecting fibers into other central regions. The second is due to contraction of the capillaries as a result of inhibition, and a compensating dilation of the blood vessels in other regions. The increased blood supply due to this dilation is in turn attended by an increase in the activity of the region in question. . . . In hypnosis it is possible for different regions within the apperception center itself to be so related that while certain of these regions are partially inhibited, others are correspondingly more open to excitation. . . . In such states of partial hypnosis the subject may carry out in an automatic way complicated acts, all his other functions seeming to be in a waking state. Or he may show certain psychological activities of clearer discrimination, or strikingly exact recognition, or reproduction of certain particular sensations and feelings to the exclusion of all other forms of activity.

The method of producing the hypnotic state is either by fatiguing the senses or by acting on the imagination. . . . It is not necessary that suggestion should always be present: "a whole series of purely physical agents exist, which prove that sleep can be induced without the aid of the subject's imagination, against his will and without his knowledge." At the

same time these cases are rare, and as it is suggestion that is usually employed, it will be well to explain what is meant by this term :

*Suggestion* uses ideas and the subject's intelligence: it consists in *introducing, cultivating, and confirming, an idea in the mind of the subject of the experiment*. The states it produces are the results of that mental susceptibility, which we all to some degree possess, of yielding assent to outward suggestion, of affirming what we strongly conceive, and of acting in accordance with what we are made to expect.<sup>1</sup> There are as many forms of suggestion as there are modes of entering into relations with another person. Spoken or written suggestion is the simplest. But gestures can be employed, and, though less precise in meaning, suggestion by their means is more intense. Several ways can also be combined. In what is known as autosuggestion, the suggestion has its origin in the subject's intelligence: instead of being the result of an external impression, as in the case of verbal suggestion, it results from an internal impression, such as a fixed idea or delirious conception; these are often derived from hallucinations. Again, suggestion may produce either an active or impulsive phenomenon, such as a sensation of pain, an act, etc., or a phenomenon of paralysis, *e.g.* loss of memory, anæsthesia: there are different psychological explanations of these two states; in the former association of ideas is used, in the latter it is supposed that the experimenter produces a mental impression which has an inhibitory effect on one of the sensorial or motor functions. . . .

A further question is how much spontaneity exists in the hypnotic state. The subject is capable of reflecting and reasoning and under the influence of suggestion will himself invent expedients which were not suggested to him, to carry out the order; also on awaking he imagines his acts were spontaneous and invents reasons of his own for doing them. "Subjects in this condition," says Professor James, "will receive and execute suggestions of crime, and act out a theft, forgery, arson, or murder. A girl will believe that she is married to her hypnotizer, etc. It is unfair, however, to say that, in these cases, the subject is a pure puppet with no spontaneity. His spontaneity is certainly not in abeyance so far as things go which are harmoniously associated with the suggestion given him. He takes the text from his operator; but he may amplify and develop it enormously as he acts it out. His spontaneity is lost only for those systems of ideas which *conflict* with the suggested delusion. The latter is thus 'systematized': the rest of consciousness is shut off, excluded, dissociated from it. In extreme cases the rest of the mind would seem to be actually abolished and the hypnotic subject to be literally a changed personality."

As regards the testimony of hypnotized persons as to what happened to them in the hypnotic state, it must first be remarked that, after waking, the subject is still liable to suggestions, which will last if he has been told that he will still see the object, etc., when awake. Though he remains influenced by the hypnotic suggestion, it appears to him to be spontaneous, and he does not remember how the hallucination was produced, nor who gave him the order, nor even that it was given at all; he will proceed to carry out an act,

<sup>1</sup> Professor James notes that the power of suggestion is insignificant unless the subject is first thrown into the trance-like state, but after that there are no limits to its power: this state has no particular outward symptoms, as the bodily phenomena which are called such are really the products of suggestion, but these suggestions could not have been made successfully without the trance state.

which he has been told to do, and if asked why he does so, will reply that he does not know or will invent some reason. A subject's statement as to the time he has been in the hypnotic sleep can rarely be accepted; he cannot measure the time, as he has no landmark. Nor do the subjects know how often they have been hypnotized, though they sometimes have a general impression about it caused by an impression of cold and shivering. This, however, is not always present and it can be destroyed by suggestion. Sometimes oblivion as to what occurred during the sleeping state is complete, sometimes partial, sometimes the events which occurred during hypnosis recur to the mind with great force, when they are recalled by some external circumstance. No rule can be laid down, as there is every variety of case from the most profound oblivion to the most lucid recollection. If the hypnotizer tells the patient that he will remember nothing on awaking, the suggestion will destroy the subject's recollection of all that has occurred; he may even undergo all sorts of violence and have no remembrance of it. The subject who says he remembers everything cannot be trusted; if he find, *e.g.*, that he has a wound, he is apt to invent an explanation or accept one given him, but in all cases he ends by suggesting to himself that he saw things as he explained them. Or, again, he may err because of the suggestion of the experimenter who has impressed upon him a recollection which is false. If, however, the subject is hypnotized anew, the recollection of all which occurred during the former hypnosis is then revived, if he has received no special suggestion of oblivion; it has been shown, however, that subjects while in a hypnotic state are capable of simulation and of suppressing the truth.

### Topic 3. Narration as affected by Typical Temperaments

275. WM. C. ROBINSON. *Forensic Oratory; a Manual for Advocates*. (1893. p. 126.)

*Intelligible Evidence: how Rendered Unintelligible. The Rambling Witness; his Treatment.* Testimony in itself intelligible is often rendered difficult of comprehension by the incompleteness, or the want of continuity, with which it is presented. These evils are due either to the defective mental constitution of the witness, or to his moral weakness, or to his personal hostility, or to the improper conduct of the advocate. A defective mental constitution manifests itself in rambling, or in dull and stupid witnesses. In many individuals there apparently exists no power of fixing the attention on a single object and persistently pursuing its consideration, and from such an individual it is useless to expect any exhaustive and coherent statement of the facts within his knowledge. Any idea which suddenly arises in his mind, during the course of his narration, diverts his thought into another channel; he loses sight of many details which he should remember, and continues his relation without consciousness of the omission. If he endeavors to express this new idea, his effort to explain it leads him still further from his proper subject, and when he returns to it, if ever, it is at a point different from that at which it was abandoned, while the intermediate ideas, however necessary to the comprehension of the whole, are left unuttered. The examination of a witness of this defective mental character should be close and catechetical. The questions of the advocate should

lead him step by step through the entire subject of his testimony, in logical order and without omissions. If he persists in rambling and irrelevant replies, he should not be rudely interrupted, for any mental shock or moral perturbation will increase his difficulties, but when he has finished what he wishes to relate, the question from whose true reply he has departed should be patiently repeated, and the examination pass from this point to the next only when the proper answer is obtained.

*The Dull and Stupid Witness: his Treatment.* The same obstacles are encountered in eliciting the evidence of a dull and stupid witness. His perceptions are cloudy and indefinite. His processes of recollection and reflection are slow and disconnected. . . . The patience of the advocate in this examination must be inexhaustible. To take the witness again and again over his story in order to recall to him some event or fact which seems to elude every effort of his memory, to construct questions which contain some word or phrase suggestive of the missing thought, to contrive methods of explanation or illustration which enable him to make himself clearly understood by the jury, to afford him opportunities for reconciling inconsistencies into which his misapprehension of the questions or the inaccuracy of his replies has led him, taxes the ingenuity and perseverance of the most adroit and indefatigable lawyers. The task imposed upon them is nothing less than the creation of the testimony, save that the facts, as crude and indefinite ideas, lie dormant in the recollection of the witness. It is the advocate who gives to these ideas vitality and form, who clothes them in suitable expressions, who arranges, produces, and communicates them to the jury.

*The Timid and Self-conscious Witness: his Treatment.* The testimony of a witness whose moral weakness manifests itself in an undue timidity and self-consciousness is subject to the same defects. His attention is divided between the ideas which he is requested to present, and the effect that he supposes is to be produced by their disclosure on himself or on the cause. His apprehensions and conjectures often work through his imagination on his memory, until without intending falsehood he omits or colors facts to a degree irreconcilable with truth. No sooner are his ideas uttered, however, than he becomes conscious of their error. If he now attempts an explanation, it usually results in his entire discomfiture. If he persists in the misrepresentation or concealment, a new cause of embarrassment arises in the fear of subsequent exposure, and leads to still more harmful falsehoods and suppressions. Thus, with the best intentions at the outset, and knowing matters of importance to the cause, a nervous, apprehensive witness may finally retire suspected of the grossest perjury, and without having related a single matter as it actually occurred. No witness who is liable to this infirmity should be permitted to narrate material facts until his embarrassment and fear are overcome. By simple questions in reference to his occupation, residence, or relation to the parties of the cause, eliciting replies in which mistake will be impossible, he should be gradually assured that he is capable of understanding, and of properly responding to, the inquiries which are to be proposed to him, and his entire attention fixed on the proceeding in which he is now engaged. When at last fully at his ease, the more material portions of his evidence should be approached, the questions made, if possible, even more simple and direct, and limiting the answer to the point required. . . .

*The Bold and Zealous Witness: his Treatment.* The moral weakness of a bold and zealous witness creates almost equal difficulties. He also is self-conscious, but in him self-consciousness is manifested by a high opinion of his discernment of the real requirements of the cause, and of the importance and conclusiveness of his own evidence concerning it. He feels that, if permitted to state fully, in his own way, what he thinks as well as what he knows, the jury must decide at once in favor of the party in whose interest he is called. He rebels at interference, even of his own counsel, is jealous of the questions in reply to which his testimony is delivered, and avails himself of every opportunity to assert his own opinions and escape the limits within which the interrogatories are intended to confine him. He is a dangerous witness, rarely adhering strictly to the truth, easily led astray by flattery, and liable to betray the cause whenever he suspects that his services are unappreciated. This witness requires the most prudent and at the same time the most inflexible control. While he should not be irritated by sensible restrictions, he must still be kept within the narrowest limits, and his evidence confined in matter and expression to the precise truth which it is necessary for him to disclose. . . . The entire examination of this witness should be conducted with a view to the dangers which will attend his cross-examination. Exaggerations in his evidence, which are likely then to be exposed, should be corrected as soon as made, by questions bringing him to some known standard and furnishing a measure of his actual meaning. If he endeavors to conceal unfavorable facts which are certain sometime to appear, such inquiries should be propounded as will now elicit them in the least unfavorable form. . . .

*The Hostile Witness: his Treatment.* Incompleteness or obscurity in the testimony of a hostile witness is caused by difficulties of an entirely different character. The obstacles encountered in the examination of the rambling, the self-conscious, or the stupid witness arise from intellectual or emotional defects, and can be overcome by enlightening the mind of the witness, or by assisting him to bring his impulses under control. The obstacle encountered in an adverse witness, however, is an antagonistic will. He labors usually under no mental or emotional embarrassments. He knows clearly and precisely the facts which ought to form his evidence. He is able to narrate them positively and coherently, if he so chooses. But, actuated by interest, or partiality, or more secret impulses, he is determined to withhold the knowledge he possesses, or, if compelled to yield it, to communicate it in language which will make it as valueless as possible. Where such a witness is the sole repository of ideas which are essential to the cause, the advocate has no other course than to produce him, and render him as useful as he may. Otherwise, he should avoid him altogether. For it is seldom that the benefit to be derived from such a witness is equal to the injury which his reluctance to assist and his perversion of the facts inflict. When, however, it becomes necessary to improve him, the advocate must first discover the cause and character of his hostility. If it be partial only, manifesting itself toward a single person or a single feature of the cause, it may be possible during the whole examination to ignore the objectionable individuals or issues, and to approach the witness solely upon matter concerning which he will freely testify. If his antagonism extend to the entire cause, or to all the parties by whom he is called, there is little hope of rendering him useful



unless he can be either conciliated, circumvented, or subdued. In order to conciliate him, the weak points in his disposition must be ascertained, and siege laid to his heart by questions which appeal directly to these vulnerable characteristics. Once in a good humor with himself and with the advocate, his motive for concealment or perversion of the truth exercises less influence upon his mind, and he replies with little hesitation to cautious inquiries which do not directly touch his prejudices, or present anew to him the exciting cause of his antagonism. . . .

*Classes of Liars: Mode of interrogating them.* A witness who is not able, or is not disposed, to tell the truth, fails in the most essential attribute of credibility, and from the moment when this fault becomes apparent to the jury their confidence in him and in his testimony is at an end. Of such witnesses there are three classes: The *innocent* liar, whose imaginations are so intimately mingled with his memories that he does not distinguish between the facts and fancies which occupy his mind, but believes and utters both alike as true; the *careless* liar, whose love of the pathetic or the marvelous, or whose desire to attract attention to himself, overcomes his weak allegiance to the truth, and leads him to weave facts and falsehoods together in his common conversation, to round out his narrations by the insertion of invented incidents, to give dramatic completeness to events by supplying with fiction whatever may be wanting in the circumstance itself; the *willful* liar, who for some definite purpose deliberately asserts what he knows to be untrue. . . . The innocent, imaginative liar is generally endowed with no remarkable astuteness, and, being honest in his intentions, readily follows wherever a kindly questioner may wish to lead him. . . . When he is called upon to state facts, at the instance of the adverse party, the natural desire to serve a friend stimulates his imagination as well as his memory, and the story he relates is the net result of fancy and recollection. The cross-examiner may take advantage of the same docility in order to exhibit to the jury his liability to self-deception. If circumstances which they know did not occur, but which are in keeping with the other parts of the transaction as narrated by him, are now suggested to him, his imagination is very likely to insert them into the picture which his memory preserves, and he will express his certainty of their existence with as much positiveness as that of any other matter to which he has testified. This process may be indefinitely repeated, until the jury see that he is willing to adopt and swear to any details which are not manifestly improbable, or until his contradiction of other witnesses, or of former portions of his own evidence, destroys their faith in his intelligence or honesty. . . . The exposure of the careless liar is a work of little difficulty. The cross-examiner needs but to apply the goad, and give him rein. The same qualities which mislead him in his statements in regard to one event operate on all the occurrences of life, and in his mouth "a little one" always "becomes a thousand," and "two roistering youths" develop into "eleven men in buckram" and "three in Kendalgreen." Let fitting incidents, whose details are already accurately before the jury, be but presented to him for description, and his palpable additions and exaggerations will complete his ruin. . . . The willful liar, though probably a rare phenomenon, sometimes appears within our courts, and when he does appear generally eludes or baffles all the artifices of the cross-examiner. . . . An open attack upon a willful liar in order to compel him to confess

his voluntary falsehood is nearly always useless, at least until he has been driven to the wall by a superior foe, or has been reduced to such a state of mental confusion that he is willing to admit whatever the victorious cross-examiner may see fit to demand. His willingness to lie may with more ease and certainty be shown by unveiling the evil motives which impel him, or by entangling him in inconsistencies and contradictions which render it impossible to accept any of his statements as worthy of belief.

276. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. pp. 65, 107.) *The Flippant Witness*. When a witness comes into the box with what is commonly called a "knowing" look, and with a determined pose of the head, as though he would say, "Now, then, Mr. Counselor, I'm your man, tackle me," you may be sure you have a Flippant and masterful being to deal with. He has come determined to answer concisely and sharply; means to say "no" and "yes," and no more; always to be accompanied with a lateral nod, as much as to say, "take that."

But although I have used the masculine pronoun, this witness is very often a female. She has come to show herself off before her friends; she told them last night how she would do it, and feels quite equal to "any counselor as ever wore a wig."

In dealing with this witness, an advocate should carefully abstain from administering rebukes, or attempting "to put the witness down." His object should be to keep her up as much as possible, to encourage that fine frenzied exuberance, which by and bye will most surely damage the case she has come to serve. . . .

You will always approach her as if she were a wild animal ready to tear you if she could get near enough. Therefore, circumvent. You may be sure she will never give an answer that she supposes may be favorable. I have known this kind of witness so "worked up," that at last she has refused to give an answer that she may think favorable even to her own side, for fear it may be made use of somehow by the other.

*The Dogged Witness*. The dogged witness is the exact opposite of the one I have just been dealing with. He will shake his head rather than say no. As much as to say: "You don't catch me. You see him, gentlemen, and you see me. I'm up to him." He seems always to have the fear of perjury before his eyes, and to know that if he keeps to a nod or a shake of the head, he is safe. He is under the impression that damage the case he must, whatever he says. "A still tongue makes a wise head," has always been his maxim.

How are you to deal with him? . . . Insinuation will help you with this witness. But carefully avoid asking for too much at the time. *Get little answers to little questions*, and you will find as a rule that answers are strung together like a row of beads within the man. . . .

This witness, without being untruthful, is always hostile; he looks on you as a dangerous man, a sort of spy, regards you as he would an ill-looking stranger on a race course who wanted to draw him into conversation. He will become bolder as he proceeds, especially if you prove to him that you are by no means the terrible creature he at first thought you. And the best way to foster this idea is to accustom him to answer. Let him see that your questions are of the simplest possible kind; even so simple and

so easily answered, that it seems almost stupid to ask or answer them. "Of course," he says to one; "Certainly," to another; "No doubt about that," to a third, and so on. Presently you slip one in that is neither "of course" nor "certainly," and get your answer.

He may be an old man (generally is), and the subject of inquiry a right of way. He may be "the oldest inhabitant." What are the moving springs of human conduct? Love of justice, which he has known from a boy upwards, and his father before him, as "*right is right, and wrong is no man's right.*" Self-approbation, or vanity, concentrated in him under the form of "*a wonderful memory,*" which has been the talk of the neighbors for years; the knowing more of by-gone times than any man or woman in the place; *Selfishness*, called by him his "*uprightness and downstraightenedness*"; Independence of spirit, "*he cares for no man, and always paid twenty shillings in the pound*" — these are the vulnerable points in his armor; and if you cannot thrust an arrow in at any of these, you had better hang up your bow, for you will never make a good archer. He will answer anything if you appeal to his memory, or if your question magnifies his independence of spirit, or brings out in all its dazzling luster that "*uprightness and downstraightenedness,*" of which exalted virtue he believes himself to have been ever a most distinguished example, if not the actual discoverer.

And thus the Dogged witness may be tamed and rendered docile, even as that moresagacious creature, the elephant, may be taught to stand on its head.

*The Hesitating Witness.* A hesitating witness may be a very cautious and truthful witness, or a very great liar. You will find this out before you begin to cross-examine. In most cases the hesitating man is wondering what effect the answer will have upon the case, and not what the proper answer is. By no means hurry this individual. Let him consider well the weight of his intended answer, and the scale into which it should go, and in all probability he will put it into the wrong one after all. If he should, *leave it there by all means.* I advise this, because I have so often seen young advocates carefully take it out again and put it into the other. Besides, your giving him plenty of time will tend to confuse him — as confused he should be if he is not honest. He can't go on weighing and balancing answers without becoming bewildered as to their probable results. . . . Very often he will repeat the question to gain time. Sometimes he pretends not to hear, sometimes not to know; all this time he is adjusting his weights, and in all probability some of them are false. . . .

Hesitation, however, may result from a desire to be scrupulously accurate, in which case you must be careful that the mere strictness of language do not convey a false impression. The letter sometimes, even in advocacy, kills, where the spirit would make alive.

*The Nervous Witness.* A nervous witness is one of the most difficult to deal with. The answers either do not come at all, or they tumble out two or three at a time; and then they often come with opposites in close companionship; a "Yes" and a "No" together, while "I don't know" comes close behind. "I believe so," or "I don't think so," is a frequent answer with this witness, as it is with the lying and the truthful witness. They are all partial to this expression, but all from different and opposite motives.

You must deal gently with this curious specimen of human nature. He is to be encouraged. It is no use to bray him in a mortar. . . . You

should deal as gently with a weakness of this kind as you would with a shying horse; encourage and humor him, while you familiarize him with the dreaded object, which is your learned self. The nervous witness, like all others, is either to be cross-examined or not; if he be, you must do it without driving him into such a state that his answer, however favorable, will have no value in the eyes of the jury; and this will surely be the effect of agitating him by petulant impatience. Endeavor to quiet his nerves if you think you can obtain anything serviceable to your case; if not, leave him alone altogether. Great allowance is always made for a nervous witness, who invariably receives the sympathy of the jury. You have to guard, therefore, against offending that sympathy, as you undoubtedly would by a severe tone or manner.

*The Humorous Witness.* The humorous witness is mostly found in theatrical cases, where he is generally looked for; and in the majority of them he seems to be conscious that he is expected. He scarcely ever says a good thing, although everybody laughs whenever he tries to. He is generally encouraged all round, and very often the judge will say a good thing for him. This witness is a public character, and at any risk he must not disappoint his eager patrons. If he says a good thing, it will be in to-morrow's paper, and the theatrical world will have it for breakfast. If he cannot manage it, his performance will be a failure. So he mounts the box and looks all round the court as much as to say, "The last witness was nothing, now comes the real performance."

No one need be told that his weak point, like that of almost all men, is vanity, and his strong one good temper. You will scarcely ever find him intentionally false, and he seldom attempts to mislead. He rarely has any interest in the case, and most frequently not the excitement incident to party feeling. As a rule he is the friend of both sides, as he is with the human family generally; for though he may be out at elbows with all the world, he brings "railing accusation" against no one.

Supposing the action to be one of assault, you can successfully appeal to his good nature if you are for the defendant; and he will almost rub the cause of action out for you as he would a debtor account from a slate. Play him with his superabundant good humor, and lay aside the style of the cross-examiner altogether. Be with him like a schoolmaster with the boys after school, and you will find that he will jump to your conclusions if you offer him a back. . . .

*The Cunning Witness.* The cunning witness must be dealt with cunningly. Humor would be mere pastime, and straightforward questioning out of character with him. But by way of contrast, and for that only, straightforwardness may not be out of place with the jury. Whatever of honesty, whether of *appearance*, manner, tone, or language contrasts with the vulgar, self-asserting and mendacious acting of this witness will tend to destroy him. It will be the antidote to his craftiness. It is strange, but true, that no man can be what is usually understood as a "cunning person" and conceal the fact. He is not really a shrewd man, but only thinks he is, tries to be, and, above all, wishes to be thought so. He always pretends that he has some deep and hidden meaning in what he says and does, which no amount of skill or perception on your part can penetrate. He would be an impostor to the world if he could, but the only person he really imposes upon is him-

self. Every one can see that he tries to appear what he is not, and that he pretends to know a great deal more than he does. This is the man to show to the jury in his real character, and they will enjoy your good-humored exposure of the cheat. . . .

*The Canting Hypocrite.* The canting hypocrite is not the least pleasing object of creation when in the witness box, nor is he the most difficult to cross-examine. He invariably speaks from the very best and purest of motives. His desire is only to speak the truth; no, not merely that, but without so much as an *apparent* tinge of partiality. He has no interest in the case — no feeling. It is such a pity it could not have been settled out of court as he proposed, himself to be the arbitrator.

Here is a good man for you! It is a pity that necessity and a sense of duty should compel you to cross-examine such a man at all. It seems almost an insult, but excusable on this ground — that his extreme disinterestedness and impartiality might impose upon the jury and do your client an injustice if you did not. Now you will observe about this rogue that whenever he approaches a downright lie he shirks it. It is a part of his very character to believe he is an honest man. When he comes to a lie, therefore, that he dares not face, he is like a bad hunter who will not leap the fence, but looks round to see if there be a gap somewhere hard by or a somewhat *lower* fence that he may scramble over, and so not do violence to himself in the event of a mishap. The hypocrite coming up to the lie, says: "I am not quite clear; I should hardly like to go so far as that." But he will wriggle over on to the other side somehow if you show him a place. So, if you put it to him something in this form: "I presume I may take it, Mr. Pecksniff, that so-and-so is the case?" "Well," says he, "I think you may." Now he's fairly over. You will not fail to mark this characteristic in him, that whenever he begins to *think*, to be *not quite sure*, *not clear*, and *to believe* and *presume*, and so forth, he is incubating a downright lie. He himself is a lie that needs little telling. His evidence, which may and will be always on the confines of truth, must be closely examined to see on which side of the boundary it really is. . . . He is too excellent to deny the truth if you put it to him *in infinitesimally small quantities at a time in the shape of simple leading questions*, each one carrying with it the shadow of perjury, which this man will always avoid committing at any cost.

The rogue believes in two things — Religion and his own Goodness. His religion is covetousness, which he always construes into a Special Providence; and his Goodness is exemplified in an enthusiastic worship of *Himself*. He is an eminently moral man, as every one will tell you; but his morality springs not from a genuine piety, but from arrant cowardice. He would sin to his heart's content but for the dread of punishment. He is a weak sinner nevertheless, who cannot even plead a robust constitution in mitigation.

*The Witness partly True and partly False.* The witness who is partly true and partly false, without hypocrisy, knowing that he is giving color to some facts, suppressing others, and adding little ones to make good measure for his party, is the most difficult of all to deal with. The process of separating the true from the false requires skill as well as ingenuity and patience. You must have a delicacy of touch in manipulating evidence of this kind that comes only by actual practice. Experienced advocates are frequently deceived, and judges even fail at times to separate what is true from what is

false. . . . And you must bear in mind that it is not sufficient for you yourself to know the nature and character of the evidence ; your task will only be half accomplished at this point. There will still remain the more difficult one of exhibiting it to the jury in the same light, and with the same aspect with which it presents itself to your own mind. . . . If, however, you can lay hold of any one part and expose an incongruity or an incompatibility, you will have accomplished a great deal. Expose an attempt at deception anywhere in a witness's evidence, and you have nearly, if not quite, destroyed it all. You must watch carefully to find out if there be a want of assimilation in the parts of the story ; if there be a disagreement between some of the false parts and some of the true, you must ascertain whether the alleged facts can exist together and in connection with one another, and must cross-examine for causes and effects ; you will then determine whether they agree with the facts stated by other witnesses. Men do not gather "figs off thistles," and if you find the same cause producing opposite effects, there is falsehood somewhere.

Improbabilities always have great weight with a jury : and if you cross-examine for these in a witness who tells a story partly true and partly false, you may succeed in detecting some. . . . The story told by this witness would resemble a neatly papered wall. On a general glance, such as an ordinary spectator would give, it would appear perfect ; but a critical examiner would discover that the pattern was broken here and there to meet the requirements or shape of the wall, notwithstanding that considerable skill had been employed to make the broken portions fit in so as to deceive the eye. As a whole, it looks complete ; examined in detail, the patchwork is apparent ; the *pattern* is not preserved in an integral condition. . . .

*The Positive Witness.* There is another class of witness which may be mentioned, and that is the positive witness (generally a female or of female tendencies). It is usually very difficult to make the witness unsay anything she has said, however mistaken she may be ; but you may sometimes lead her by small degrees to modify her statements, or induce her to say a great deal more in her positive way ; and the great deal more may be capable of contradiction, or may itself contradict what has been said before by the same witness. If you deal with her skillfully, she will in all probability be equally positive about two or three matters which cannot exist together. She is the worst witness to unsay anything, but the best to lead into a contradiction of what she has said.

Her idea of an oath is not that it should be a restraint upon her mendacity, but that it should give force to her positive assertions — a stamp of genuineness like the Queen's head on a bad shilling. She would unhesitatingly have sworn that Abel struck the first blow if she had been called on the side of Cain. She always stands up for what she calls "her own side." Beware how you try to convince her that she must be wrong. Such questions as "How can that be?" will only draw the answer, "I don't know how it *can* be, but I know it *is*." You might just as well try to convince a street mongrel that barking is done away with, as to attempt to persuade her that she ought not to be quite so positive.

*The Awkward Witness—Mr. Growles.* "Better let me take this witness," says the leader ; "he's rather awkward." The learned counsel knows him, I should think. Examined him before, perhaps, and lost his case. An

"awkward" witness to examine, chiefly because his instinct is to contradict "everybody and everything." His neighbors would tell you that he is "the contrariest man that ever was bornd." Unless by sheer force of circumstances he would never agree with anybody upon any subject whatever. If you were to say, "A fine morning, Mr. Growles," he would answer in a tone by no means conciliatory, "*It'll rain afore long.*" Suggest in the most friendly manner that it is rather warm, he'll sneeringly reply that "*it's a great coo-at colder 'an it was yesterday.*" So you cannot tell where to have him. No wonder the leader takes him in hand; he requires masterful treatment. The "instructions" seem to refer to a watercourse, respecting which I suppose there is a dispute between riparian owners; or it may be some Genii, who live at the bottom, and the parish authorities. Perhaps we shall find out from the examination of the witness.

He clambers into the box with a clatter of hobnails and appears at the top with a very big, red, flat face, and a small sharp nose. He stares all round the court as though he were looking after somebody with whom he meant to have a row, and then stares at the judge as if he were a good-sized ghost in his best clothes. Presently he hears a soft sad voice appealing to him in these terms:

"I think you have known this watercourse for a good many years, haven't you, Mr. Growles?" It is the voice of the leader. There is a pathos in the tone which is irresistibly persuasive, and there is a smile upon the leader's face which is almost *angelic* — not quite. At this soft wooing, Mr. Growles looks up, and in a voice which sounds the more loudly and gruffly by contrast, exclaims, striking the ledge of the witness box with his fist —

"No, I ain't!"

Then he turns half round towards the jury, as much as to say, "I had un there!" This supposed observation is concluded with another supposed remark to the learned leader in this form:

"You mornt try none o' them ere geames on wi' me, I can tell ee!"

"I thought you had," says the leader, meekly, his face beaming with blushes.

Leader then turns over a sheet of his brief, and whispers behind his hand to the solicitor who is instructing him —

"This *is* Growles, isn't it?"

Solicitor in great excitement jumps up, twists round, and exclaims, with fearful rapidity —

"Yes, yes; this the one; very careful? told you awkward, awfully queer; gently as ever you can; careful, only witness —"

"Hush! don't be so excited, Mr. Miles," says the counsel.

Then the leader, satisfied himself that it is Mr. Growles, has to satisfy Mr. Growles of that fact; so he says to him:

"You *are* Mr. Growles?"

"*Be I?*" says Growles, not quite convinced.

"*Well, ARE you?*" asks the leader, this time somewhat facetiously, for the court is roaring with laughter, although there is nothing to laugh at; but the judge began it.

"*Suppose I be — what then?*"

"Come, get on," says the learned judge; "we are a long way off from the issue yet."

"Well, now, come, Mr. Growles; I dare say we shall understand one another presently." This is said in the most insinuating manner you can imagine — a manner that the learned counsel was accustomed to years and years ago in other and sweeter scenes.

"*I be ready,*" says the witness, clutching the ledge of the witness box as though the next shot might dislodge him.

"You've known this watercourse for some time, haven't you?"

"*Not all on her, I ain't.*"

"*All on her?*" repeats the leader.

The learned judge explains. "You see, Mr. Smiles, the witness is a particularly accurate witness, and when you ask him if he knows the watercourse he naturally thinks you mean *all* the watercourse, and so he says, 'No, I don't; I know a part of it.'"

At this Growles nods and grins triumphantly.

"Well, now, then, Mr. Growles, such part as you have known you have known for a *great* number of years, haven't you?"

"*No, I ain't,*" says Growles; "I've knowed her on and off for a matter o' two-and-twenty 'ear come Candlemas, ever since I worn't no 'igher 'an that."

"Well, well," says the leader, with renewed hope, "that's something. We shall get on now."

"*I doan't know so much about that,*" replies the witness. "*I be here t' spak the truth.*"

"Very well, Mr. Growles, have you ever known it take any other course than the one it now flows in?"

"*Yes, I have.*" This is uttered very loudly, and with another nod. Counsel on the other side of course laugh and shake their heads as much as to say, "You see the case *we've* got."

("I told you he was awkward," whispers the solicitor.)

"Pray, pray, sir, don't interrupt," remonstrates the leader. "This is really too bad." Then, stooping down, "Why did you bring such a witness as this? he's selling us. Where have you known it take a different course?" he asks the witness.

"*Where?*" repeats Growles.

"Yes, where, sir? Don't fence with me, sir, but answer. You are here to speak the truth, and the truth I'll have." Leader seems to be warming up a bit.

"*I'll spoken out,*" says Growles.

"He's your own witness," murmurs the opposite leader.

"*Where* have you known the water flow in a different course, sir?"

"I've knowed her goo down athirt an' across Squire Stookey's field, till t' squire turned her off down by t' lane close up gin Fairmile Corner, and sent her through Hog's Moor and away down —"

"Oh, dear, dear," says Smiles; "that's miles and miles away, my good fellow."

"I can't help un, sir; it's true, and I'll spak t' truth: I bean't asheamed."

"But, pray attend, sir. Close by the plaintiff's garden did not this watercourse always run in the same place?"

Objected to as a leading question — a slip by the learned counsel, who was just the merest trifle irritated at the crookedness of the witness.

"Where *did* it run, man? I'll have an answer if I stand here all day."



You have come to tell the court, and you must do so, and not trifle with us in this way. Did it run as it does now or in some other direction?"

"Allays, as fur's ever I know'd, she did."

"Stand down, sir," says the leader. . . .

And there's the end of his evidence — no more loads to push up hill that day. Well may the leader observe to his solicitor, "What on earth did you call that witness for? — he has lost the case."

#### Topic 4. Confessions of Guilt

277. HANS GROSS. *Criminal Psychology*. (transl. Kallen. 1911. § 8, p. 31.) The confession is a very extraordinary psychological problem. In many cases the reasons for confession are very obvious. The criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession, or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another. In addition there is a thread of vanity in confession — as among young peasants who confess to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing their actual crime). Then there are confessions made for the sake of care and winter lodgings: the confession arising from "firm conviction" (as among political criminals and others). There are even confessions arising from nobility, from the wish to save an intimate, and confessions intended to deceive, and such as occur especially in conspiracy and are made to gain time (either for the flight of the real criminal or for the destruction of compromising objects). Generally, in the latter case, guilt is admitted only until the plan for which it was made has succeeded; then the judge is surprised with a well-founded, regular, and successful establishment of an alibi. Not infrequently confession of small crimes is made to establish an alibi for a greater one. And finally there are the confessions Catholics are required to make in confessional, and the death-bed confessions. The first are distinguished by the fact that they are made freely and that the confessee does not try to mitigate his crime, but is aiming to make amends, even when he finds it hard; and desires even a definite penance. Death-bed confessions may indeed have religious grounds, or the desire to prevent the punishment or the further punishment of an innocent person.

Although this list of explicable confession types is long, it is in no way exhaustive. It is only a small portion of all the confessions that we receive; of these the greater part remain more or less unexplained. . . . A number of cases may perhaps be explained through pressure of conscience, especially where there are involved hysterical or nervous persons who are plagued with vengeful images in which the ghost of their victim would appear, or in whose ear the unendurable clang of the stolen money never ceases, etc. If the confessor only intends to free himself from these disturbing images and the consequent punishment by means of confession, we are not dealing with what is properly called conscience, but more or less with disease, with an abnormally excited imagination. But where such hallucinations are lacking, and religious influences are absent, and the confession is made freely in reponse to mere pressure, we have a case of conscience, — another of

those terms which need explanation. I know of no analogy in the inner nature of man, in which anybody with open eyes does himself exclusive harm without any contingent use being apparent, as is the case in this class of confession. There is always considerable difficulty in explaining these cases. One way of explaining them is to say that their source is mere stupidity and impulsiveness, or simply to deny their occurrence. But the theory of stupidity does not appeal to the practitioner; for even if we agree that a man foolishly makes a confession and later, when he perceives his mistake, bitterly regrets telling it, we still find many confessions that are not regretted and the makers of which can in nowise be accused of defective intelligence. To deny that there are such is comfortable but wrong, because we each know collections of cases in which no effort could bring to light a motive for the confession. The confession was made because the confessor wanted to make it, and that's the whole story.

The making of a confession, according to laymen, ends the matter; but really, the judge's work begins with it. As a matter of caution all statutes approve confessions as evidence only when they agree completely with the other evidence. Confession is a means of proof, and not proof. Some objective, evidentially concurrent support and confirmation of the confession is required. But the same legal requirement necessitates that the value of the concurrent evidence shall depend on its having been arrived at and established independently. The existence of a confession contains powerful suggestive influences for judge, witness, expert, for all concerned in the case. If a confession is made, all that is perceived in the case may be seen in the light of it, and experience teaches well enough how that alters the situation. . . . It fits. So does the autopsy, so do the depositions of the witnesses. Everything fits. There have indeed been difficulties, but they have been set aside, they are attributed to inaccurate observation and the like, — the point is, — that the evidence is against A. Now, suppose that soon after B confesses the crime; this event is so significant that it sets aside at once all the earlier reasons for suspecting A, and the theory of the crime involves B. Naturally the whole material must now be applied to B, and in spite of the fact that it at first fitted A, it does now fit B. Here again difficulties arise, but they are to be aside set just as before. Now if this is possible with evidence, written and thereby unalterable, how much more easily can it be done with testimony about to be taken, which may readily be colored by the already presented confession. The educational conditions involve now the judge and his assistants on the one hand, and the witnesses on the other.

Concerning himself, the judge must continually remember that his business is not to fit all testimony to the already furnished confession, allowing the evidence to serve as mere decoration to the latter, but that it is his business to establish his proof by means of the confession, and by means of the other evidence, *independently*. The legislators of contemporary civilization have started with the proper assumption that also false confessions are made, — and who of us has not heard such? Confessions, for whatever reason, — because the confessor wants to die, because he is diseased, because he wants to free the real criminal, — can be discovered as false only by showing their contradiction with the other evidence. If, however, the judge only fits the evidence, he abandons this means of getting the truth.

. . . I repeat : the suggestive power of a confession is great and it is hence really not easy to exclude its influence and to consider the balance of the evidence on its merits, — but this must be done if one is not to deceive one's self. Dealing with the witness is still more ticklish, inasmuch as to the difficulties with them, is added the difficulties with one's self. . . . In this regard it cannot be sufficiently demonstrated that the coloring of a true bill comes much less from the witness than from the judge. The most excited witness can be brought by the judge to a sober and useful point of view, and conversely, the most calm witness may utter the most misleading testimony if the judge abandons in any way the safe bottom of the indubitably established fact.

It happens comparatively seldom that untrue confessions are discovered ; but once this does occur, and the trouble is taken to subject the given evidence to a critical comparison, the manner of adaptation of the evidence to the confession may easily be discovered. The witnesses were altogether unwilling to tell any falsehood and the judge was equally eager to establish the truth, nevertheless the issue must have received considerable perversion in order to fix the guilt on the confessor. Such examinations are so instructive that the opportunity to make them should never be missed. . . .

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278. DANIEL WEBSTER, *Argument for the Prosecution in COMMONWEALTH v. KNAPP*. (*Great Speeches and Orations of Daniel Webster*. ed. Whipple, 1899, p. 192.) [Mr. White, a highly respectable and wealthy citizen of Salem, about eighty years of age, was found, on the morning of the 7th of April, 1830, in his bed, murdered, under such circumstances as to create a strong sensation in that town and throughout the community. Richard Crowninshield, George Crowninshield, Joseph J. Knapp, and John F. Knapp were, a few weeks after, arrested on a charge of having perpetrated the murder, and committed for trial. Joseph J. Knapp, soon after, under the promise of favor from the government, made a full confession of the crime and the circumstances attending it. In a few days after this disclosure was made, Richard Crowninshield, who was supposed to have been the principal assassin, committed suicide. A special session of the Supreme Court was ordered by the legislature, for the trial of the prisoners, at Salem, as printed *post* No. 392. . . . At the request of the prosecuting officers of the government, Mr. Webster appeared as counsel, and assisted in the trial.] . . .

Gentlemen, — it is a most extraordinary case. In some respects, it has hardly a precedent anywhere ; certainly none in our New England history. This bloody drama exhibited no suddenly excited, ungovernable rage. . . . It was a cool, calculating, money-making murder. . . . An aged man, without an enemy in the world, in his own house, and in his own bed, is made the victim of a butcherly murder, for mere pay. . . . The deed was executed with a degree of self-possession and steadiness equal to the wickedness with which it was planned.

The circumstances now clearly in evidence spread out the whole scene before us. Deep sleep had fallen on the destined victim, and on all beneath the roof. A healthful old man, to whom sleep was sweet, the first sound slumbers of the night held him in their soft but strong embrace. The as-

assassin enters, through the window already prepared, into an unoccupied apartment. With noiseless foot he paces the lonely hall, half lighted by the moon; he winds up the ascent of the stairs, and reaches the door of the chamber. Of this, he moves the lock, by soft and continued pressure, till it turns on its hinges without noise; and he enters, and beholds his victim before him. The room is uncommonly open to the admission of light. The face of the innocent sleeper is turned from the murderer, and the beams of the moon, resting on the gray locks of his aged temple, show him where to strike. The fatal blow is given! and the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death! It is the assassin's purpose to make sure work; and he plies the dagger, though it is obvious that life has been destroyed by the blow of the bludgeon. He even raises the aged arm, that he may not fail in his aim at the heart, and replaces it again over the wounds of the poniard! To finish the picture, he explores the wrist for the pulse! He feels for it, and ascertains that it beats no longer! It is accomplished. The deed is done!

He retreats, retraces his steps to the window, passes out through it as he came in, and escapes. He has done the murder. No eye has seen him, no ear has heard him. The secret is his own, and it is safe!

Ah! gentlemen, that was a dreadful mistake. Such a secret can be safe *nowhere*. The whole creation of God has neither nook nor corner where the guilty can bestow it, and say "It is safe." Not to speak of that eye which pierces through all disguises, and beholds everything as in the splendor of noon, such secrets of guilt are never safe from detection, even by men. True it is, generally speaking, that "murder will out." True it is, that Providence hath so ordained, and doth so govern things, that those who break the great law of Heaven by shedding man's blood seldom succeed in avoiding discovery. Especially, in a case exciting so much attention as this, discovery must come, and will come, sooner or later. A thousand eyes turn at once to explore every man, every thing, every circumstance, connected with the time and place; a thousand ears catch every whisper; a thousand excited minds intensely dwell on the scene, shedding all their light, and ready to kindle the slightest circumstance into a blaze of discovery.

Meantime the guilty soul cannot keep its secret. It is false to itself; or rather it feels an irresistible impulse of conscience to be true to itself. It labors under its guilty possession, and knows not what to do with it. The human heart was not made for the residence of such an inhabitant. It finds itself preyed on by a torment, which it dares not acknowledge to God or man. A vulture is devouring it, and it can ask no sympathy or assistance, either from heaven or earth. The secret which the murderer possesses soon comes to possess him; and, like the evil spirits of which we read, it overcomes him, and leads him whithersoever it will. He feels it beating at his heart, rising to his throat, and DEMANDING disclosure. He thinks the whole world sees it in his face, reads it in his eyes, and almost hears its workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions from without begin to embarrass him, and the net of circumstances to entangle him, the fatal secret struggles with still greater violence to burst forth. It *must* be confessed. It *WILL* be confessed. There is no refuge from confession, but suicide, — and suicide is confession.

279. HONORÉ DE BALZAC. *Lucien de Rubempré*. (c. XV); and *The Last Incarnation of Vautrin*. (c. II, Miss Wormeley's translation.)

[Lucien de Rubempré was a sentimental, fashionable youth, of weak will, who had fallen completely under the control of the Abbé Carlos Herrera, a pretended Spanish priest and spy. Herrera was really a desperate and hardened criminal, by name Jacques Collin, nicknamed Trompe-la-Mort. He plotted a vast scheme to secure a rich marriage for Lucien, obtain for him high official position, and thereby amass wealth. Lucien knew fully Collin's nefarious character, and entered into the plot. He accordingly courted Mlle. Clotilde de Grandlieu, a noble heiress. Meantime he prepared to give up his mistress, Esther Gobseck, a beautiful Jewess, who truly loved him. Esther had been given by an aged admirer, Baron de Nucingen, the sum of 750,000 francs, which she kept in her room. In despair at her impending loss of Lucien, Esther took poison, and was found dead in her bed by the servants; who immediately absconded with the 750,000 francs. But just before this, unknown to Esther, her grand-uncle, the usurer Gobseck, had died, leaving her sole heiress to his 7,000,000 francs. The Baron had hurried to Esther's house, to inform her of the inheritance from her uncle, but found her dead, and his own gift gone. The police and the coroner came to investigate the cause of Esther's death. Under her pillow they found her will, leaving all her property to Lucien. (The will had in fact been forged by Jacques Collin, after her death, but this forgery was not detected.) Her sudden death, her will bequeathing all to Lucien, and the disappearance of the Baron's gift, gave rise immediately to the suspicion that Lucien and Collin had murdered her. Warrants were issued for their arrest. Collin is arrested. Lucien is pursued by the police, and is

found with Mlle. de Grandlieu, just as they are exchanging pledges of marriage.] . . .

The gallop of several horses was heard, and in a moment a squad of gendarmes surrounded the little group, much to the astonishment of the two ladies.

"What do you mean by this?" said Lucien, with the arrogance of a fashionable young man.

"Are you Monsieur Lucien de Rubempré?" asked a person who was the public prosecutor of Fontainebleau.

"Yes, monsieur."

"You will sleep to-night in La Force; I have a warrant to arrest you." . . .

"Of what crime is monsieur accused?" asked Clotilde, whom the duchess was entreating to get into the carriage.

"Of theft, and murder," replied the corporal of gendarmes.

Baptiste lifted Mademoiselle de Grandlieu in a dead faint into the carriage. At midnight Lucien was locked up in the prison of La Force, where he was kept in solitary confinement. The Abbé Carlos Herrera had been brought there on the previous evening. . . .

Before entering into the terrible drama of a criminal examination, it is necessary to explain the normal process of a case of this kind, so that its divers phases may be better understood. . . . A crime is committed. If detected in the act, the suspected persons are taken to the nearest guardhouse and put in the cell called in popular parlance "the violin," probably on account of the music — of cries and tears — that is heard there. From there they are taken before the commissary of police, who makes a preliminary inquiry and has the power to release them if a mistake has been made; otherwise they are next taken to the depot, or guardhouse

of the prefecture, where the police hold them at the disposition of the prosecuting officer and the examining judge, who, being informed of the affair, more or less promptly according to the gravity of the case, come to the depot and question the parties, who are in a condition of provisional arrest. According to the presumptive nature of the case the examining judge issues a warrant and orders the accused person locked up in a house of correction. . . . When the examination ends and the judge decides that the accused persons must be referred to a court of justice, they pass to the condition of indicted persons. . . . Few of them ever dream of resisting the situation in which the law and the police of Paris place accused persons, — especially those who, like Jacques Collin and Lucien, are in solitary confinement.

It is difficult for those at large to imagine what this sudden isolation is to the accused person; the gendarmes who arrest him, those who convey him to the lockup, the turnkeys who place him in what is literally a dungeon, those who take him by the arm and make him mount the step into the police van, in short, all the beings who surround him from the time of his arrest, are mute, and notice him only to make a record of his words for the police or the judge. This absolute separation, so instantaneously and easily brought about between the whole world and the accused person, causes an upset of all his faculties, and a fearful prostration of mind; above all, when the person happens to be one not familiar, through his antecedents, with the ways of the law. The duel between the accused man and the examining judge is, therefore, all the more terrible because the latter has for auxiliary the silence of the walls, and the incorruptible stolidity of the agents of the law. . . .

Lucien's appearance was that of a broken-down culprit; he aban-

doned himself wholly and allowed them to do what they pleased with him. From the moment of his arrest at Fontainebleau, the poet considered himself ruined; he felt that the moment of expiation had come. Pale, undone, ignorant of all that had happened as to Esther, he knew only that he was the intimate companion of an escaped galley slave. That situation was enough to make him foresee catastrophes that were worse than death. If his thoughts turned to anything resembling a plan, it was to suicide. He wanted to escape at any price from the ignominy which he saw before him like a dreadful dream. . . . He was placed in a cell adjoining the Pistoles. Most persons who have never had anything to do with criminal justice have the blackest ideas about solitary confinement. They hardly separate them from the old ideas of torture, unhealthiness of dungeons, cold walls sweating tears of dampness, brutality of jailers, and coarseness of food, — accessories required for the drama. It may not be useless to say here that these exaggerations exist only on the stage, and make judges, lawyers, officials, and all who visit prisons either out of curiosity or on errands, laugh. . . . And it may be said that, putting aside the fearful mental and moral tortures of persons of the upper classes who find themselves in the grasp of the law, the action of this new power is of a gentleness and simplicity which seem all the greater because unexpected. Accused persons are certainly not lodged as they would be in their own homes, but all necessities are found in the prisons of Paris. It is not the body that suffers; in fact, the mind is in so agitated a state that any form of being ill at ease, even brutality if it were met with, can be easily supported. And it must be allowed that the innocent are quickly set at liberty, especially in Paris. Lucien found, therefore, in his cell a repro-

duction of the first room he had occupied on his arrival in Paris. A bed like those in the poorest furnished lodgings of the Latin quarter, chairs with straw seats, a table and a few utensils, completed the furniture of a room in which were sometimes confined two indicted persons if their behavior were good and their crimes not dangerous, — such, for instance, as forging and swindling. This resemblance between his point of departure, bright with innocence, and his end at the lowest step of shame and degradation, was so instantly seized by a last flash of his poetic nature that he burst into tears. He wept for four hours, as insensible apparently to everything about him as a stone image, but suffering anguish from his broken hopes, his shattered social vanities, his annihilated pride; degraded in that *I*. and all that *I* represented of ambition, adoration, luck, of the poet, the Parisian, the dandy, the man of pleasure, and of social privilege and success! All was crushed within him by this Icarian fall. . . .

To be in the secret of the terrible scenes which are enacted in the office of an examining judge; to fully understand the respective situations of the two antagonists, — the accused person and the magistrate, — the object of whose struggle is the secret guarded by the accused against the curiosity of the judge (who is called, in prisoner's slang, the Curious), we must never forget that the accused persons, who have been in solitary confinement from the moment of their arrest, are ignorant of all that the public says, all that the police and the judges know, all that the newspapers publish, as to the crime of which they are accused. . . . These points once explained, the least emotional person will tremble at the effect produced by three causes of terror, — isolation, silence, and remorse. . . .

A few minutes after two o'clock

Monsieur Camusot saw Lucien de Rubempré brought to his office — pale, limp, undone, his eyes red and swollen, in a state of prostration, which enabled him to compare nature with art, — the really fainting man with the fainting actor. The passage from the Conciergerie to the judge's room, made between two gendarmes preceded by an usher, had brought despair to its acme in Lucien. It is in the nature of a poet to prefer death to punishment. Beholding this nature utterly devoid of mental courage, — a courage so powerfully manifested in the other prisoner, — Monsieur Camusot felt scorn for his easy victory. "Monsieur," said the judge, in a very kindly manner, "it is, nevertheless, difficult to set you at liberty without fulfilling certain formalities, and putting a few questions to you. It is almost as a witness that I shall now require you to answer. To a man like you, I think it useless to remark that the oath to tell the truth is not only an appeal to your conscience, but it is also a necessity of your position, which has been for a short time ambiguous. The truth, no matter what it is, cannot injure you; but falsehood would send you to the court of assizes, and will oblige me now to send you back to the Conciergerie, whereas, if you answer frankly, you will sleep at home to-night, and you shall be publicly vindicated in the public journals by the following notice: 'Monsieur de Rubempré, arrested yesterday at Fontainebleau, was immediately released after a very short examination.' . . . I repeat, you have been suspected of complicity in the murder, by poison, of the Demoiselle Esther. There is, however, proof of her suicide, and that ends the question of murder. But a sum of money has been taken from the house, — 750,000 francs, — which now forms part of your inheritance. Here, unfortunately, there is a crime. The crime precedes the discovery of

the will. Now the law has reason to think that a person who loves you, as much as the Demoiselle Esther loved you, has been guilty of this crime for your sake. . . . Abandon the false, the miserable point of honor which binds accomplices together, and tell the whole truth."

Our readers must have already observed the extreme disproportion of weapons existing between accused persons and examining judges. It is true that denial, cleverly managed, has on its side completeness of form, and it is sufficient for a criminal's defense; but for all that, it is a sort of panoply which becomes a crushing weight when some turn in the examination discloses a rent in it. As soon as denial is insufficient against evident facts, the accused person is absolutely at the mercy of the judge. . . . "Now," said Camusot, after a pause, "what is your name? Monsieur Coquart, attention!" he said to the clerk. "Lucien Chardon de Rubempré." "Where born?" "Angoulême." And Lucien gave the day, month, and year.

"You had no property from your father?" "None."

"You did, nevertheless, during your first residence in Paris, live at considerable expense, compared with your small means?" "Yes, monsieur; but I had at that time a devoted friend, in Mademoiselle Coralie, whom I had the misfortune to lose. It was grief, caused by her death, which took me back to my former home."

"Good, monsieur," said Camusot; "I commend your frankness; it will be appreciated."

Lucien was entering, as we see, upon the path of general confession.

. . . "Lately, in the hope of marrying Mademoiselle de Grandlieu, you bought the remains of the château de Rubempré, to which you have added lands worth about a million. You told the Grandlieu family that your sister and brother-

in-law had lately inherited a large fortune and that you owed the sum for the payment of your purchase to their liberality. Did you say that, monsieur, to the Grandlieu family?" "Yes, monsieur."

"You are ignorant of the reasons why your marriage was broken off?" "Entirely."

"Well, the Grandlieu family sent one of the most trusty lawyers in Paris to your brother-in-law, in order to obtain the information. This lawyer learned at Angoulême, from the statements of your sister and your brother-in-law, not only that they had lent you nothing, but that their inheritance was chiefly in land, and that the personal property amounted to little more than 200,000 francs. You cannot think it strange that a family like that of Grandlieu should draw back when they find your fortune such that you dare not explain its origin."

Lucien was struck dumb by this revelation; and the little strength of mind he still retained abandoned him.

"The police and the legal authorities know all they wish to know, remember that," said Camusot. "Now," he resumed, after a pause, thinking of the abbé's claim to be Lucien's father, "do you know who this so-called Carlos Herrera is?" "Yes, monsieur; but I knew it too late."

"Too late? how do you mean? Explain yourself." "He is not a priest, he is not a Spaniard, he is —"

"An escaped convict?" said the judge, quickly. "Yes," replied Lucien. "But when the fatal secret was revealed to me I was already under obligations to him. I thought I had allied myself with a respectable ecclesiastic —"

"Jacques Collin —" said the judge, beginning a sentence. "Jacques Collin," said Lucien, interrupting him, yes, that is his name."

"Good. Jacques Collin," resumed Camusot, "has just been rec-



ognized here by two persons; but he still denies his identity—in your interests, I think. . . .”

Instantly Lucien felt as if hot irons were plunged into him.

“Are you ignorant,” continued the judge, “that he pretends to be your father, to explain the extraordinary relation in which you stand to him?” “He! my father! Oh, monsieur, did he say that?”

“Have you suspected where the sums of money which he gave you came from? . . .” “Ah! monsieur, it is you who must tell me,” cried Lucien, “where convicts get their money—Jacques Collin my father! Oh! my poor mother!”

And he burst into tears.

“Clerk, read that part of the examination in which the pretended Carlos Herrera declares himself the father of Lucien de Rubempré.” The poet listened to the reading in silence and with a countenance it was painful to witness. “I am lost!” he cried.

“No man is lost in the path of truth and honor,” said the judge. “But you will send Jacques Collin to the assizes,” said Lucien.

“Undoubtedly,” replied Camusot, who wished to make Lucien say more. “Continue; say what you think.”

But in spite of the efforts and remonstrances of the judge, Lucien no longer answered. Reflection had come, — too late, as it does in all men who are slaves to feeling. . . . Lucien sat pale and dumb; he saw himself at the bottom of the precipice down which the judge had rolled him, while he, the poet, had let himself be trapped by apparent kindness. He had betrayed, not his benefactor, but his accomplice, — him, who had defended their position with the courage of a lion and an ability without a flaw. Just there, where Jacques Collin had saved Lucien by his audacity, Lucien, the man of mind, had lost all by his want of intelligence and his lack of reflection.

The infamous lie, which had so shocked him, was the screen of a truth, for him more infamous. Confounded by the subtlety of the judge, terrified by his cruel cleverness, by the rapidity of the blows given, by the exposure of the faults of all his life thus brought to light like so many grapnels to drag his conscience, Lucien was like an animal which the club of the slaughterhouse has missed. Free and innocent in the eyes of the law when he entered that room, in one hour he saw himself a criminal by his own confession. . . .

Monsieur Camusot enjoyed his triumph. He held two guilty men; with the hand of the law he had struck down an idol of fashionable society, and he had found the hitherto unfindable Jacques Collin. He would, undoubtedly, be considered one of the ablest of examining judges. So he let the unhappy prisoner keep silence; but he studied that silence of consternation; he saw the drops of sweat accumulating on that anguished face, swelling and rolling down to mingle with two streams of tears. . . . Lucien put Esther’s letter and the miniature it inclosed upon his heart. Then he bowed haughtily to Monsieur Camusot, and walked with a firm step through the corridors between two gendarmes.

“That is an utter scoundrel!” said the judge to his clerk, as the door closed on Lucien. “He thought to save himself by sacrificing his accomplice.”

“Of the two,” replied Coquart, timidly, “the convict is the better man.” . . .

During the time the turnkey took in obtaining and bringing up to Lucien the things he had asked for, the unfortunate young man, to whom the idea of being confronted with Jacques Collin, was intolerable, fell into one of those meditations in which the idea of suicide, to which he had already yielded without accomplishment, attains to mania.

According to some great alienists, suicide in certain organizations is the termination of a mental alienation. Since his arrest Lucien had fastened on that idea. . . . Certainly it would have been difficult to act with more dignity in the false position to which infamy had brought Lucien. He saved his own memory, and he repaired the wrong done to his accomplice, so far as the mind of the man of the world could annul the effects of his actions. . . . By mounting on the table, Lucien could reach the glazed portion of the window, and, by removing or breaking two panes, he could use the strong crossbar between them as his point of support. He resolved to do this: to pass his cravat around the bar, making a turn about his own neck and fastening the end securely, and then to knock away the table from under him with his feet. He moved the table to the window noiselessly, took off his coat and waistcoat, and mounted the table without the least hesitation, to remove the panes above and below the first crossbar. [Then he hung himself.] . . .

Jacques Collin, nicknamed *Trompe-la-Mort*, in the world of the galleys and to whom we shall henceforth give no other name than his own, had been, from the moment of his reincarceration by Camusot's orders, in the grasp of an anxiety he had never before known in the course of a life marked by many crimes, by three escapes from the galleys, and two sentences in the court of assizes. . . . When returned to his solitary cell, Jacques Collin's thought was: "They are questioning the young one!"

He shuddered, — he who could strike as another man drinks. "Has he seen those women? Will they warn him? . . . Have they stopped the examination? Has Lucien received my letter? If fate wills that he be examined, how will he carry himself? Ah, poor boy! it is I who have brought him to

this!" . . . And so the monologue went on for three hours. The agony was so great that it got the better of that creature of iron and vitriol. Jacques Collin, whose brain was fired almost to madness, felt such devouring thirst that he drank, without observing that he did so, all the water contained in two buckets, which, with a wooden bedstead, form the whole furniture of a solitary cell. . . .

At this moment the director . . . left the cell to get it (the letter written by Lucien to Jacques Collin for transmission to the latter), leaving the doctor with the prisoner, in charge of the jailer.

"Monsieur," said Jacques Collin to the doctor, . . . "I shouldn't consider a matter of 30,000 francs, if I could be enabled to send five lines to Lucien de Rubempré." "I will not steal your money," replied the doctor. "No one on earth can communicate with that young man."

"No one?" said Jacques Collin, bewildered. "Why not?" "Because he hanged himself." . . .

Collin dropped back upon the camp bed, saying, "Oh! my son!"

"Poor man!" exclaimed the doctor, moved by this terrible struggle of nature. . . . Jacques Collin, exhausted by the violence of that explosion of grief, seemed to calm himself. . . .

"May I see him with my own eyes?" asked Jacques Collin, timidly. "Will you give a father freedom to mourn his son?" . . . The prisoner's eyes, devoid of warmth and life, moved slowly from the director to the doctor. . . .

"If you wish to see the body," said the doctor, "you have no time to lose. It is to be removed to-night." . . . Jacques Collin, accompanied by the jailer, who took him by the arm, preceded by the director and followed by the doctor, was only a few moments in reaching the cell where Lucien lay. They had placed him on a bed. At the sight, the convict fell upon the body,

clinging to it with a grip of despair, the strength and passionate movement of which made the three spectators shudder. . . . At one o'clock in the morning, when they came to remove the body, Jacques Collin was found kneeling beside Lucien's bed. . . . The miserable man was still holding the stiffened hand of him he had loved so well; he held it pressed between his own clasped hands, and was praying God. When they saw him thus, the jailers stopped for an instant; he resembled one of those stone figures kneeling for eternity on the tombs of the middle ages. . . . Looking once more at Lucien with the eyes of a mother from whom they are rending her son, Jacques Collin sank back upon himself. As he watched them take the body, so dreadful a moan escaped his breast that the porters hastened to be gone. The secretary of the attorney-general and the director of the prison had already withdrawn from the painful sight. What had become of that iron nature in which decision and resolution equalled the glance of those eyes in rapidity; in whom thought and action sprang forth with a single flash; whose nerves, injured by three escapes, three periods at the galleys, had attained to the metallic strength of the nerves of savages?

Iron yields to reiterated striking,

or to a certain continuance of pressure; its impenetrable molecules, purified by man and made homogeneous, segregate, and, without being in fusion, the metal has not the same power of resistance. Blacksmiths, locksmiths, tool makers, all men who work constantly in this metal, express that condition by a technical word. "The iron is retted," they say, appropriating a term which belongs properly to flax or hemp, the fiber of which is disintegrated by retting. Well, the human soul, or, if you choose to say so, the triple energy of body, heart, and mind, is found in a condition analogous to that of iron as the result of repeated shocks. It is then with men as it is with flax or iron: they are "retted." . . . It is in this state that confessors and examining judges often find great criminals. The terrible emotions caused by the court of assizes and by the "toilette" almost always bring even the strongest natures to what may be called a dislocation of the nervous system. Confessions escape the lips till then most firmly closed; the stoutest hearts give way, and this — strange fact! — at the moment when confession becomes useless, — when this sudden weakness merely tears from the guilty man the mask of innocence by which he disturbs the mind of justice.

280. ALLAN PINKERTON. *Bank Robbers and Detectives*. (1882. p. 231.)

[A bank was robbed of some \$65,000. A clerk of a store in the same building, one Sloane, was suspected. For nearly a year he was shadowed, but without result. Finally, he was found to be planning to sell some securities in a distant town. The detectives then arranged to arrest him and his chum in that place.]

. . . Wright reported that Sloane and Patterson intended taking the eight o'clock train in the morning and would return by way

of Troydon, as they had come; Patterson having found it impossible to induce Sloane to return by the way of Ryan. Mr. Warner immediately telegraphed me the state of affairs, asking what should be done. To this I replied that I would be at Elliott on arrival of the designated train from Portville, and would meet him there. I then telegraphed Mr. Somers to start immediately for Ryan and carry out the program already conveyed him by one of my detectives.

In the afternoon Sloane had sold to Messrs. Race & Co. two thousand dollars' worth of compound interest notes, many of them mildewed and worn like the one handed Patterson, and the entire number bearing evidence of having been for a long time secreted in some damp place or receptacle. At ten o'clock of the evening of the same day, I left Chicago for Elliott. The time had come when a little wholesome force could be used to advantage; and as some exceptional responsibility might attach to this, I proposed to conduct the affair in person.

As the express train from Portville rolled into the depot at Elliott, the next day at noon, Mr. Warner and myself stood on the platform, vigilant and ready for action. Mr. Warner, who had come on by the preceding train, had brought me the two thousand dollars in compound-interest notes, with the gratifying intelligence that, at last accounts, Sloane had expended none of the money paid him for the same, but carried all of it upon his person. Everything was therefore ripe for my purpose. . . . Patterson [the disguised detective] and Sloane appeared on the platform, and, with arms interlocked, proceeded to follow the retreating crowd. It was but the work of an instant to rush in between them, thrust Patterson violently aside, seize Sloane rudely by the wrist and say to him, in a voice of suppressed passion:

"I want you. Come this way!" In the same breath I shouted to Wright: "Officer! bring that man along; no parleying now!"

"What does this mean? this is an outrage!" began Patterson. We could hear no more, for Wright grasped his prisoner by the collar, taking in his grip shirt, collar, and all, and fairly drove him into the baggage car, while Patterson was seemingly rendered speechless from choking. As for Sloane, no such angry demonstrations were neces-

sary. He turned deathly pale the instant he recognized me, and began trembling violently from head to foot. So completely did his courage desert him that I had rather to support, than force, him into the same car with Patterson. . . .

"I know what this is for!" faltered Sloane, as he threw himself on a trunk and buried his face in his hands, a picture of abject despondency.

"What do you suppose it is for?" I inquired, ironically, drawing a pair of handcuffs from my pocket and preparing to fasten them upon his wrists. "Let's hear what it is for?" "The bank robbery," he gasped.

The twenty minutes' stoppage had expired, the bell rang, and we were on our way, not to Troydon, but to Ryan.

"Don't put those things on me, please!" stammered Sloane, in a supplicating way. "I give you my word I will make no effort to escape. I have no reason to do so," he added, gathering courage as he spoke, "for I am not guilty."

"Don't try to play that game on me, young man," I said sternly, and making the handcuffs secure. "I know all about whether you are guilty or not. If you begin by lying, I promise I will show you no mercy."

"Won't you trust me?" he pleaded. "I will tell you the whole truth whenever you wish to know it. I will go with you peaceably anywhere, but I cannot bear to be manacled in this way." . . . I then searched my prisoner thoroughly, emptying his pockets of their entire contents, and . . . the fruits of this search were a bunch of keys, some Masonic emblems, a watch and chain, two pocketbooks, and lastly, three thousand dollars in compound-interest notes, and twenty-three hundred and eighty dollars in greenback currency. "Ah!" I exclaimed, as this booty fell into my possession; "no doubt

you will be able to account for this trifling amount of pocket-money." Sloane shook his head in a dull, dejected way, and for a moment made no reply. He was completely unmanned, and I felt pretty certain that I should have but little further trouble with him. Presently, after a visible effort to regain his self-possession, he answered: "I hope to do so, sir. I came by it honestly." . . .

The county sheriff and a constable were at the depot on the arrival of our train at Ryan. I turned my prisoners over to their care, giving strict injunctions in Sloane's hearing that on no account were they to be allowed to communicate with one another. Sloane now had two or three hours for private meditation in his cell, during which time, Mr. Somers, Mr. Warner, Patterson, and myself discussed the good fare of the Mansion House, and the now pleasant condition of our operation. . . .

Late in the afternoon, in a private room which the jailer had placed at my service, Sloane was brought before me. I will not weary the reader with a full account of what transpired at this interview. It lasted over two hours, during the greater part of which time Sloane doggedly asserted his innocence of the robbery itself, and attempted to deceive me with the foolish invention that he had *found* a package of five thousand dollars of compound-interest notes on the Sunday morning following the burglary, in his store, near the Willow street door, where he presumed the robbers had dropped it in their flight. I made use of every argument and instrumentality I could think of to drive him from this story, and impel him to a full confession; but for a long time all was in vain. It was necessary to screen my detective at all hazards. I was, therefore, driven to the use of information, only, that I might have reached through other channels.

Still, with these resources alone, I was able to astound Sloane by reference to matters pointing to his guilt. He would show his affright and surprise by involuntary starts and exclamations, but he would not budge from his story. I gave him to understand that Mr. Marston had engaged me to track Barnes, and that I had abandoned the case after bringing it to the point of success, because Mr. Marston insisted upon compromising; a proceeding to which I was unalterably opposed. This explanation was offered incidentally, as a cover to Patterson, but chiefly to show that I had been for a long time on their joint trail, and to impress upon Sloane the conviction that full restitution was the only basis on which he could treat with me. It had been constantly reported to me that Sloane was a man of good domestic habits, devoted to his wife, and seemingly appreciative of home comforts. So, after all other attempts had proven futile, I strove to reach him through the medium of his affections. I pictured to him as best I might, and at great length, the distress that this affair would cause his friends and relatives, and most of all, his wife; and lastly, I spoke of the danger of his exposure in her then delicate condition, for, as I understood, he expected to be shortly a father. No sooner had I made this reference, than Sloane, who up to that time had maintained his old, impassable demeanor, burst into a flood of tears and cried out:

"Stop, stop! I beg of you;—I shall go mad. My poor wife! My dear, innocent, trusting wife! Oh, heavens! this will kill her!" Completely overcome, after giving vent to this wail, he buried his face in his handkerchief and rocked himself from side to side in an agony of remorse.

I confess that this spasmodic outburst quite astonished me. I was far from believing him to be a man

sassin enters, through the window already prepared, into an unoccupied apartment. With noiseless foot he paces the lonely hall, half lighted by the moon; he winds up the ascent of the stairs, and reaches the door of the chamber. Of this, he moves the lock, by soft and continued pressure, till it turns on its hinges without noise; and he enters, and beholds his victim before him. The room is uncommonly open to the admission of light. The face of the innocent sleeper is turned from the murderer, and the beams of the moon, resting on the gray locks of his aged temple, show him where to strike. The fatal blow is given! and the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death! It is the assassin's purpose to make sure work; and he plies the dagger, though it is obvious that life has been destroyed by the blow of the bludgeon. He even raises the aged arm, that he may not fail in his aim at the heart, and replaces it again over the wounds of the poniard! To finish the picture, he explores the wrist for the pulse! He feels for it, and ascertains that it beats no longer! It is accomplished. The deed is done!

He retreats, retraces his steps to the window, passes out through it as he came in, and escapes. He has done the murder. No eye has seen him, no ear has heard him. The secret is his own, and it is safe!

Ah! gentlemen, that was a dreadful mistake. Such a secret can be safe *nowhere*. The whole creation of God has neither nook nor corner where the guilty can bestow it, and say "It is safe." Not to speak of that eye which pierces through all disguises, and beholds everything as in the splendor of noon, such secrets of guilt are never safe from detection, even by men. True it is, generally speaking, that "murder will out." True it is, that Providence hath so ordained, and doth so govern things, that those who break the great law of Heaven by shedding man's blood seldom succeed in avoiding discovery. Especially, in a case exciting so much attention as this, discovery must come, and will come, sooner or later. A thousand eyes turn at once to explore every man, every thing, every circumstance, connected with the time and place; a thousand ears catch every whisper; a thousand excited minds intensely dwell on the scene, shedding all their light, and ready to kindle the slightest circumstance into a blaze of discovery.

Meantime the guilty soul cannot keep its secret. It is false to itself; or rather it feels an irresistible impulse of conscience to be true to itself. It labors under its guilty possession, and knows not what to do with it. The human heart was not made for the residence of such an inhabitant. It finds itself preyed on by a torment, which it dares not acknowledge to God or man. A vulture is devouring it, and it can ask no sympathy or assistance, either from heaven or earth. The secret which the murderer possesses soon comes to possess him; and, like the evil spirits of which we read, it overcomes him, and leads him whithersoever it will. He feels it beating at his heart, rising to his throat, and DEMANDING disclosure. He thinks the whole world sees it in his face, reads it in his eyes, and almost hears its workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions from without begin to embarrass him, and the net of circumstances to entangle him, the fatal secret struggles with still greater violence to burst forth. It *must* be confessed. It *will* be confessed. There is no refuge from confession, but suicide, — and suicide is confession.

279. HONORÉ DE BALZAC. *Lucien de Rubempré*. (c. XV); and *The Last Incarnation of Vautrin*. (c. II, Miss Wormeley's translation.)

[Lucien de Rubempré was a sentimental, fashionable youth, of weak will, who had fallen completely under the control of the Abbé Carlos Herrera, a pretended Spanish priest and spy. Herrera was really a desperate and hardened criminal, by name Jacques Collin, nicknamed Trompe-la-Mort. He plotted a vast scheme to secure a rich marriage for Lucien, obtain for him high official position, and thereby amass wealth. Lucien knew fully Collin's nefarious character, and entered into the plot. He accordingly courted Mlle. Clotilde de Grandlieu, a noble heiress. Meantime he prepared to give up his mistress, Esther Gobseck, a beautiful Jewess, who truly loved him. Esther had been given by an aged admirer, Baron de Nucingen, the sum of 750,000 francs, which she kept in her room. In despair at her impending loss of Lucien, Esther took poison, and was found dead in her bed by the servants; who immediately absconded with the 750,000 francs. But just before this, unknown to Esther, her grand-uncle, the usurer Gobseck, had died, leaving her sole heiress to his 7,000,000 francs. The Baron had hurried to Esther's house, to inform her of the inheritance from her uncle, but found her dead, and his own gift gone. The police and the coroner came to investigate the cause of Esther's death. Under her pillow they found her will, leaving all her property to Lucien. (The will had in fact been forged by Jacques Collin, after her death, but this forgery was not detected.) Her sudden death, her will bequeathing all to Lucien, and the disappearance of the Baron's gift, gave rise immediately to the suspicion that Lucien and Collin had murdered her. Warrants were issued for their arrest. Collin is arrested. Lucien is pursued by the police, and is

found with Mlle. de Grandlieu, just as they are exchanging pledges of marriage.] . . .

The gallop of several horses was heard, and in a moment a squad of gendarmes surrounded the little group, much to the astonishment of the two ladies.

"What do you mean by this?" said Lucien, with the arrogance of a fashionable young man.

"Are you Monsieur Lucien de Rubempré?" asked a person who was the public prosecutor of Fontainebleau.

"Yes, monsieur."

"You will sleep to-night in La Force; I have a warrant to arrest you." . . .

"Of what crime is monsieur accused?" asked Clotilde, whom the duchess was entreating to get into the carriage.

"Of theft, and murder," replied the corporal of gendarmes.

Baptiste lifted Mademoiselle de Grandlieu in a dead faint into the carriage. At midnight Lucien was locked up in the prison of La Force, where he was kept in solitary confinement. The Abbé Carlos Herrera had been brought there on the previous evening. . . .

Before entering into the terrible drama of a criminal examination, it is necessary to explain the normal process of a case of this kind, so that its divers phases may be better understood. . . . A crime is committed. If detected in the act, the suspected persons are taken to the nearest guardhouse and put in the cell called in popular parlance "the violin," probably on account of the music — of cries and tears — that is heard there. From there they are taken before the commissary of police, who makes a preliminary inquiry and has the power to release them if a mistake has been made; otherwise they are next taken to the depot, or guardhouse

talks with the persons suspected, and their statements as to their whereabouts and conduct at the time in question are important links in unraveling a mystery. These investigations by the police have no doubt cleared the record of many an innocent suspect. The object is to ascertain the truth, not, as the public seem to think, fasten the commission of a crime upon some one — whether guilty or innocent.

Within the last year or two probably all have seen an exemplification upon the stage of "The Third Degree." One connected with the police department cannot witness this play without being thoroughly impressed with the thought that the audience only gets a portion of the author's idea — the reputed methods of the police. . . . No true and sincere police officer who has witnessed this play of "The Third Degree" will disagree with me that it does a gross injustice to that hard-working body of men who preserve the peace and dignity of the various municipalities of this country, and an endeavor should be made to correct the false impressions given the public of police officials and police methods by this play. . . . No police official would take this play seriously, but the public will. . . .

There may have been individual cases where police officials have used improper and unfair methods to obtain results, but the "Third Degree" is and always should be simply a battle of wits, the only object being to get at the truth. There can be no set rules for gaining information from a person suspected, but brute force to accomplish the result should never be resorted to, and any police official should be promptly dismissed who employs harsh measures to obtain statements. The methods of acquiring information depend upon the circumstances of each case and the disposition and mental faculties of the person under suspicion. . . . A crime has been committed. It is reported to the police; facts may come slowly or quickly. On the spur of the moment the head of the detective bureau must evolve a theory — what was the motive for the crime — who may have had an object in committing it? Some one is suspected, brought in and questioned. The one object is to get the truth. A searching examination is made, call it the "third degree" or whatever you may; a great deal depends upon it. It may send out from police headquarters a suspect with his reputation good before the world; it may be the means of bringing a felon to justice. If the suspect is innocent, his story can generally be quickly checked up and proved, and the "third degree" is then the means of working to the advantage of the suspect and society. . . .

*Chief JANSSEN, of Milwaukee.* . . . I think that future historians will write of the present time as the age of yellow journalism and the age of yellow statesmanship. This "Third Degree" is brought about in this manner. A man is arrested charged with an offense. An investigation is set on foot, and the prisoner is asked certain questions in order to ascertain his defense or any excuse he may have in regard to certain suspicious circumstances that may surround him. When he finds he cannot get around those circumstances he tells the truth and admits the crime. Why? First, a cowardly conscience; second, that he *wants* to tell somebody about it; and third, that he may escape the maximum penalty prescribed for the offense with which he may be charged. What happens next? He goes to court and waives examination, and is bound over for trial, and he is sent to jail to await that trial. Now the shyster lawyer comes around, one who hangs



around the courthouse, or has been sent by a friend or accomplice of the man who is under arrest, and the first thing he asks is, "What have you done?" And the answer is, "I have talked with the Chief of Police" (or to the Detectives of the Police Department). His reply is, "Why, you fool, what did you do that for; I can't do anything for you unless you find some excuse for making that statement; what did they say to you?" and the prisoner answers that they said this and that, and the lawyer asks, "What did they do?" and he tells something, and with this the prisoner goes on, the lawyer always suggesting, until the prisoner finally gets the idea that he has made a mistake in making a statement to the police officer. The case of this man goes to trial, and the lawyer begins before the jury and tells about the violence that has been practiced on the prisoner, about the terrible strain he was placed under by the police in order to get this confession, and the poor creature who stands at the bar for trial is the victim of police persecution. The press is represented, and in a sensational manner starts to vilify the police. . . . This is why you hear so much about this "third degree," caused by the vile, unrestrained, unwarranted attacks published in the daily press, brought about by the action of these shyster lawyers and the prisoners themselves in misrepresenting what really did happen when they were questioned by the police. . . .

*Chief DAVIS, of Memphis.* . . . Many people have a wrong impression regarding what is generally designated as the "Third Degree." Simply sweating a prisoner, which we all know means only to interrogate him, is considered by many as a "Third Degree" act. If police officials were simply allowed to take the statement of a prisoner (when I say prisoner, I refer to a thief or murderer), and not attempt to contradict him in any manner, shape, or form, there would be few convictions of criminals. The intelligent police officer generally knows when he has a guilty man under arrest.

Now I wish to relate an incident that occurred during my career as Chief of Police of the city of Memphis, seventeen years ago. It was at the time that George T. O'Haver, then a Captain of Police, now the Principal of a Detective Agency bearing his name, and who is an honored member of this Association, was the chief actor in the case which I think will clearly show the necessity for action at critical times. As I remember the incident referred to, it was on one dark rainy night, in the city of Memphis, that the residence of C. C. Graham on Shelby street was entered by two thieves. In ransacking the house they entered the bedroom of Mr. Graham, who upon being awakened saw two men at his door. Seizing a pistol, he rushed into the hall, where he was fired upon by one of the burglars. He returned the fire, but unfortunately missed his man. One of the thieves ran down the front steps and out of the front door; the other thief broke through the rear window and escaped by means of the roof, jumping to the ground below. Police Officer T. B. Gwartney, who is still a member of the Memphis police force, was on duty near the Graham residence. He saw a man come running out of the yard bareheaded. I forgot to mention that the thief who ran down the front stairs after firing at Mr. Graham dropped his hat. Hearing the shots and seeing the man running, convinced the officer that a crime had either been committed or attempted. Concealed behind a large tree and with the man running towards him, Officer Gwartney remained secreted until the man was abreast of him and stepping out from behind the tree with

pistol pointed, he ordered the man to hold up his hands. Taken by surprise the thief did so, regardless of the fact that he had a pistol in his pocket. The police officer having him thus covered, took the weapon from him and forced him to walk in front until the Graham mansion was reached. By this time the whole house was lighted up and a few neighbors came upon the scene attracted by the shooting. The prisoner was securely handcuffed, and after learning the details of the attempted robbery and murder, Officer Gwartney brought his prisoner to Central Station.

Captain O'Haver was on duty that night, it being just after midnight. When brought in, Captain O'Haver quickly identified the overcoat worn by the thief as one that was stolen from the residence of Mr. Abe Frank, on Poplar Avenue only two nights previous, and in his pocket was found a wallet with the name of another citizen whose residence had been robbed the previous night; thus he was convinced, beyond a doubt, that he not only had a thief, but a would-be murderer in custody. On hearing the officer's statement, he began questioning the man, who refused to divulge his name, where he was from, where he roomed, or who his confederate was that was seen with him in the Graham residence. He was very abusive to Captain O'Haver, so I was informed the next day, and that officer, finally concluding that the Police Station proper was too public a place for him to further question the thief, took him downstairs into the cellar. What followed I don't know. But Captain O'Haver reported the next day that he finally succeeded in getting from him where he roomed, the description of his partner, and also that it was understood by them in the event they became separated they were to meet at the Tennessee House, which is in the southern portion of the city of Memphis. Repairing there with a full description of the man wanted, his arrest quickly followed, as he was found just as the thief reported to Captain O'Haver. It was afterwards learned that their names were Richard Lawrence and James Johnson, and they were escaped convicts from the Michigan penitentiary. They were convicted and each sentenced to ten years in the Tennessee Penitentiary.

Now *I don't know* what Captain O'Haver *did* to secure the information he desired. He is here himself among you, probably he will tell. But I want to say this to the Association, as I said to Captain O'Haver the next morning, *whatever you did* was right. You acted (as you said) the same as you would had you had a rattlesnake in your power that could talk and would not, to make it tell where its companion was, who had attempted to rob and murder an honored citizen of Memphis. It is just possible that the "third degree" in all its severity was exercised in this particular case. And I would like to see the member of this Association who would gainsay that Captain O'Haver was not fully justified in any measure he resorted to to gain the information he so desired. I simply recite this case to show that at times heroic methods must be resorted to to gain desired ends. You may call it whatever you please, the "third degree" or any other kind of degree, but it had the desired effect. No innocent man suffered and the guilty parties were punished.

282. ARTHUR TRAIN. *Courts, Criminals, and the Camorra*. (1912. p. 20.) No doubt the methods of the inquisition are in vogue the world over, under similar conditions. Everybody knows that a statement by

the accused immediately upon his arrest is usually the most important evidence that can be secured in any case. It is a police officer's *duty* to secure one, if he can do so, by *legitimate* means. It is his *custom* to secure one by *any* means in his power. . . . When it comes to the more important cases the accused is usually put through some sort of an inquisitorial process by the captain at the station house. If he is not very successful at getting anything out of the prisoner, the latter is turned over to the sergeant and a couple of officers who can use methods of a more urgent character. If the prisoner is arrested by headquarters detectives, various efficient devices to compel him to "give up what he knows" may be used — such as depriving him of food and sleep, placing him in a cell with a "stool-pigeon" who will try to worm a confession out of him, and the usual moral suasion of a heart-to-heart (!) talk in the back room with the inspector.

This is the darker side of the picture of practical government. . . . But the writer is free to confess that, save in exceptional cases, he believes the rigors of the so-called "third degree" to be greatly exaggerated. Frequently, in dealing with rough men rough methods are used. But considering the multitude of offenders, and the thousands of police officers, none of whom have been trained in a school of gentleness, it is surprising that severer treatment is not met with on the part of those who run foul of the criminal law. The ordinary "cop" tries to do his duty as effectively as he can. With the average citizen gruffness and roughness go a long way in the assertion of authority. Policemen cannot have the manners of dancing-masters.

The writer is not quarreling with the conduct of police officers. On the contrary, the point he is trying to make is that in the task of policing a big city, the rights of the individual must indubitably suffer to a certain extent, if the rights of the multitude are to be properly protected. We can make too much of small injustices and petty incivilities. Police business is not gentle business. The officers are trying to prevent you and me from being knocked on the head some dark night or from being chloroformed in our beds. Ten thousand men are trying to do a thirty-thousand-man job.

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283. W. M. BEST. *The Principles of the Law of Evidence*. (3d Amer. ed. 1908. §§ 560-573, in part.) All false self-criminative statements are divisible into two classes, — those which are the result of *mistake* on the part of the confessionalist, and those which are made by him in expectation of *benefit*. And the former are twofold, — mistakes of *fact* and mistakes of *law*.

First, of mistakes of *fact*. A man may believe himself guilty of a crime either when none has been committed, or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding circumstances, as well as the spectators. A case has been cited in a former part of this work where a girl died in convulsions while her father was in the act of chastising her very severely for theft, and he fully believed that she died of the beating; but it afterwards turned out that she had taken poison

on finding her crime detected. If the surgeon had not made a post-mortem examination, that man would have been indicted for homicide, and most probably would have pleaded guilty to manslaughter, at least. . . .

Next, as to mistakes of *law*. It should never be forgotten that all confessions avowing delinquency in general terms are, more or less, "confessiones juris"; and this will in a great degree explain what to unreflecting minds seems so anomalous, — the caution exercised by British judges in receiving a plea of guilty. The same observation of course applies to all extrajudicial statements which are not mere relations of facts. And here one great cause of error is ignorance of the meaning of forensic terms; especially where the accused, conscious of *moral*, is unaware that he has not incurred *legal* guilt. Thus a man really guilty of fraud or larceny might plead guilty to a charge of robbery, through ignorance that, in legal signification, the latter means a taking of property accompanied with violence to the person, though it is popularly used to designate any act of barefaced dishonesty. . . .

In the other class of false self-criminative statements, the statement is known by the confessionalist to be false, and is made in expectation of some *real or supposed benefit*. It is obviously impossible to enumerate the motives which may sway the minds of men to make false statements of this kind. First, many are made for ease, and to avoid vexation arising out of the charge; and in some of these cases the cause of the false statement is apparent; viz. when it is made to escape torture, either physical or moral. In others it is less obvious. Weak or timorous persons, confounded at finding themselves in the power of the law, or alarmed at the testimony of false witnesses, or the circumstantial evidence against them or distrustful of the honesty or capacity of their judges, hope by an avowal of guilt to obtain leniency at their hands. . . .

But false self-criminative statements also arise from objects wholly collateral, relating either to the party himself or to others. With respect to the first of these. (1) A false confession of an offense may be made with the view of stifling inquiry into other matters; as, for instance, some more serious offense of which the confessionalist is as yet unsuspected. (2) The most fantastic shape of this anomaly springs from the state of mental unsoundness which is known by the name of "*tædium vitæ*." Several instances are to be found, where persons tired of life have falsely accused themselves of capital crimes, which were either purely fictitious, or were committed by others. In such cases the maxim of the continental lawyers, "*Nemo auditur perire volens*" may be applied with advantage. (3) "In the relation between the sexes," says Bentham, when treating of the subject of false confessions, "may be found the source of the most natural exemplifications of this, as of so many other eccentric flights. . . ." And so sensible was the canon law of this country of the danger of false confessions from this source that, as we have seen, it would not allow adultery to be proved (at least for the purpose of divorce "*a vinculo matrimonii*") by the unsupported confession, judicial or extrajudicial of the wife. . . . (4) "Vanity," observes the jurist above quoted, "without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another. . . ." False statements of this kind are

sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally.

(5) Instances may be found of false confessions made with a view to some specific collateral end. The Amalekite who falsely accused himself of having slain Saul presents an early and authentic instance. . . . And whether from such morbid love of notoriety, or mere weak-mindedness, or a love of mischief, it is almost invariably the case that murders of a specially horrible kind — as, for instance, the Whitechapel murders of prostitutes in 1888 and 1889 — are followed by a series of false confessions. . . .

Hitherto we have been considering cases where the false confession is made with the view of benefiting the confessionalist himself. We now proceed to those in which other parties are involved. (1) The strongest illustrations of this are where the person who makes the false confession is desirous of *benefiting others*; as, for instance, to save the life, fortune, or reputation of, or to avert suffering from, a party whose interests are dearer to him than his own. A singular instance of this is said to have taken place at Nuremberg, in 1787, where two women in great distress, in order to obtain for the children of one of them the provisions secured to orphans by the law of that country, falsely charged themselves with a capital crime. They were convicted; and one was executed, but the other died on the scaffold, through excitement and grief at witnessing the death of her friend. . . . The less exalted motive of getting money has sometimes had the same effect. After the publication of the third edition of his work, the author received a letter on this subject from Mr. T. T. Meadows, British Consul at Newchwang, Northern China, to the effect that in China the personation of criminals, and that in cases involving capital punishment, is a well-known fact. "The inducement," observes Mr. Meadows, "is not always money. Juniors in families have been known to personate their criminal seniors, and even domestic slaves or serfs their guilty masters to whom they were attached." The custom supplies the chief incident in Mr. James Payn's novel "By Proxy." (2) The desire of *injuring others* has occasionally led to the like consequence. Persons reckless of their own fate have sought to work the ruin of their enemies by making false confessions of crimes and describing them as participators. We shall feel little surprise at this when we recollect how often persons have inflicted grievous wounds on themselves, and even in some instances, it is said, committed suicide, in order to bring down suspicion of intended or actual murder on detested individuals.

The anomaly of false confession is not confined to cases where there might have been a criminal, or *corpus delicti*. Instances are to be found in the judicial histories of most countries where persons, with the certainty of incurring capital punishment, have acknowledged crimes now generally recognized as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits which, in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms. Some of them present the extraordinary spectacle of individuals, not only freely (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of these imaginary offenses, with the minutest details of time and place, but even charging themselves with having, through the

demoniacal aid thus avowed, committed repeated murders and other heinous crimes.<sup>1</sup>

The above causes affect, more or less, every species of confessorial evidence. But *extra-judicial*, confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses, which are sometimes overlooked in practice. These are *mendacity* in the report, *misinterpretation* of the language used, and *incompleteness* of the statement. (1) *Mendacity*. The supposed confessorial statement may be either wholly or in part a fabrication of the deposing witnesses. And here it should not be forgotten that, of all sorts of evidence, that which we are now considering is the most easy to fabricate, and however false, the most difficult to confront and expose by any sort of counter-evidence, direct or circumstantial. (2) *Misinterpretation*. No act or word of man, however innocent or even laudable, is exempt from this. . . . Unfounded inferences are sometimes drawn from words supposed to be confessorial, but which were used with reference to an act not identical with the subject of accusation or suspicion; as where a man who has robbed or beaten another, hearing that he has since died, utters an exclamation of regret for having ill-treated him. . . . (3) The remaining cause of error in confessorial evidence of this nature is "incompleteness"; i.e. where words, though not misunderstood in themselves, convey a false impression for want of some explanation which the speaker either neglected to give, or was prevented by interruption from giving, or which has been lost in consequence of the deafness or inattention of the hearers. "Ill hearing makes ill rehearsing," said our ancestors. Expressions may have been forgotten or unheeded in consequence of witnesses not being aware of their importance; e.g. a man suspected of larceny acknowledges that he took the goods against the will of the owner, adding that he did so because he thought they were his own. Many a bystander, ignorant that this latter circumstance constitutes a legal defense, would remember only the first part of the statement.

284. **THE HERMIONE CASE.** (JOHN PAGET. *Judicial Puzzles*. 1876. p. 64.)

Dr. Southwood Smith, in his "Lectures on Forensic Medicine," after observing how common false self-inculpatory evidence is, gives some remarkable instances in which it has occurred.<sup>2</sup> Of these the following is perhaps the most striking: In the war of the French Revolution the "Hermione" frigate was commanded by Captain Pigot, a harsh man and a severe commander. His crew mutinied, and carried the

ship into an enemy's port, having murdered the captain and many of the officers under circumstances of extreme barbarity. One midshipman escaped, by whom many of the criminals, who were afterwards taken and delivered over to justice one by one, were identified. Mr. Finlaison, the Government actuary, who at that time held an official situation at the Admiralty, states: "In my own experience I have

<sup>1</sup> See the cases of Mary Smith, 2 How. St. Tr. 1049; and of the Three Devon Witches, 8 How. St. Tr. 1017; the note to the case of the Bury St. Edmond's Witches, 6 How. St. Tr. 647; and the case of the Essex Witches, 4 How. St. Tr. 817, the latter especially. The confessions of Anne Cate, 4 How. St. Tr. 856, of Rebecca West, id. 840, of Rose Hallybread, id. 852, of Joyce Boanes, id. 853, and of Rebecca Jones, id. 854, are among the most remarkable.

<sup>2</sup> London Medical Gazette, January, 1838.

known, on separate occasions, more than six sailors who voluntarily confessed to having struck the first blow at Captain Pigot. These men detailed all the horrid circumstances of the mutiny with extreme minuteness and perfect accuracy; nevertheless, not one of them *had ever been in the ship*, nor had *so much as seen Captain Pigot in their lives*. They had obtained, by tradition, from their messmates, the particulars of the story. When long on a

foreign station, hungering and thirsting for home, their minds became enfeebled; at length they actually believed themselves guilty of the crime over which they had so long brooded, and submitted with a gloomy pleasure to being sent to England in irons for judgment. At the Admiralty we were always able to detect and establish their innocence, in defiance of their own solemn asseverations."

285. **THE GLOUCESTER CHILD-MURDER.** [Printed *ante*, as No. 110.]

286. **THE CASE OF THE BOORNS.** (*American Criminal Reports*, ed. John F. Geeting. Vol. XII, p. 221; Vol. XV, p. 223.)<sup>1</sup>

On the 19th of May, 1813, Stephen and Jesse Boorn, with Russell Colvin and Lewis Colvin, his son, were seen in the morning, by a neighbor, one Thomas Johnson, in Manchester, Vermont, picking up stones in a field. They were seemingly in a quarrel. Johnson had a full view of them, but was concealed from their sight. In the course of the quarrel, according to the testimony of Lewis, Colvin first struck Stephen, who then knocked the former down with a club. The blow brought no blood. Lewis ran off, and neither he nor Johnson saw Colvin again.

The sudden departure of Colvin excited at the time some inquiry as to what had become of him. As he was, however, in the habit of mysteriously absenting himself, sometimes for months together, being occasionally in a state of mental derangement, it was supposed by his friends and neighbors that he would shortly return. There were, however, some vague suspicions that this time he had been murdered. They arose from the fact of the quarrel, and from contradictory declarations by the Boorns in regard to his disappearance or

death. These circumstances were not deemed sufficient, however, to warrant their arrest. They both remained unmolested in the village until 1818, when Stephen removed to Denmark, in New York, making a visit to Manchester in the winter of 1818-1819.

Probably these men would never have been brought to trial, if an uncle of theirs had not, sometime in 1819, dreamed that Colvin came to his bedside and declared that he had been murdered, and that the uncle must follow the ghost, who would lead him to the spot where the body lay. This dream being repeated three times, was finally attended to. Search was made in the place indicated, being where a house had formerly stood. Under the house was a hole about four feet square, made for the purpose of burying potatoes, but filled up at the time of the search. The pit was opened, and only a large knife, a penknife, and a button found in it. Mrs. Colvin accurately described these articles previously to their being shown to her; and having seen them, declared the large knife and the button to have belonged to her husband. This wonderful dream,

<sup>1</sup> The citations of the original accounts of this case are fully given in Mr. Geeting's notes. — Ed.

as near as we can learn, took place in April, 1819. It created a great sensation in the neighborhood, and was deemed by many as a providential interference for the detection of the murdered. Immediate search was thereupon made for the body of Colvin, concerning whose murder by the Boorns no doubt now existed. Toward the end of April, 1819, on the strength of this dream, Jesse Boorn was arrested in Manchester. His examination was commenced on the 27th of April, during which day, as well as on the three following, search was unsuccessfully made for the body of Colvin. The ghost had played them false. It was not to be found in the pit indicated, nor in any other place ingenuity could assign. Still, so strong was popular belief in the honesty of their mysterious informant, that no one questioned his truth. Two pieces of bone were found in a hollow stump, which were pronounced to be the nails of a human toe — a cluster of bones was found in the same place. Several physicians thought them human — only one thought otherwise. In order to determine this matter conclusively, they dug up a leg, which had been amputated from a man about four years previously, and upon comparing the two sets of bones, it was unanimously determined that the set first found did not belong to the human race.

But people would not admit the fallibility of their ghost, especially as the bones first found were discovered by the agency of a dog, in the most approved mode of canine sagacity. It was therefore surmised that the body had been burnt, and some parts not consumed cast into the stump and other bones put amongst them for deception. This surmise gained strength from the fact that shortly after the disappearance of Colvin, a barn belonging to the dreamer was accidentally consumed by fire, and about the same time a log heap was burnt by

the Boorns near the place where the ghost said the body was to be found.

Upon the examination of Jesse, the magistrate allowed none of this stuff to be given in evidence. The facts relied on were, the disappearance and continued absence of Colvin, the quarrel, and the contradictions and observations before alluded to. These circumstances were deemed insufficient to warrant his detention. He was accordingly on the eve of being discharged when he stated to some of the myrmidons of the jail, "that the first time he had an idea that his brother Stephen had murdered Colvin, was when he was here last winter; he then stated that he and Russell were hoeing in the Glazier lot; that there was a quarrel between them; that Colvin attempted to run away; that he struck him with a club or stone on the back part of his head or neck, and had fractured his skull, and supposed he was dead. That he could not tell what had become of the body." He mentioned many places where it might be found. Search was accordingly made, but to no purpose.

A warrant was immediately issued for the apprehension of Stephen, who was committed to jail on the 15th of May. He strongly asserted his innocence, and was severe upon Jesse for making the confession. The latter, after an interview with Stephen, retracted all he had said, declaring the whole to be false. They were, however, committed to take their trial before the Supreme Court of Vermont, to be holden in Manchester, in September, 1819. During the time of their imprisonment, before the trial, they were frequently visited by a clergyman. "They evinced no contrition," but persisted in solemnly declaring their innocence. At length, in October, 1819, they were brought to trial, but such was the excitement against them that it was difficult to get a panel, almost every one in the vicinity having



expressed his opinion against the prisoners.

Upon the trial, about fifty witnesses were examined; the principal testimony was as follows:

*Thomas Johnson*, sworn. I was a neighbor to the Boorns and Colvin. In the early part of the month of May, seven years ago, last spring, I saw one morning, Stephen Boorn, Jesse Boorn, Russell Colvin, and his son Lewis Colvin, picking up stones. They appeared to be in a quarrel. I had a full view of them, although they could not see me. I have never seen Russell Colvin since. Stephen said he was not in the field picking stones at the time Russell went off, but that he went off at that time. Jesse, while in imprisonment, told me that he was assisting in shoeing an horse, when Russell went off. Stephen said the woodchuck they had for dinner the day Russell went off was killed by him, when mending fence for a Mr. Hammond. Having purchased the land where this quarrel took place, the children found and brought home an old moldy rotten hat — I knew it to be the hat of Russell Colvin. In the cellar hole stood a thrifty apple tree about three feet high, which was taken away the season after I noticed it.

*Lewis Colvin* (son of Russell Colvin), sworn. He said that at the time Russell went off, he was picking stones with him, and Stephen and Jesse Boorn — that a quarrel arose between Stephen and Russell — that Russell struck Stephen first — that Stephen knocked Russell down with a club, and that he (the witness) ran away, and saw no blood — that Stephen told him not to tell that he struck Russell — that he had never seen Russell since.

It appeared from the testimony of many witnesses that a jackknife and a button was found in the old cellar hole which were recognized as having once belonged to Russell Colvin — that he had occasionally

absented himself from his family, and was at times in a state of mental derangement — that bones had been found, which by some were supposed to be human bones, but which appeared, from the most conclusive evidence, not to be human bones.

*Truman Hill*, sworn. He stated that he had the keys of the prison in which the Boorns were imprisoned — that he exhorted Jesse to tell the truth, and that if he told a falsehood it would increase his trouble — that he confessed that he was afraid that Stephen had murdered Colvin, and that he believed he knew very near where the body was buried — that when the knife and the hat of Colvin were shown him, he was much agitated. He said he urged Jesse to confess nothing but the truth.

*Sally Colvin* (wife of Russell Colvin, and sister to the Boorns) stated that about four years since Stephen said I could swear the child with which I was pregnant, for he knew that Colvin was dead. Jesse also said that I could swear it.

*Daniel D. Baldwin*, and Mrs. Baldwin to the same effect said that about three years since, Stephen told them that Colvin went off in a strange manner into the woods at the time he, Jesse, Colvin, and Lewis were picking stones — that Lewis had gone for drink, and when he asked them where Colvin was gone? one answered, gone to hell; the other that they had put him where potatoes would not freeze.

Numerous witnesses testified to the contradictory declarations of the Boorns in regard to the disappearance or death of Colvin. The testimony of Silas Merrill to the confession of Jesse Boorn was as follows:

*Silas Merrill*, sworn. Testified that as Jesse was returned to prison from time to time from the court of inquiry, that he had been urged to confess; that one night in the prison we got up, and Jesse said that Stephen knocked Colvin down twice,

broke his skull, and the blood gushed out; that his father came up there several times, and asked if he was dead, and said, damn him; that all three of us took the body and put it into the old cellar, where father cut his throat; that he knew the jackknife to be Colvin's; that Stephen wore Colvin's shoes; that about a year and an half after, they took up the bones; put them under a barn that was burned; then pounded them up and flung them into the river; that father put some of them into a stump, etc.

The following written confession of Stephen, made Aug. 27, 1819, was rejected by the Court; but as its contents were alluded to by oral testimony, it was introduced by the prisoner's counsel.

*Stephen Boorn.* "May the 10th, 1812, I, about 9 or 10 o'clock, went down to David Glazier's bridge and fished, down below Uncle Nathaniel Boorn's, and then went up across their farms, where Lewis and Russell was, being the nighest way, and set down and began to talk, and Russell told me how many dollars benefit he had been to father, and I told him he was a damned fool; and he was mad, and jumped up, and we sat down close together, and I told him to sit down, you little tory; and there was a piece of beech limb about two feet long, and he caught it up and struck at my head as I sat down; and I jumped up, and it struck me on one shoulder, and I caught it out of his hand, and struck him a back-handed blow, I being on the north side of him; and there was a knot on it about one inch long. As I struck him, I did think I hit him on his back; and he stooped down; and that knot was broken off sharp, and it hit him on the back of the neck, close in his hair; and it went in about half of an inch on that great cord; and he fell down; and then I told the boy to go down, and come up with his uncle John; and he asked me if I had killed

Russell, and I told him no, but he must not tell we struck one another. And I told him when he got away down, Russell was gone away; and I went back and he was dead; and then I went and took him and put him in the corner of the fence by the cellar hole, and put briers over him and went home, and went down to the barn and got some boards, and when it was dark I went down and took a hoe and boards and dug a grave as well as I could, and took out of his pocket a little Barlow knife, with about half of a blade, and cut some bushes, and put on his face and the boards, and put in the grave and put him in, four boards on the bottom and on the top, and t'other two on the sides, and then covered him up, and went home, crying along, but I warn't afraid as I know on. And when I lived to William Boorn's I planted some potatoes; and when I dug them I went there, and something I thought had been there, and I took up his bones and put them in a basket, and took the boards and put on my potato hole, took the basket and my hoe, and went down and pulled up a plank in the stable floor, and then dug a hole, and then covered him up, and went into the house and told them I had done with the basket; and took back the shovel, and covered up my potatoes that evening. And then, when I lived under the West mountain, Lewis came and told me that father's barn was burnt up; the next day, or the next day but one, I came down and went to the barn, and there was a few bones; and when they was to dinner, I told them I did not want any dinner, and went and took them, and they warn't only a few of the biggest of the bones, and threwed them in the river above Wyman's, and then went back, and it was done quick too, and then was hungry by that time, and then went home, and the next Sunday I came down after

money to pay the boot that I gave to boot between oxens; and went out there and scraped up them little things that was under the stump there, and told them I was going to fishing, and went, and there was a hole, and I dropped them in, and kicked over the stuff, and that is the first anybody knew it, either friends or foes, even my wife. All these I acknowledge before the world."

The body of Colvin was not found, nor anything approaching nearer to it than the toenails. The confessions had been the result of much solicitation. Jesse was told that if he would confess the facts, it would probably be the means of clearing him. It appeared in evidence that several had promised to sign for their pardon if they would confess; at the same time telling them that there was no doubt they would be convicted upon the testimony that was then against them. The jury, after a trial occupying five days, a "short, judicious and impressive charge" from Mr. Justice Doolittle, and a "lengthy and appropriate one" from Mr. Chief Justice Chase, rendered a verdict of guilty against both the prisoners. They were accordingly sentenced to be executed on the 28th of January, 1820.

So much distress was manifested by these men upon learning their fate, that the usual reaction almost immediately took place in the public mind. Notwithstanding their confessions, they now vehemently asserted their innocence. A petition was presented to the legislature for a commutation of punishment, which was granted to Jesse, but refused to Stephen. The former was accordingly carried to the State prison on the 29th of October. Stephen remained in the "inner dungeon" of the jail with "heavy chains on his hands and legs, being also chained to the floor." During his confinement his agony is described as extreme. He was unwilling to die, both on his own and

his family's account, and vehemently protested his entire innocence.

A clergyman, Lemuel Haynes, who visited him in prison, reported: "I visited him frequently with sympathy and grief, and endeavored to turn his mind on the things of another world; telling him that as all human means failed, he must look to God as the only way of deliverance. I advised him to read the holy scriptures, to which he consented, if he could be allowed a candle, as his cell was dark; this request was granted; and I often found him reading. He was at times calm; and again impatient. The interview I had with him a few days before the news came that it was likely that Colvin was alive, was very affecting. He says to me, 'Mr. Haynes, I see no way but I must die; everything works against me; but I am an innocent man; this you will know after I am dead.' He burst into a flood of tears, and said, 'What will become of my poor wife and children; they are in needy circumstances, and I love them better than life itself.' I told him God would take care of them. He replied: 'I don't want to die. I wish they would let me live even in this situation, some longer; perhaps something will take place that will convince people that I am innocent.'"

Whatever may have been public opinion on their conviction, it was shortly changed, for on the 22d of December, 1819, *the murdered man was brought alive to Manchester!* The reaction in favor of the Boorns was now excessive. Stephen, sentenced to be hung, was released amidst the congratulations of the crowd and the peal of artillery. Jesse, then at hard labor in the State prison, was forced to wait the slower process of a regular discharge. Both became the heroes of the moment, and enjoyed, as a slight recompense for their months of agony, the sympathy of their former persecutors.

It appeared that when Colvin left his native town, he went to Dover, in New Jersey, and resided in a state of harmless mental derangement in the family of a Mr. Polhamus, during the whole time of his absence. The brother-in-law of Mr. Polhamus, a Mr. Chadwick, who lived at a distance of forty miles from Dover, seeing an account of the trial of the Boorns in the "Evening Post," which paper he was not in the habit of reading, and had taken up at that time by the merest apparent accident, had an idea that the resident in Mr. P.'s house was the man for whose supposed murder the Boorns were indicted. Under this impression he published a letter, in which, as we suppose — for we have never seen the letter

nor any intimation of its contents — he stated his suspicions that his brother-in-law's guest was the supposed murdered man. This suspicion was communicated to a Mr. Whelpley, of New York, formerly of Manchester, and well acquainted with Colvin. Mr. Whelpley went to New Jersey in quest of Colvin, and being convinced of his identity brought him to Manchester. Thus, by what may be considered almost a direct interposition of Divine Providence, two innocent men were restored to society; and, at least in one instance, it was satisfactorily proved, that lawyers may undertake the defense of "atrocious criminals" against the clearest conviction of the people, with truth, honesty, and justice on their side.

287. **MRS. MORRIS'S CASE.** (A. C. PLOWDEN. *Grain or Chaff; the Autobiography of a Police Magistrate*. 1903. p. 269.)

... One day, just as I was about to leave the Court, a charge was brought in of larceny from Whiteley's shop, in the Westbourne Grove. The accused was a young girl, slight and graceful, and daintily dressed. Her face was buried in her hands, and she was evidently deeply distressed. A detective officer stepped into the witness box and quickly informed me that the prisoner had been seen to put some shoes into her pocket without paying for them, and that she had been arrested as she left the shop. The shoes were of small value, but there seemed little doubt that they had been feloniously taken. I granted a remand, admitting the prisoner to bail, but it was many weeks before she was able to attend the court. When she did appear her counsel explained that she had been seriously ill from shock, and suffered acutely. With regard to the charge, she had no defense to offer, and could only throw herself on the mercy of the Court. It was not difficult to be merciful in such a case; indeed, to be merciful was to be just. I

felt she had been punished enough, and I allowed her to be discharged on her recognizances to come up for judgment if required.

Four years after, I noticed sitting in the court a young woman, charmingly dressed, whom I had no difficulty in recognizing as the same who had stolen the things from Whiteley's. She was seated so as to be almost opposite to me, and she appeared desirous of attracting my attention. Presently a letter was handed up to me, in which, after recalling herself to my memory, she went on to say that I had saved her life by not sending her to prison. She was sure, therefore, I would not refuse the small favor she wished to ask, which was that she might attend the court daily in the hope of being of some service to any of her sex who might be in trouble. Now that she knew what it was to stand in a dock charged with crime, her heart went out to any woman in the same position, and she longed to be of use. I readily acceded to her request, and for a few weeks

the graceful little figure brightened the court with her presence, like a sunbeam. She appeared very busy with her notes, and seemed to take an intelligent interest in the work she had undertaken. . . .

[After a while, she ceased to attend the court.] Within a fortnight the poor girl had committed suicide by throwing herself out of a window. From a report which I had read in the newspapers it appeared that she had been taken ill with influenza, which had affected her brain — never, I imagine, too strong. And so ended her tragic little life. She was not strong enough, poor child, to fight the world's battle alone. . . .

Mrs. Morris, for that was her name (she was a widow, and not the young girl I supposed), possessed very decided traits of character. I am indebted to Mr. W. T. Stead, who knew her perhaps better than any one else, for particulars of her life and history, which have interested me greatly. She appears to have been intelligent, brave, and self-willed, with a full share of the vanity of her sex. Her personal courage amounted almost to heroism. I am told that in her crusading zeal for philanthropic causes which she had at heart, she would venture into the worst slums of the East End, by night as well as by day, quite careless of any personal risk that she might run. The death of her husband left her heartbroken, and was followed by a complete breakdown of her health, attended by morbid symptoms which probably had much to say to her subsequent suicide. Nevertheless, she was able to leave behind her an unpublished autobiography, written with great vivacity and frankness. The incident which brought her into the Marylebone Police Court evidently affected her whole life. The shock of the accusation was followed by an illness of which catalepsy was only one of the symptoms, and which brought her to

death's door. She was affectionately nursed by kind friends, and on her recovery was persuaded to accept an offer of marriage from a young and impressionable doctor who had attended her throughout with no less devotion than skill. But she was never able to get out of her mind the horror and disgrace of being regarded as a thief. It colored her thoughts incessantly, whether she was raving with delirium or struggling towards convalescence. As the day approached when she would have to appear in Court she determined on suicide in one form or another rather than demean herself by going before the magistrate. Finally, when the terrible trial was over, and happiness seemed to be within her reach, an unguarded remark by her lover, reflecting as she thought on her character, stung her as so intolerable that she broke off the engagement and committed suicide, leaving a letter behind her to explain her conduct. . . .

I have taken the following extracts from her "Life": "I then left the shop, and had just passed into the street, and was thinking how delightful the fresh air was and how frightfully weak and tired I felt, when a shop walker caught hold of my arm and asked to see my bills. I showed them to him, but he did not seem satisfied, and he asked me if I would step into the manager's room. 'Certainly, if you wish it,' I answered. Then they took all my things away from me, and I, too weary and headachy to care what they did, sank down on the nearest chair almost exhausted. I noticed that they spread the bills out on the table, and compared each article with them, and calling in several men, had a discussion in an undertone, which I either did not hear, or do not remember. But very shortly one of them turned to me and said,

"Where did you get this pair of shoes?"

"I brought them in to change," I said.

"'No,' he said, 'you stole them!'

"'I stole them!' I repeated after him, with wide-open eyes; 'what do you mean?' these awful words quite taking away my headache for the instant.

"'Yes,' he repeated; 'you deliberately stole them. Mr. — saw you put them into your bag, and you wrapped this pair,' pointing to a tiny pair of satin ones without any heels, and marked one shilling. The same man then asked me my name and address, while the others all seemed to be laughing, as if a great joke were going on. I was bewildered to madness, all that I know is that I refused to give it, telling them 'it was no business of theirs. If they had anything against me they could punish me as much as ever they liked, but I would not allow them to bring disgrace or discredit on the people I loved — the sweet mother and sisters who had been so good to me.' They say I added in an undertone, 'You may send me to prison, kill me if you like, life is not worth living; but you shall not bring discredit on my people.' Then I dimly recollect half a dozen cruel looking men saying, 'She won't give her name, won't she? that looks fishy! You'd better search her,' said the ringleader of my tormentors. So they either turned out my pockets, or made me do so, but they only discovered a handkerchief, my notebook — chiefly full of my own poetry, which they must have kept, for I never saw it again — and a paper bag containing several greengages which was marked 'Southend,' from which they concluded that I lived down there, for they talked a great deal about it. After that I do not remember anything, for a dreamy sense of the unreality of life beset me, and my mind, as regards anything that really happened, is a perfect blank. To make my whole story understood, I must now tell it, not from my own memory, but from what I have since

been told by kind friends, and what I have gathered from newspaper accounts.

"It seems that Mr. Whiteley's assistants, after thoroughly convincing themselves that I was a 'thief,' in spite of my offering them eight pounds for the shoes, and seeing that I then possessed thirty shillings in my purse, which would have enabled me to buy them several times over had I wished to do so, sent for a policeman and gave me in charge. They say I did not raise the slightest objection, until he proposed to put handcuffs on me, then I began to rave and storm, until quite suddenly my whole manner changed, and as the policeman subsequently told me, I became as meek as a lamb. . . . On my arrival at Marylebone Police Court, I was told that I should be locked up in a dark cell, until I gave my name and address. . . .

"They then took me before a magistrate, and charged me with stealing two pairs of shoes valued one at ten shillings and the other at a shilling. He then asked me if I pleaded guilty. It is recorded — for I remember nothing of all this — that I answered in a very excited voice and manner, trembling so violently all the while that I shook the dock. 'If they said I had taken them, it must be so, although I knew nothing of it. If so, I suppose I must have done it on a sudden impulse, for I certainly did not want the shoes, they did not fit me, and I had numbers of pairs at home, and never meant to steal them.' I then added, 'Send me to prison — give me three years' penal servitude — but don't bring disgrace on my friends — don't tell them you think me a thief!' Now it seems to me most unlikely that I stole those shoes on a sudden impulse. For, had it been so, I should surely have had some recollection of the impulse. And why, I ask myself, should I ever have had an impulse to steal shoes which I did not want, and, even if I had wanted them,

would not have fitted me, being several sizes too small? Some uncharitably minded persons may remark that I might have wished to pawn them. But I ask that person why I should begin to pawn things thus, when I had plenty of money, and no unsatisfied needs, when I never did so when I was hard up, nay starving! I don't know that it's wrong to pawn your things, but I do know that I have never pawned a single thing in my whole life. . . . They tell me, that at six o'clock, when the van came which was to take me to the jail, laden with its crowd of erring flesh, I gave one long, bitter cry, then fell to the ground in a dead faint. So they fetched a four-wheeler, and laying me flat on one seat, a policeman mounted guard over me on the other. When I ultimately arrived, the authorities stated that they had seldom seen a more miserable object. . . . [I was then taken to the hospital.] All that night I was delirious, talking wildly, and keeping every one awake by shrieking and laughing, and refusing to stop in bed. But next morning I was so exhausted that I lay all day in a state of dead catalepsy, and for days I remained in this state, seeing nothing, knowing no one, and being fed artificially. At last came a time when no one thought I could live through the night. My friends all prayed for me; I know not if their prayers were answered, but I did not die, and from that time the sickness left me, and by very slow degrees I got better. Gradually I began to know my friends again, then I sat up for a few minutes; then after many days they robed me in a white dressing gown, not more white than my face, and the doctor carried me to an easy chair in front of the low French window. Well do I remember that day — it seemed to me like the first dawn of summer, I had been taken ill on the first of July, now it was nearing the end of September. But soon exhausted I

was put back to bed, then I remember I was alone with the dear doctor who had always been so good to me. . . .

"Ethel, dear,' he said, oh so gently, 'will you tell me everything that happened just before you were taken ill?'

"Yes, poor Edwin died,' I said.

"Yes, but that was some time before. Don't you remember, for instance, spending the day with me at Southend?'

"Yes, I remember something about it. I felt very seasick on the boat. I suppose that was what brought on all this sickness I've had ever since.'

"But next day, what did you then?'

"I had an awful headache, but I went out soon after breakfast and bought Maude a hat. I hope she got it all right. Poor little thing, I expect she trimmed it herself, and she does make them look such guys!' and I laughed long and merrily at by-gone recollections of Maude's hats.

"But he refused to share my amusement, looking as serious as the grave, and continued blushing, I noticed, up to the roots of his hair.

"Did you buy any shoes that morning?'

"No, but I think I changed some. But somehow, dear, that seems to have been mixed up with my dreams — I have everlastingly dreamed of shoes all the time I've been ill. Silly — isn't it?'

"But — my darling, tell me, tell me, what did you dream about them?'

"I don't know: it's all confused and muddled, and something different every night,' I answered.

"Coming still nearer, and taking my face between his two hands, he looked deep into my eyes as if he would fain read my soul, and said in a voice broken and husky with emotion —

"Did you ever dream that you stole a pair of shoes?'

"I did not speak, neither did I

move. Truths always seem to force themselves on me like flashes of lightning, so there is nothing gradual in the process. And after that instant there was no need for him to tell me that I was wanted as a thief. I knew it. The scene at Whiteley's — the confusion of the bills, the men who had amused themselves at my expense, the policeman who had wished to handcuff me and drag me through the streets, it all came back, not as idle dreams, but as the realities of life. For a few brief seconds no torture in hell could have been greater. Then I dropped my head into my hands and knew no more."

There is much more to the same effect that I could quote.

What is the impression that is left? Aye or No — did she steal the shoes?

On the one hand, there is her plea of "Guilty" in the Police Court. Against it, there is the knowledge of all that she said, and did, and suffered — the strenuous protest of all her subsequent life. There is also the improbability that had she been guilty she would have taken the matter so much to heart as she did. Remorse cuts deep, but nothing stings like a false accusation. Only perhaps this is certain, that she paid a heavy penalty.

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288. HUGO MÜNSTERBERG. *On the Witness Stand*. (1909. p. 77.) . . . The study of the association of ideas has attracted the students of the human mind since the days of Aristotle; but only in the last century have we come to inquire systematically into the laws and causes of these mental connections. . . . The school of associationists began to explain our mental life as essentially the interplay of such associations. . . .

One aspect dominates in importance: I can measure the time of this connection of ideas. Suppose that both my subject and I have little electrical instruments between the lips, which, by the least movement of speaking, make or break an electric current passing through an electric clockwork whose index moves around a dial ten times in every second. One revolution of the index thus means the tenth part of a second, and, as the whole dial is divided into one hundred parts, every division indicates the thousandth part of a second. My index stands quietly till I move my lips to make, for instance, the word "dog." In that moment the electric current causes the pointer to revolve. My subject, as soon as he hears the word, is to speak out as quickly as possible the first association which comes to his mind. He perhaps shouts "cat," and the movement of his lips breaks the current, stops the pointer, and thus allows me to read from the clockwork in thousandth parts of a second the time which passed between my speaking the word and his naming the association. . . . I may find out how long it takes if my subject does not associate anything, but simply repeats the word I give him. If the mere repetition of the word "dog" takes him 325 thousandths of a second, while the bringing up of the word "cat" took 975 thousandths, I conclude that the difference of 650 thousandths was necessary for the process of associating "cat" and "dog." In this way, during the last twenty years, there has developed an exact and subtle study of mental associations, and through such very careful observation of the time-difference between associations a deep insight has been won into the whole mental mechanism. The slightest changes of our psychical connections can be discovered and traced by these slight varia-



tions of time, which are, of course, entirely unnoticeable so long as no exact measurements are introduced. . . .

Like many other branches of experimental psychology, the doctrine of association has become adjusted to the practical problems of education, of medicine, of art, of commerce, and of law. It is the last which chiefly concerns us here — a kind of investigation which began in Germany and has since been developed here and abroad.

For instance, our purpose may be to find out whether a suspected person has really participated in a certain crime. He declares that he is innocent, that he was not present when the outrage occurred, and that he is not even familiar with the locality. An innocent man will not object to our proposing a series of one hundred associations to demonstrate his innocence. A guilty man, of course, will not object, either, as a declination would indicate a fear of betraying himself; he cannot refuse, and yet affirm his innocence. Moreover, he will feel sure that no questions can bring out any facts which he wants to keep hidden in his soul; he will be on the lookout. As long as nothing more is demanded than that he speak the first word which comes to his mind, when another word is spoken to him, there is indeed no legal and no practical reason for declining, as long as innocence is professed. Such an experiment will at once become interesting in three different directions as soon as we mix into our list of one hundred words a number, perhaps thirty, which stand in more or less close connection to the crime in question — words which refer to the details of the locality, or to the persons present at the crime, or to the probable motive, or to the professed alibi, and so on.

The first direction of our interest is toward the choice of the associations. Of course, every one believes that he would be sure to admit only harmless words to his lips; but the conditions of the experiment quickly destroy that feeling of safety. As soon as a dangerous association rushes to the consciousness, it tries to push its way out. It may, indeed, need some skill to discover the psychical influence, as the suspected person may have self-control enough not to give away the dangerous idea directly; but the suppressed idea remains in consciousness, and taints the next association, or perhaps the next but one, without his knowledge. He has, perhaps, slain a woman in her room, and yet protests that he has never been in her house. By the side of her body was a cage with a canary bird. I therefore mix into my list of words also "bird." His mind is full of the gruesome memory of his heinous deed. The word "bird," therefore, at once awakens the association "canary bird" in his consciousness; yet he is immediately aware that this would be suspicious, and he succeeds, before the dangerous word comes to his lips, in substituting the harmless word "sparrow." Yet my next word, or perhaps my second or third next, is "color," and his prompt association is "yellow": the canary bird is still in his mind, and shows its betraying influence. The preparation of the list of words to be called thus needs psychological judgment and insight if a man with quick self-control is to be trapped. In most cases, however, there is hardly any need of relying on the next and following words, as the primary associations for the critical words unveil themselves for important evidence directly enough.

Yet not only the first associations are interesting. There is interest in another direction in the associations which result from a second and a third repetition of the series. Perhaps after half an hour, I go once more through

the whole list. The subject gives once more his hundred replies. An analysis of the results will show that most of the words which he now gives are the same which he gave the first time; pronouncing the words has merely accentuated his tendency to associate them in the same connection as before. If it was "house" — "window" first, then it will probably be "house" — "window" again. But a number of associations have been changed, and a careful analysis will show that these are first of all the suspicious ones. Those words which by their connection with the crime stir up deep emotional complexes of ideas will throw ever new associations into consciousness, while the indifferent ones will link themselves in a superficial way without change. To a certain degree, this variation of the dangerous associations is reinforced by the intentional effort of the suspected. He does not feel satisfied with his first words, and hopes that other words will better hide his real thoughts, not knowing that just this change is to betray him.

But most important is the third direction of inquiry: more characteristic than the choice and the constancy of the associations is their involuntary retardation by emotional influence. A word which stirs emotional memories will show an association time twice or three times as long as a commonplace idea. . . . The retardation is not always confined to the dangerous association alone, but often comes in a still more pregnant way in the following or the next following association, which on the surface looks entirely harmless. The emotional shock has perturbed the working of the mechanism, and the path for all associations is blocked. The analysis of these secondary time retardations is the factor which demands the greatest psychological skill.

A few illustrations from practical life may make the whole method clearer.

An educated young man of eighteen lived in the house of an uncle. The old gentleman went to consult a nerve specialist in regard to some slight nervous trouble of the younger friend. On that occasion he confided his recent suspicion that the young man might be a thief. Money had repeatedly been taken from a drawer and from a trunk; until lately he had had suspicions only of the servants; he had notified the police, and detectives had watched them. He was most anxious to find out whether his new suspicion was true, as he wanted, in that case, to keep the matter out of court, in the interest of the family. The physician, Dr. Jung, in Zurich, arranged that the young man come for an examination of his nerves. He then proposed to him a list of a hundred associations as part of the medical inspection. The physician said "head," the patient associated "nose"; then "green" — "blue," "water" — "air," "long" — "short," "five" — "six," "wool" — "cloth," and so on, the average time of these commonplace connections being 1.6 seconds. But there were thirty-seven dangerous words scattered among the hundred — words that had to do with the things in the room from which the money was abstracted, or with the theft and its punishment, or with some possible motives. There appeared, for instance, the word "thief." The association "burglar" seemed quite natural, but it took the boy suddenly 4.6 seconds to reach it. In the same way "police" — "theft" took 3.6 seconds, "jail" — "penitentiary" 4.2 seconds. In other cases the dangerous word itself came with normal automatic quickness, but the emotional disturbance became evident in the retardation of the next word. For instance, "key" — "false key" took only 1.6 seconds, but the following trivial association "stupid" — "clever "

grew to 3.0 seconds. "Crime" — "theft" came again promptly in 1.8, but the inner shock was so strong that the commonplace word "cook" was entirely inhibited and did not produce an association at all in 20 seconds. In the same way "bread" — "water" rushed forward in 1.6 seconds, but this characteristic choice, the supposed diet of the jail, stopped the associative mechanism again for the following trivial word. It would lead too far to go further into the analysis of the case, but it may be added that a repetition of the same series showed the characteristic variations in the region of the suspicious words. While "crime" had brought "theft" the first time, it was the second time replaced by "murder"; "discover" brought the first time "wrong," the second time "grasp." In the harmless words there was hardly any change at all. But, finally, a subtle analysis of the selection of words and of the retardations pointed to sufficient details to make a clear diagnosis. The physician told the young man that he had stolen; the boy protested vehemently. Then the physician gave him the subtle points unveiled by the associations — how he had bought a watch with the money and had given presents to his sister; and the boy confessed everything, and was saved from jail by the early discovery. . . .

Our chief interest belongs to the legal aspect of this method. Carried out with the skill which only long laboratory training can give, it has become, indeed, a magnifying glass for the most subtle mental mechanism, and by it the secrets of the criminal mind may be unveiled. All this has, of course, no legal standing to-day, and there is probably no one who desires to increase the number of "experts" in our criminal courts. But justice demands that truth and lies be disentangled. . . . The "third degree" may brutalize the mind and force either correct or falsified secrets to light; the time-measurement of associations is swifter and cleaner, more scientific, more humane, and more reliable in bringing out the truth which justice demands. Of course, we are only at the beginning of its development; the new method is still in many ways imperfect, and if clumsily applied it may be misleading; moreover, there exists no hard and fast rule which fits every case mechanically. But all this indicates only that, just as the bodily facts have to be examined by the chemist or the physiologist, the mental facts must be examined also, not by the layman, but by the scientific psychologist, with the training of a psychological laboratory.

289. JOHN. H. WIGMORE. *The Psychology of Testimony*. (Illinois Law Review. 1909. Vol. III, p. 410.) . . . The method of guilt-diagnosis by psychic associations was first publicly announced by Wertheimer and Klein in 1904, in the Austrian "Archiv für Kriminal-Anthropologie," edited by Hans Gross (their master, and professor of criminal law at Graz), and immediately taken up by Alfred Gross, at Prag. Meanwhile Jung, at Zurich, a psychologist, quite independently had been making similar applications, which first saw the light in 1905. Thereafter these two sets of researches were widely discussed in the same technical journals, from 1905 onwards. . . . But the method is as yet in its infancy. Such statements as the following are significant — for example, by Loeffler, professor at Vienna, in 1906:

"Before we dare to rely on it in a real criminal case, it must be first studied in thousands of laboratory experiments;"

by Gottschalk, advocate at Berlin, in 1906,

"This method is so far in such mere beginnings that one cannot speak of it as having practical utility; it can therefore be here ignored;"

by Lederer, of Prag, in 1906,

"The danger of this method is certainly an adequate reason for rejecting it. . . . Where it is not dangerous, it is usually quite fruitless. . . . We may positively say that criminal investigation has in the new method, either as hitherto put forward or as later to be improved, nothing useful to expect;"

or by Hoegel, chief State's attorney at Vienna, in 1907,

"I regard it as inconceivable to expect the State and the officers intrusted with the administration of justice to make use of an instrument so doubtful as this diagnostic against accused persons, even with their consent." . . .

Let us take the psychologists themselves. Listen, for example, to Freud, lecturing to the law students at Vienna in 1906.

"In the laboratory experiments you will never be able to reproduce the identical situation of the real accused person. . . . It should be your right, and even your duty, to carry on investigations for a series of years with suitable accused persons — but without letting the results have any influence on the decision of the magistrate, or better still, without his having any knowledge of the results reached as to a particular person's guilt. After years and years of accumulation and comparison of such data, all doubt of the utility of this psychological method would certainly be dissipated." . . .

Jung himself, after the first publication and critical reception of his results, frankly admitted, as late as 1906, in view of Stern's doubts and Krauss' critique,

"To this doubt I must fully agree; the discrimination between the guilty and the innocent thus is difficult. I agree with Krauss in apprehending great difficulties in the application of the experiments to judicial practice. . . . I shall not quarrel with any one who says that he is unconvinced by the method. I do not desire to pour cold water on it, but I am not reluctant to warn against an unjustifiable optimism. I do this in the interest of the method itself, which can easily be discredited by striking instances of misuse. It is a delicate instrument. . . . In its present state one must not expect too much from it, though it has an undeniable capacity for development."

and finally, in replying to Lederer's searching criticisms (above quoted), Jung again frankly declares in 1906,

"I am of Lederer's opinion, that *the psychological diagnostic, at least as yet, is thoroughly unsuitable for criminal practice.*" . . .

In short, on the Continent the new method appears to have met with a large, if not overwhelming, measure of hesitation, doubt, and opposition among jurists and even psychologists, in that the proposal of its practical use is regarded as quite premature at least. . . .

Now, as we read four centuries ago, in one of the earliest books on Evidence, "*Præsumitur contra eum qui vellet innovare;*" to which is the proviso, "*nisi ista novitas esset utilis.*" So that the question here really is, Is this novelty useful and practicable? To this end let us ask, (1) Does the method indicate guilt? (2) Are its indications exact? (3) Are its conditions practical? And first,

(1) *Does this method indicate guilt?* Is not the most that is claimed by its adherents this much, that they can diagnose whether the person *knows* about the facts? And that *how* he came to know them — whether as a guilty doer or a mere spectator or even a disinterested witness or a newspaper reader — cannot be discriminated. For example, Alfred Gross himself plainly says,

“In those persons to whom the sought facts are known we can diagnose with passable certainty their guilt or at least their *strong suspicion or knowledge* of the facts. . . . Our task has been thus far no more than to answer the question whether a person knows of a certain fact or not.” . . .

So that the method, even at these highest claims for it, does not indicate in any way whether the person's knowledge is guilty or innocent. . . .

(2) *Are its indications exact?* In other words, are they not subject to so many possible interpretations as to be too loose for any practical use? . . . Let us first take, as an example, the detailed report of Loeffler, professor of criminal law at Vienna. His experiment was on an assistant State's attorney, supposed to be arrested in a foreign country on suspicion of crime, and trying to pass himself off there as a bookkeeper. One hundred reactions were taken; let us look at some of them. (a) In the first eight, the reaction-time of six of them is 1.4 to 1.8 seconds, but the fifth, being 2 seconds, is “Service-Forenoon,” which the observer calls a “self-betrayal” as attorney. Now, apart from this queer interpretation, look at the seventh reaction, which is the largest of the eight, 2.6 seconds, and reads “Write-Bill,” and note that this “self-betrayal” as bookkeeper is quite ignored by the observer. (b) In the next group, reaction No. 11 is 2.6 seconds, and is called a “betrayal” because Nos. 12 and 13, which are 7.4 and 3.4 seconds, are so much longer, though colorless in their words. (c) In another series, the reaction of No. 4, in 4.6 seconds, “Private-party,” is triumphantly taken as a “betrayal” because of the length of time — though it is hard to see why a State's attorney thinks of “private parties.” (d) In the same group, with reaction words “press-seen,” after “copy-made,” the observer complacently says of the former: “No bookkeeper would ever have reacted in this way!” and quite ignores the “copy-made.”

Now we do not lay stress on the radical lack of scientific method here; I mean that those who boast of testing everything by experiment should not affirm that “no bookkeeper would have reacted thus” without finding by experiment whether bookkeepers *do* thus react. What I desire to note is the delightful adaptability of this method to a judge's whims, in allowing him to prove whatever he is hoping to prove. For, observe the method as thus used: If the reaction-word is one essentially relevant to the accused's supposed occupation, it is a “betrayal”; if the word itself is colorless, but its reaction-time is long, it is also a “betrayal”; if it is colorless, and its own reaction-time is normal, but the *ensuing* reaction-time is long, it is again a betrayal; and if the word indicates some innocent occupation, it is ignored entirely. Now after reckoning these four possibilities, there will remain only a few reactions, so that the zealous magistrate is sure to “get his man”; there is no failure; he can always find guilt — *if he wishes to*. Might not any one whosoever be convicted on the above interpretations?

This whimsicality and arbitrariness of interpretation are constantly to be seen in the records of these experiments. For example, in Jung's own

primal experiment, by which he is said to have detected an actual thief, he found a so-called "betrayal" in the reaction "stranger-look," by interpreting it thus: "The young thief thought that some one had *looked* when he was stealing, and had informed on him, so that I, a *stranger*, now knew of it." Such interpretations will to many seem merely amusing; I will not call them "wild feats of jugglery," as one of the German lawyers does. Nor will I press analogous defects — the danger of trusting to the whims of all sorts of magistrates in using this method — the probability that a clever rascal could counterfeit a normal reaction-time — the lack of clear indication of different occupations, etc., as found by observed reaction-times — the fallacy of the assumption that a guilty person knows all the details of his crime, and the corresponding fallacy of fixing beforehand as criteria of guilt the reaction-words which the magistrate supposes to belong to the crime — the error of method in assuming, in our present state of knowledge, that there are any uniform associations with certain so-called "key-words" which are valid for every individual's experience. . . .

(3) *Are its conditions practical?* I will not here dwell on the impractical length of time required for adequate tests; nor on the relative cumbrousness of the method to other ordinary ones which would at least secure as much result; nor on the circumstance that it could (in this country) only be done either by trained psychologists, who would doubtless differ in their interpretations and thus introduce a new mass of disputed expert testimony, or by the police, who presumably would be too subject to bias to give great weight to their interpretation. I will simply point out that all the investigators do not frankly state that the willingness of the accused to submit to the test is assumed. So that, obviously, the accused cannot be put to it unless he waives his constitutional privilege against self-incrimination. And if he refuses, claiming his privilege, no inference can be drawn as to his guilt, under our law; for *we* cannot say, as a German or Austrian magistrate might say, "If he refuses, he would presumably find himself deemed guilty." And since the most experienced men at our bar accept it as a solid maxim, "If the client is guilty, never let him enter the witness-box," no guilty man would in an important case probably ever consent after the method became generally known. After all, then, since with us the method is not practicable at all unless the accused consents, it is hardly worth while to offer it to our bar as something that would play an important part in ordinary criminal practice.

### **TITLE III: THE INTERPRETATION OF SPECIFIC TESTIMONY, TO ESTABLISH THE EXTENT AND SOURCES OF ERROR**

#### **SUBTITLE A: EXTENT OF LATENT ERROR IN THE NORMAL TESTIMONIAL PROCESS**

290. GUY M. WHIPPLE. *Manual of Mental and Physical Tests*. (1910. p. 286.)<sup>1</sup> *Tests of Description and Report*. The two tests which are described in this chapter have certain features in common which demarcate them on the one hand from the tests of perception and attention of the previous chapter, and on the other hand from the memory tests of the succeeding chapter, though, in many other respects, they resemble these tests. The essential idea in both of the present tests is to determine capacity, not merely to attend and observe, or to recall what has been observed, but to put the results of this observation into linguistic form. (If the observer gives his account of the experience at the time of his observation, this constitutes "description"; if at some time subsequent to his observation, this constitutes "report.")

It is evident that this giving of an account of an experience, particularly if the experience be somewhat complicated in form, is a more complex psychical process than those under discussion in the tests of attention and perception. This greater complexity makes the reduction of the observer's performance to exact quantitative terms a matter of greater difficulty, but, on the other hand, the activity called forth is more akin to that demanded in everyday life, and it is for this reason that these tests have been felt to possess a peculiar value, particularly in the study of individual differences in mental constitution and mental efficiency. Again, language occupies so strikingly prominent a place in our mental economy that tests which seek to bring out the observer's ability to cast experience into linguistic form are, on that account, well worth while. This is particularly the case in the second form of test, that of the report, which, in connection with the "psychology of testimony," has of late had a prominent place in psychological research.

*Test 32. Fidelity of Report* ("Aussage" test). Capacity to observe, or range of observation, may be tested by methods previously described (Tests 25 and 31); native retentiveness or capacity for recall may be tested by methods such as those that are described in subsequent sections; capacity to describe what is seen may be tested as has been indicated in Test 31. But there exists also a type of activity, that of reporting a pre-

<sup>1</sup> Published at Baltimore, by the Warwick & Yorke Co.

vious experience, which in a way combines these several activities, in that it demands both attentive observation, retention, recall, and an ability to marshal and formulate the items of experience in a *verbal report* ("Aussage"). In studying the "psychology of testimony," interest has been developed of late in the direct examination by experimental methods of the capacity to report, itself, and it has been found that reports may exhibit varying degrees of fidelity or reliability, more or less independently of the capacity that the reporters possess to observe or to retain experience. In other words, discrepancies or inadequacies may appear in reports, which are due, not only to misdirected attention, malobservation and errors of memory, but also to lack of caution or of zeal for accurate statement, to scanty vocabulary, to injudicious phraseology, or, of course, to deliberate intent to mislead. . . .

*Method.* 1. Choice of material. Of the several types of material that have been elaborated for the study of the report, *e.g.*, the picture test, the event test, the rumor test, etc., the first mentioned has many advantages for our present purposes. . . . 2. Choice of exposure time. For pictures, times ranging from 5 sec. to 7 min. have been used, though 45-60 sec. is most usual. The principle which has controlled the choice of exposure time for the two tests that follow is to select such a period as will permit an average S<sup>1</sup> to examine each detail of the object once. 3. Choice of time interval. For the sake of brevity, the instructions that follow prescribe a report directly after the exposure. If circumstances permit, E<sup>1</sup> will find it of interest to extend the interval to several minutes, or even hours or weeks. The effect of a lengthening time interval has not as yet been satisfactorily determined. 4. Choice of form of report. There are two distinct forms of report. (1) The "narrative" ("Bericht," "récit"), (2) the "interrogatory" ("Verhör" of Stern, "Prüfung" of Wreschner, "interrogatoire" of Borst, "forage de mémoire" or "questionnaire" of Binet). The *narrative* is a free account, delivered by S, either orally or in writing, without comment, question, or suggestion by E. The *interrogatory* is a series of prearranged questions; the replies to these questions constitute the *deposition* ("Verhörprodukt"). The constituent parts of the narrative or the deposition may be termed "statements" or "items." Each form of report has its advantages; both should be employed whenever possible. 5. Choice of form of interrogatory. An interrogatory is "complete" when its questions cover all features of the experience exhaustively, and are propounded to all S's in the same order and manner: an interrogatory is "incomplete" when its questions are restricted to such as refer only to those items not mentioned by S in his narrative. . . . 6. Choice of questions. The form of questioning very materially affects S's deposition, particularly if the questions are of the type known as "leading" or "suggestive" questions. If we follow Stern, at least six types of questions may be framed, *viz.*: determinative, completely disjunctive, incompletely disjunctive, expectative, and consecutive. A completely disjunctive question is one that forces the reporter to choose between two specified alternatives, *e.g.* "Is there a dog in the Picture?" An incompletely disjunctive question is one that offers the reporter a choice between two alter-

<sup>1</sup> [S = the person who is the subject of the experiment; E = the person managing the experiment. — ED.]



natives, but does not entirely preclude a third possibility, *e.g.* "Is the dog white or black?"... An expectative question is one that arouses a moderately strong suggestion of the answer, *e.g.* "Was there not a dog in the picture?" (This is the form used by Binet to induce moderate suggestion.) An implicative question is one that assumes or at least implies the presence of a feature that was not really present in the experience, *e.g.* "What color is the cat?"... The consecutive question is any form of question that is used to augment a suggestion that has been developed by previous questions. 7. Choice of method of grading. Treatment of data. In general, the adequacy of a report depends both upon its quantity and its quality: quantity is measured by the number of items mentioned or the number of questions answered (in absolute or in relative terms) and is referred to as the range of report ("Umfang," "étendue"): quality is measured by the fidelity of the statements made, and is referred to as the accuracy of report ("Treue," "fidélité").

We have also at our command useful indications of the positiveness or degree of assurance that S places in his report. Besides (1) complete uncertainty ("I don't know" or "I have forgotten"), we may distinguish (2) hesitancy ("I think" or "I believe"), (3) positive statement or assurance of ordinary degree, and (4) attestation or attestable assurance, *i.e.* the highest degree of assurance, as indicated by S's willingness to take his oath that the statement is correct. . . .

*A. Report Test with a Card of Objects. Method.* Give S the following instructions: "I want to try an experiment with you to see how good your memory is. I am going to show you a large card with a number of things fastened on it. You will have just half a minute to look at it. Half a minute is a pretty short time, so you must look very carefully, because afterwards I shall want you to tell me what you have seen, and I shall ask you questions about many little details, and I want you to answer these questions exactly, if you can. Do you understand?" Place the card directly before S in a good light. At the end of 30 sec., remove it and keep it well concealed. Direct S at once: "Now tell me everything you saw: describe it so clearly that if I had never seen the card I should know all about what was on it." The narrative is given orally by S, and recorded verbatim by E, without comment, query, or suggestion. Reread the report to S, and ask him to indicate what statements he is so sure of that he would swear to their accuracy. Underline these statements. Proceed next with the interrogatory. If possible, ask S the following questions in the order given. Record his replies by number, verbatim, and underline all attested replies.

*B. Report Test with a Colored Picture. Materials.* Set of four colored pictures: "Australians," "A Disputed Case," "Washington and Sally," and "The Orphan's Prayer." Watch. . . . Suggestions for interrogatories for two of the pictures follow.

*Interrogatory for "A Disputed Case."*<sup>1</sup> (1) How wide is the picture (horizontally)? (2) How high is the picture (vertically)? (3) Is there any border: if so, what color? (4) How many persons are there in the

<sup>1</sup> [This picture is recommended to be used by law school instructors in collating results of uniform experiments on this subject. It can be obtained from the Taber-Prang Art Co., Springfield, Mass., at 50¢ per copy, post paid; the order number is 1235, color print, 14½" × 16½". — Ed.]

picture? Take the person on your right: (5) Is he young, middle-aged, or old? (6) What is his posture, — sitting, standing, or lying down? (7) What is he doing? (8) What is his facial expression? (9) Is he bald or has he abundant hair? (10) What color is his hair? (11) Is he smooth-faced or has he a mustache or a beard? (12) What color is his beard? (13) Does his mustache conceal his mouth? (14) Does he wear eyeglasses or spectacles? (15) Has he a hat on? What kind? What color? (16) Where is his right hand? (17) Where is his left hand? (18) What color is his coat? (19) What color is his shirt? (20) Has he a collar on? (21) What color is his necktie? (22) What color is his vest? (23) What color are his trousers? (24) Does he wear slippers or shoes or boots? Take the person on your left: (25-44) Repeat questions 5-24. (45) What kind of light or lamp is used? (46) Where is it placed? (47) Where is the inkwell? (48) Is there not a pen in it? (49) What color is the dog? (50) Is there a table or a bench? (51) How long is it really? (52) What color is the tablecloth or covering? (53) Is the fringe of the same or a different color? (54) Name the objects on the table. (55) How many chairs are there in the room? (56) Is the rocking-chair on your left or your right? (57) Is there an umbrella? (58) Do you think it is jet-black or dark blue? (59) In what position is it? (60) Name the objects in front of the table on the floor. (61) Is there a satchel or dress-suit case in the room? Which? (62) Is it open or shut? (63) What do the pictures on the wall represent? (64) How many windows are visible? (65) Can you see any detail of outdoor scenery through them? (66) How many hats are there in the room? (67) Describe and locate them. (68) Can you recall the time indicated by the clock on the wall? (69) What object is on your extreme right? (70) Are there any books in this part of the room? (71) What color is the wall? (72) Where is the newspaper? (73) How long did you see the picture? . . .

*Typical Results.* The following narrative by a college senior, a man of varied experience, mature, much traveled, and well trained, though of mediocre native ability, shows clearly the tendency of an adult S to describe a situation, a meaningful whole, rather than merely to enumerate details, as do many children. Indeed the detail here is distinctly subordinated to the interpretative rendering. The *narrative* tells what the picture is about rather than what it is. "The picture, about 10×10 inches, represents a scene that would be typical of a rural justice of the peace and a man who has come to ask his advice on some subject. The justice sits before his desk, an old manuscript before him, one hand on his head as if he had not yet given his decision. The office is filled with books and on one of them in the left of the picture rests his top hat. The visitor seems to be troubled very much. His clothing denotes that he is of a different station in life. He has placed his carpetbag on the floor and his hat near it, as a sign of great mental strain, which seems to increase as he awaits the decision. On the wall to the right is a double map of the world, showing, perhaps, that the justice is a man of wisdom and a source of information to his neighbors. The room, furniture, the manner of dress would have denoted a time long before ours. The men seem to be about 65 or 70 years of age."

In his *deposition*, this student rendered an unusually full list of answers: the reply — "I don't know" — is given only twice (Questions 34 and 72).

The range of report is, therefore, large, but the fidelity is relatively small, since the following erroneous statements appear (those italicized are attested statements): "The picture is 14×14 inches. The man on the right is *bald*, wears spectacles, has his right hand on a paper, wears a collar, a *purple tie*, black trousers, and slippers. The man on the left is thinking hard, has a troubled expression, wears a sandy mustache: he has his right hand in his pocket, *his left on his knee*: he wears a light-colored vest and brown trousers. The room is lighted by a candle which stands on the pile of books. There is a pen in the inkwell. The table is fourteen feet long, has a light-colored cloth top *with fringe of a different color*. There are three chairs in the room, the rocker being at the left. *The umbrella is dark blue in color and lies on the floor*. There is a coat on the floor in front of the table; there is a basket on the table. *The satchel is shut*. *One window is visible*. There is a chair at the extreme right of the picture. The wall is white. (The cuspidor and the newspaper are not recalled.)"

*General Results of Tests of Report.* (1) *Accuracy.* The chief single result of the "Aussage" psychology is that an errorless report is not the rule, but the exception, even when the report is made by a competent S under favorable conditions. Thus in 240 reports, Miss Borst found only 2 per cent errorless narratives and 0.5 per cent errorless depositions. The average S, when no suggestive questions are employed, exhibits a coefficient of accuracy of approximately 75 per cent. (2) *Range and accuracy.* There is no general relation of range to accuracy, though, for a given S, it is doubtless true that there is an inverse relation between these two coefficients.<sup>1</sup> . . . (4) *Accuracy and attestation.* Generally speaking, attestation does not guarantee accuracy: on the contrary, though the number of errors is nearly twice as great in unsworn as in sworn testimony (according to Stern, 1.82 times, according to Borst, 1.89 times as great), there still remains as high as 10 per cent error in sworn testimony. These relations are shown clearly in Table 44. (5) *Dependence on sex.* In all of Stern's work, both in narratives and depositions, with pictures, or events, or estimations of times and distances, whether under oath or not, the reports of men have been more accurate (by from 20 to 33 per cent), though less extended, than those of women, and a similar sex difference has appeared in tests of school children. This superior accuracy of boys becomes more evident when the report is difficult to make. Stern's conclusions have, however, been criticized by both Wreschner and Miss Borst. Wreschner found that among adults women did better than men. Miss Borst likewise found women superior to men in accuracy and range, but inspection of her results shows that the superiority of women consisted in the fact that they returned a larger number of correct statements, and that the men did not make less accurate statements in their more limited reports. (6) *Dependence on age.* The reports of children are in every way inferior to those of adults: the range is small, the inaccuracy large, and, since the assurance is high, the warranted assurance and reliability of assurance are both very low. During the ages 7 to 18 years, the range, especially the range of knowledge, increases as much as 50 per cent, but the accuracy,

<sup>1</sup> The reason for this lack of general relation between range and accuracy is presumably that there are two kinds of good witnesses — the one possesses good capacity of observation, recall and report, and hence exhibits a large range and a high degree of accuracy; the other is cautious, and therefore restricts his range, which may be poor at best.

save in the deposition, does not increase as rapidly (20 per cent). This development of capacity to report is not continuous, but is characterized by rapid modification at the age of puberty. The one factor that more than any other is responsible for the poor reports of children is their excessive suggestibility, especially in the years before puberty. (7) *Dependence on intelligence*. We have as yet no conclusive experiments upon the relation between accuracy of report and general intelligence. (8) *Defectives*. The reports of defectives, paralytics, epileptics, the insane, etc., show, as one might expect, a very high degree of inaccuracy, even when the pathological condition is not seriously developed. Such persons are also highly suggestible (de Placzek). (9) *Dependence on time interval*. Lengthening of the time interval between experience and report exerts, as one might expect, a generally unfavorable influence, but there is nothing like the loss in efficiency shown in curves of memory for nonsense syllables, as in the familiar tests of Ebbinghaus: indeed, for some S's the report seems to be somewhat improved after several days have elapsed, and, in general, the conditions are so complex as to demand further special investigation. (10) *Dependence on contents or features*. Not all the features of the original experience are reported with the same frequency or with the same accuracy: there is rather a process of selection, both in the process of observation, and also, probably in memory and in the formulation of the report. In general, we may say, that persons and their acts, objects, things, and spatial relations are reported with considerable accuracy (85-90 per cent), whereas secondary features, especially quantities and colors, are reported with considerable inaccuracy (reports on color have an error of from 40 to 50 per cent).<sup>1</sup> . . . (13) *Dependence on the ideational type of the reporter*. The best reports are given by observers of a mixed ideational type, e.g. acoustic motor or visual motor (Borst): even in a picture test, the purely visual-minded observer is inferior, though less open to suggestion (Lobsien). A characteristic analysis of reports, for the purpose of classifying reporters into ideational types has been given in the description-of-an-object test (No. 31), in which Binet distinguishes four types of reporter — the observer, the describer, the emotionally minded, and the erudite. . . . (14) *The effect of repeating a report*. When S is called upon to make his report several times, the effect of this repetition is complex, for (a) it tends in part to establish in mind the items reported, whether they be true or false, and (b) it tends also to induce some departure in the later reports, because these are based more upon the memory of the verbal statements of the earlier reports than upon the original experience itself, i.e. the later reports undergo distortion on account of the flexibility of verbal expression. (15) *The effect of practice*. Simple practice in reporting, even without special training or conscious effort to improve, facilitates and betters the report, as is shown in Table 47, from Miss Borst. It will be noted that the tendency to attestation and oath are both particularly improved by practice, and that there is also an appreciable improvement in range, accuracy, warranted assurance, and reliability of assurance, whereas assurance and accuracy of assurance are scarcely affected. Similar practice effects may be discerned in the deposition. From these results, it is clear that the several coefficients of report may vary more or less independently.

<sup>1</sup> [For the summaries here numbered 11 and 12, dealing with the effect of suggestive interrogatories, see *ante*, No. 257. — Ed.]

291. **KANSAS UNIVERSITY EXPERIMENT.** (WM. A. M'KEEVER. *Psychology in relation to Testimony.* Kansas Bar Association Proceedings. 1911. p. 113.)

As a means of testing the actual worth of eyewitnesses to a tragic act, I recently planned to stage a little drama of one act in the presence of a class of twenty-five junior and senior psychology students. It was arranged that at a given moment, without any warning to the members of the class, three men should burst into the room and go through the movements of a "holdup," of a running fight. The act had been carefully rehearsed under my personal direction, and I am satisfied that each actor carried out his part very accurately. The parts enacted and the personal "makeup" of each one was carefully recorded in a notebook.

The participants in the act rushed into the room to a distance of 25 or 30 feet, then, pausing for a moment, ran out. Jones, the first to enter, was to have the appearance of being hotly pursued by Smith and White. As they left the room the pursuers changed the order of their places. While all were, of course, acting at the same time, each of the three and the instructor as well had time to recite his oral part in succession. After the players had left the room I turned immediately to the class, the most of whom were visibly ex-

cited, and enjoined silence while the paper was passed and their written testimonies were asked for under the headings given below. From the twenty-five papers I copied verbatim the many inaccuracies given in the accounts printed with this. The correct statements were much fewer than the incorrect ones.

In an actual criminal trial the testimony would perhaps be most unfair and damaging in the case of Smith. Although entirely unarmed, and inoffensive in his statements, yet three witnesses testified that he carried a revolver, snapped it several times at Jones, or that he cried, "Stop, or I'll shoot!" White, on the other hand, who carried a revolver minus the cylinder, was little noticed. There was even more confusion of the testimony as to the wearing apparel of the participants, as is clearly indicated.

Whatever may be said as to the results of this little experiment, it is my opinion that it represented very satisfactorily a true and natural situation, and that the testimonies of the eyewitnesses were no less and no more accurate than if the scene had been enacted upon the stage of real life.

#### VARIATIONS OF THE STUDENTS' TESTIMONY

##### *Jones' Appearance*

Tall man; hat on; black mask over eyes, nose, and mouth; gray raincoat; salt bag half full of nails in left hand; small monkey wrench in right hand; streak of red paint across left cheek.

##### *Testimony*

- 1 Black coat; light-colored mask.
- 2 Red mask; cheeks painted red.
- 3 Black coat; mouth painted red.
- 4 Carried pistol.
- 5 Cheeks more than natural redness; club in his hand; dark suit.
- 6 Dark suit.
- 7 Dark suit.
- 8 Black clothes.
- 9 Red mask on; black clothes.
- 10 Hatless.
- 11 Dressed in blue suit and handkerchief around his neck. Medium sized; bare-headed.
- 12 Red mask.

*Jones' Conduct*

Rushed in ahead, turned inside of door, pointed wrench at pursuers, and exclaimed, "Stay back, or I'll shoot!" Ran across room, fell to knees, dropped bag, saying, "There it is, take it!" and rushed out.

*Smith's Appearance*

Medium size and weight; wore hat and black coat borrowed from White.

*Smith's Conduct*

Rushed in close after Jones, exclaimed, "Give it up, you scoundrel!" Grabbed bag which Jones dropped, and ran out behind other

*White's Appearance*

Short and stout; wore cap and blue serge coat, borrowed from Smith. Came in third.

*White's Conduct*

Came in last, went out second; carried small revolver with cylinder removed. Yelled, "Take it from him, Eddie; he won't hurt you!"

*Testimony*

- 1 Pointed his finger at Smith; said, "Get out of here, Ed."
- 2 The whole class was paralyzed with fear, says a witness.
- 3 Pointed a revolver.
- 4 Pointed imaginary pistol and said, "I dare you to come further."
- 5 The other jerked him up and started him toward the door.
- 6 Pointed heavy object at others as he went out.
- 7 Came in after the others. (I was too afraid to look up.)
- 8 Held a revolver in hand; wore dark suit. (Witness recognized Jones.)
- 9 Had something like a revolver.

*Testimony*

- 1 Wore a gray suit.
- 2 Husky six-footer.
- 3 Dark gray suit.
- 4 Bare-headed.
- 5 Blue suit on.

*Testimony*

- 1 Carried pistol and snapped it several times.
- 2 Came in last, went out second, said, "Get out of here!"
- 3 Carried pistol, snapped it several times, cried, "Stop, or I'll shoot!" aiming at Jones.
- 4 Dropped umbrella on floor.
- 5 A witness, "So excited I didn't know what it was."
- 6 Snapped gun.
- 7 Came in last, stayed behind; "Catch that man!" he yelled.

*Testimony*

- 1 Dark suit and raincoat.
- 2 Bareheaded.
- 3 (Was scarcely observed by any of the witnesses.)

*Testimony*

- 1 Had a club of some kind.
- 2 Yelled, "Get out of here!"

*Instructor's Appearance and Conduct*

Probably showed some agitation; rose from chair and exclaimed, "Men, what are you up to here?"

*Testimony*

- 1 Looked very much astonished; said, "What's all this?"
- 2 Said, "What does all this mean?"
- 3 Said, "Here!"
- 4 Said, "Here, what's going on here?"
- 5 Showed signs of great surprise and said, "Well!" (Witness was rather frightened.)
- 6 Grew pale, said, "Here!"
- 7 Said, "Who are those men?"
- 8 Seemed badly scared.
- 9 Looked scared.

292. ARNO GUNTHER. *A Dramatic Incident as reported by Witnesses and Reconstructed by a Jury.* (Beiträge zur Psychologie der Aussage. 2d Series, 1905-1906, pt. 4, p. 33.)

[In March, 1905, the author conducted a testimonial experiment. The scene was a lecture room, where on Sunday a lecture was being delivered. Ten persons, four men and six women, were present, but with no warning that any testimony was expected. The testimony was taken down on the succeeding Friday and Saturday, with certain precautions designed to make the proceeding a fair test of their accuracy in reporting an incident not known to them at the time of its occurrence to be the subject of future investigations, nor at the time of their testimony to be a mere experiment.

The incident began with the entry of a man into the lecture room; and the various features of the incident were subdivided into points, as follows: (1) The time was 3.45 P.M. (2) The man was medium height, medium large. (3) His hair was brown. (4) He had a small brown mustache, no beard. (5) He wore glasses, *i.e.* spectacles. (6) He had on an overcoat, of black cloth, and buttoned. (7) He had on a dark suit. (8) A soft hat, dark brown. (9) No gloves. (10) In his hands he carried cane, hat, and a letter; the cane was brown, with a black handle. (11) His cravat was dark red. (12) The man was

21½ years old. (13) On entering he did not knock. (14) After entering, he said: "Excuse me, Mr. G, may I speak with you a moment?" (15) Mr. G replied, "Certainly. Come in." (16) The visitor stepped forward and handed a letter, (17) saying, "I have here a letter to be handed to you." (18) Mr. G was standing at his desk, (19) and replied, "Thank you. Won't you sit down?" but the visitor did not do so. (20) Mr. G then perused the letter, (21) with some emotion, (22) first saying, "Excuse me a moment." (23) The visitor meanwhile carelessly turned over the leaves of some books lying on the table. (24) There were 6 books. (25) The visitor asked Mr. G, during his perusal, "May I look at these books more particularly?" and Mr. G replied, "Certainly"; whereon the visitor sat down and read in the books (26) Mr. G, after perusing the letter, proceeded fruitlessly to stick it into his pocket, and finally placed it on the desk. (27) He then continued the delivery of his lecture. (28) The visitor then turned, and said, "May I take this" (holding up a book) "into the next room?" Mr. G consenting, the visitor went out, (29) carrying his hat, his cane, and

2 books; one of them was red, the other blue. The visitor did not stop in the next room. (30) The whole incident occupied 3 minutes.

On the basis of points, a valuation was made of testimonial correctness and of verdict correctness. The accounts are here much abbreviated for the former.]

I. *Testimonial Correctness.* (1) *Description of the visitor's person.* The average correctness of the testimony was 80.6 per cent; for the men, 84.2 per cent; for the women, 76 per cent. The best single testimony reached 100 per cent, by a man; the best by a woman was 90.5 per cent. The poorest by a woman was 37.5 per cent; by a man 73.3 per cent. . . .

(2) *Description of the action of the parties.* The average correctness of the testimony was 79.7 per cent; for the men, 80.8 per cent; for the women, 78.9 per cent. The best single testimony reached 96.2 per cent, by a woman; the best by a man was 85.7 per cent. The poorest by a woman was 60 per cent; by a man, 71 per cent.

(3) Thus the averages for the whole incident were: men, 81.8 per cent; women, 78.4 per cent; total persons, 79.9 per cent. The best single testimony averaged: a man, 87.8 per cent; a woman, 94.6 per cent. The poorest averaged: a man, 77.5 per cent; a woman, 58.7 per cent. . . .

II. *Verdict Correctness.* The written testimonial reports were submitted separately to T, a lawyer, and D, an assistant judge, with the request to make special findings on the facts of the incident as therein disclosed. Their finding was valued by the same system of points used in valuing the testimony. The result was as follows: . . .

(1) *Description of the visitor's person.* It is pleasing to note that, in spite of the great differences of correctness in the individual testimonies, a correct finding was made. Both jurors made a finding 100 per

cent correct (though the average for the testimony was only 80.6 per cent). . . .

(2) *Description of the action of the parties.* Here the finding of T was 86.5 per cent correct, and that of D 82.4 correct (the witnesses averaging only 79.7 per cent).

T's narrative reconstruction was as follows: "The visitor, who exhibited some restlessness, handed to the lecturer a sealed letter, with some such remark as 'Excuse me.' The lecturer opened the letter and read it, exhibiting some marks of emotion. The lecturer had risen from his chair and stood in front of it while reading, and then stuck the letter in his pocket and continued his lecture; the statement of one of the witnesses that the lecturer laid the letter on his desk is contradicted by the other witnesses and appears to be an error. The visitor took a seat without further remark, and the lecturer while reading the letter stood at a table to the left of the desk. On the table were some books (how many the witnesses do not agree), of which the visitor turned the leaves. He then asked the lecturer's permission to take one of the books, and went off after getting this permission. Whether he took one or two books was not clearly proved." Here we observe an error of half a point in finding "Excuse me" as the visitor's second remark. The actual words were: "I have here a letter to be handed to you." How T could make such a finding is inexplicable; for five of the witnesses testified that the visitor said nothing, four that they did not know whether he said anything, and one that he had said something which the witness could not recall. T's second error is interesting, in that he refused to trust the one witness who was right in saying that the lecturer placed the letter on the table. On the most important item in the whole experiment, viz. how many books the visitor took off with him, T's report is that the



visitor asked permission for one book only, but that the number actually taken is doubtful. Yet a comparison of the testimonies reveals the curious fact that there was no basis for this discrimination on his part; the witnesses differed no less radically on the one item than on the other. . . .

D's narrative reconstruction was as follows: "The visitor knocked, entered, and asked if he might speak with Mr. X. The lecturer said that he was that person; whereon the visitor entered and handed over the letter. The lecturer took it, cut it open, and read it, after asking the audience to excuse him and requesting the visitor to take a seat. The visitor remained standing a moment, then approached the table, on which lay 4 books, and asked if he might look at them; and on being told 'Certainly,' he sat down at the table and turned over the pages. The lecturer meanwhile read the letter, glancing occasionally at the visitor. While reading, the lecturer was noticeably pale. After finishing its perusal, he stuck it in his pocket and went on with the lecture. The visitor continued reading a short while; then he asked permission to take away to the next room two books, which he had been

looking at. Permission was granted, and the visitor then went out, carrying his cane and the two books." D reports that the visitor knocked before entering; here he was incorrect, but followed the majority of the testimonies. A more important point is his finding that the visitor asked "if he might speak with Mr. X." The actual words were: "Excuse me, Mr. G, may I speak with you a moment?" . . . This part of D's finding, covering both remarks of the visitor, was debited with two errors. . . . D also erroneously found that the lecturer put the letter, after reading it, into his pocket. Moreover, he makes the error of finding that the visitor, not only took off, but asked consent to take, *two* books.

(3) On the *whole incident*, the percentage of correctness for T's finding was 90.6 (24 correct points, and 2½ incorrect), and for D's finding 87.4 (41½ correct and 6 incorrect); the two averaging 88.5. The average correctness of the testimonies, 79.9 per cent, was thus 10.7 per cent below T, and 7.5 per cent below D. Put in another way, the average percentage of error in the testimonies was about twice as great as in the findings. . . .

### 293. NORTHWESTERN UNIVERSITY EXPERIMENTS. TESTIMONIAL AND VERDICT EXPERIMENTS AT NORTHWESTERN UNIVERSITY LAW SCHOOL. 1905, 1911.<sup>1</sup>

*April 11, 1905. A. The Dramatic Incident as agreed upon beforehand.* [The scene is an ordinary lecture room, about 30' × 60', having 10 rows of narrow note-tables, with 2 seats at each; there are in each row 4 tables, each 3' long, with 2 aisles between. The floor is tiered, rising 10' at the back. The four student participants sit near together in the 7th and 8th rows. The lecturer is on a small raised

platform at the front. About 60 students are in the class.] The lecturer will open the lecture by saying: "Mr. Candee, please state the case of *Smith v. Jones*." Mr. Candee will say nothing; but Mr. Brothers will slowly and promptly say, "Mr. Stowe is a cad, and I can prove it." Mr. Stowe will then rise and shout, "That is an insult, and I shall here resent it." Then Mr. Candee will strike the table

<sup>1</sup> [These experiments are not supposed to have any scientific value; but are here printed, for lack of better material, to illustrate the possibilities of correction of testimonial errors in the verdict. — Ed.]

with two sticks, immediately and very loud. Mr. Dickinson will then promptly rise, turn, and throw a book at the door of Mr. Woodward's office, next south of the lecture room; immediately Mr. Brothers will start forward across the benches to grapple with Mr. Stowe. Mr. Candee will try to hold back Mr. Brothers, Mr. Stowe will start towards Mr. Brothers, and Mr. Dickinson will try to hold back Mr. Stowe. Messrs. Stowe and Brothers will not touch. All will make as much noise as possible. In the meantime Mr. Crossley, in Mr. Woodward's room at the rear of the lecture room, will break a piece of glass, enter the lecture room from Mr. Woodward's door, and exclaim, "Who broke my window?" Then the lecturer will pound on the desk with a stick; and all will stop.

*B. The Testimony.* [Immediately an adjournment took place to the school court room; a jury of six was in waiting, selected from members of other law classes. Thirteen witnesses were arbitrarily selected from those present at the drama. The following questions were put to each:

1. What was the first incident?
2. Who spoke first?
3. What did he say?
4. Who spoke next?
5. What did he say?
6. Who first used any weapon or missile, and of what sort?
7. Who was struck or assailed with it?
8. Who else participated, and what did he do?
9. Who else was struck or injured by any one?

The stenographic report of the answers was as follows:]

*Answers.*

*First Witness, Mr. Krause* (who sat four or five rows in front of the actors).

1. I turned around and saw Mr. Brothers on top of two other gentlemen.
2. I don't remember, I could not distinguish whose voice it was. I heard somebody hallo "Scab."

3. I don't remember.
4. I don't remember.
5. I don't remember.
6. I did not see any weapon.
7. I did not see anybody.
8. When the noise was at its height, I saw Mr. Crossley put his head through the rear door.
9. I don't know.

*Second Witness, Mr. Thomason.*

1. I turned round and saw Mr. Candee move towards Mr. Stowe and Mr. Dickinson.
2. Mr. Candee.
3. Mr. Stowe is a cad and I can prove it.
4. I don't know.
5. I don't know.
6. I didn't see any.
7. I didn't see any.
8. I saw Mr. Crossley, and heard, at the same time I saw him, the crash of some glass.
9. I did not see any one else.

*Third Witness, Mr. Moore* (who sat about two rows in front and to the right of the actors).

1. I looked back of me and saw Mr. Candee, who seemed to be holding some one. They had their arms around each other. I think Mr. Brothers was one.
2. I don't know.
3. Mr. Somebody is a cad and I can prove it; but I did not hear the name.
4. I don't know.
5. I don't know.
6. I didn't see any weapon.
7. I don't know.
8. My attention was called to the front of the room, and I did not see anything else after that.
9. I don't know.

*Fourth Witness, Mr. Gannon* (who sat straight in front of the actors).

1. I heard some noise and looked around, and several of the men were in a scuffle, and I heard a crash of glass.
2. I do not remember who spoke first.
3. I did not distinguish any speech.

4. I did not hear.
5. I did not hear.
6. I did not see any weapon or missile.

7. I did not see any.
8. I did not distinguish.
9. I did not distinguish.

*Fifth Witness*, Mr. Shultis (who was sitting the row in front).

1. I heard Mr. Wigmore state a certain case.

2. Mr. Candee.

3. Mr. Stowe, you are a cad and I can prove it.

4. No one spoke.

5. No one spoke.

6. The only weapon I could see was a stick in the hand of Mr. Wigmore.

7. The desk.

8. I saw Mr. Brothers, Mr. Stowe, and Mr. Candee in a scuffle.

9. I did not see any one struck.

*Sixth Witness*, Mr. Strause (who sat down in the front, about the 3d row).

1. I heard somebody speaking.

2. Mr. Brothers.

3. Mr. Stowe is a cad and I can prove it.

4. I didn't hear any one else.

5. I heard nothing.

6. I saw none.

7. I saw none.

8. I saw no one in connection with it until the affray was over. Then I saw Mr. Dickinson. I saw no one participating, when I saw him.

9. I saw Mr. Candee force Mr. Brothers down in the seat.

*Seventh Witness*, Mr. Nordhold (who was sitting four or five rows in front of the actors).

1. I saw Mr. Brothers.

2. I do not know who was the first one to speak.

3. Mr. Stowe is a cat.

4. I do not remember.

5. I do not know.

6. I do not know of any.

7. I do not know of any.

8. Mr. Candee was wrestling with Mr. Brothers. Mr. Stowe was among the rest of them. He came

towards Mr. Brothers, and that is all I saw.

9. I do not know of any one else being struck.

*Eighth Witness*, Mr. Anderson (who sat directly in front of the actors, in the very front row).

1. I saw Mr. Candee hold Mr. Brothers in his chair.

2. Mr. Candee spoke first.

3. Stowe is a cad.

4. I did not hear any one speak after that.

5. I heard nothing.

6. I did not see any one throw any missile.

7. I saw none.

8. The same instant I heard a crash and saw Mr. Crossley walking out of the back door.

9. I did not see any one else participating.

*Ninth Witness*, Mr. Milchrist (who sat in the same row with Mr. Stowe on the left, and one row in front of Mr. Candee and Mr. Brothers).

1. I heard Mr. Brothers say to Mr. Stowe, "You are a cad." Mr. Brothers had something in his hand. Mr. Stowe jumped up from his seat.

2. Mr. Brothers.

3. Mr. Stowe, you are a cad and I can prove it.

4. I saw Mr. Stowe get up.

5. I do not know.

6. I did not see any weapon or missile.

7. I saw none.

8. I saw Mr. Candee and Mr. Dickinson appear to be holding Mr. Brothers to keep him away from Mr. Stowe.

9. I did not see him do anything but jump up.

*Tenth Witness*, Mr. Haight (who sat about 15 feet from the actors, to the left and in front).

1. The first I saw was that Mr. Otjen and Mr. Brothers were standing up in the rear of the room.

2. Mr. Wigmore was the first one to speak.

3. Mr. Stowe, will you state the case of Smith v. Jones?

4. I am not positive, but I think Mr. Brothers did not.

5. Stowe is a cad.

6. I did not see any weapon or missile used and did not hear any, but I heard some glass fall.

7. I did not see any one struck or assailed.

8. I saw Mr. Candee and Mr. Stowe.

9. No one that I saw.

*Eleventh Witness*, Mr. Steinbrecher (who was sitting in the same row with Mr. Brothers, to the left across the aisle).

1. I heard Mr. Wigmore call on Mr. Candee for a case.

2. Then Mr. Brothers said, You are a cat.

3. As above.

4. I heard no one speak afterwards.

5. Nothing.

6. Mr. Dickinson jumped forward slightly, and it was a yellow brown book which Mr. Dickinson aimed at Mr. Brothers, and just at that moment there followed a crash.

7. No one was struck. I saw the book thrown, but did not see the result, until Mr. Crossley opened the door and said, "Who struck at my window?"

8. As above.

9. I saw no particular person struck or injured.

*Twelfth Witness*, Mr. Romans (who was sitting two rows ahead, next to the wall on the left).

1. I heard the declaration and immediately turned around.

2. Mr. Candee started to state his case.

3. I don't know.

4. Mr. Brothers.

5. He shook Mr. Stowe and said, Stowe, you are a cad.

6. I was impressed with the fact that Mr. Dickinson stuck a small parcel at Mr. Candee. I do not know whether it left his hand or not.

7. Mr. Candee.

8. I think I have named all the men I have seen in the fray.

9. Nobody.

*Thirteenth Witness*, Mr. Otjen (who was sitting directly in the rear of Mr. Stowe and to the right of Mr. Brothers).

1. The calling of the case from the chair.

2. Mr. Brothers.

3. He struck the desk in front of him, and said, "Mr Stowe, you are a cad and I can prove."

4. I could not distinguish anything next. There was a roar. Mr. Stowe made an exclamation. The roar came from Mr. Stowe. The exclamation was more like a roar.

5. I did not distinguish anything else.

6. Mr. Dickinson threw a book.

7. I don't think any one was struck. It was aimed at Mr. Candee, but did not strike any one.

8. I did not see it hit any one.

9. No one else was struck or injured.

*C. The Verdict of the Jury.* [The jurors then retired, without the stenographic report, and after deliberation, brought in the following verdict:] Mr. Wigmore called on Mr. Candee for a case. Mr. Brothers created a disturbance by rising and calling Mr. Stowe a cad, saying, "Mr. Stowe is a cad and I can prove it." Mr. Stowe started towards Mr. Brothers. Mr. Candee took hold of Mr. Brothers and tried to hold him down. Mr. Dickinson threw a book at Mr. Candee and missed him, and it lit near the window. There was a crash, as though the book went through the window, but it did not. Nobody was hit and nobody injured.

Mr. Crossley put his head in at the back door, and said, "Who threw at my window?" Mr. Wigmore struck the desk with a shingle. (Signed.)

C. W. Whitcomb, Foreman;  
Geo. A. Finley, C. C. Colton,  
Frederick Secord, J. A. Bugee, W.  
Capron, Jr.

*November, 1911. A. The Dramatic Incident agreed upon beforehand.* [Scene the same as before.] At 10.55 A.M., the lecture being in progress, Mr. Keedy enters the lecture room from the south door at the rear. The lecturer says "Stop" to Mr. Keedy, strikes a table twice with a ruler, and says: "I showed a cup of coffee, and then an examination broke loose. Why not give them poison?" He then sits down, but goes out after the others cease speaking. At the close of his speech, Mr. Grubb and Mr. Luther, students sitting in the second row from the front, rise and say together: "Gompers has geology. Where is the breed? Next time you will not throw a pistol at the bread." Charles Caldwell, the janitor, then enters from the side (east) door, walks up to Mr. Richie, sitting in the front row, taps him on the shoulder; Mr. Richie follows Charles out of the front (north) door. Mr. Grubb and Mr. Luther follow them out. The lecturer during this latter stage exclaims: "Do not give up the ship. Taft and Bryan forever." The class then adjourns to Hoyne Hall, at the lecturer's request.

*B. The Testimony.* [Immediately upon adjournment to the court room, a jury of six, made up from members of other classes, is in waiting. A stenographic report is taken of the answers to the following questions:

1. Who came in first?
2. What did he do?
3. What did he say?
4. What became of him?
5. Who was the second man to speak?
6. What did he say?
7. Who was the third man to speak?
8. What did he say?
9. What did Charlie do?
10. What did Charlie say?
11. What became of the second man?
12. What became of the third man?

13. What did Mr. Wigmore do?

The actors being all at the front of the room, except one who was at the extreme rear, the precise position of each witness was not noted. Six witnesses were arbitrarily selected from those present.]

*Answers.*

*G. Fowler.* — 1. I never saw any one enter.

2. Mr. Keedy rapped on the desk.

3. He said, "I would like a cup of coffee."

4. He sat down.

5. I do not know his name. He was a student.

6. His words were not audible to me.

7. I don't know.

8. I could not tell you.

9. He walked up and touched Mr. Richie.

10. He did not open his mouth.

11. He rushed toward the door.

12. I don't know.

13. He said to retire to Hoyne Hall.

*B. L. Goldberg.* — 1. I don't know.

2. I don't remember.

3. I am not sure. I don't remember.

4. I don't know.

5. Mr. Grubb.

6. I don't know.

7. Mr. Luther.

8. I don't know.

9. He walked in front of the desk, and went out other door.

10. I think he said nothing.

11. He walked out ahead of Charlie.

12. He did the same thing as Mr. Grubb.

13. He said to adjourn to Hoyne Hall.

*A. H. Marshall.* — 1. Mr. Keedy.

2. He jumped up and made several statements, to create a commotion.

3. I don't know.

4. I don't know.

5. Mr. Grubb.

6. "Coffee," "Toast," and "Outrage."

7. Mr. Luther.

8. I believe he said the same thing.

9. He entered by one door, and tapped a gentleman on the shoulder, and walked out of the room, and this gentleman followed him.

10. Nothing.

11. He walked out the north door.

12. He did the same as Mr. Grubb.

13. He was standing up, but said nothing.

*R. Fernald.* — 1. Mr. Keedy.

2. He made a racket with something.

3. Quite a few words I could not understand. Some were, "Examination papers." "Why not poison them?"

4. I don't know.

5. I don't remember his name.

6. "I protest. I protest," and other words.

7. I don't know his name.

8. He tried to follow directly after the first man, then continued in chorus to say the same thing.

9. He came into the east door, and walked along the front of the room, tapped a man in the front row, Mr. Richie, and he went out with him.

10. Nothing.

11. He went out the north door.

12. He went out the north door.

13. Nothing, except to appear surprised.

*N. S. Blumberg.* — 1. Mr. Keedy.

2. He slammed a book on a desk, and sat down in the last seat.

3. I could not get all he said, but I distinguished "examination papers" and "poison."

4. He sat down in the first chair in last row on left-hand side, near the door.

5. Mr. Grubb.

6. "I protest. I protest, the coffee spilled over the bread." I believe this is all he said.

7. Mr. Luther.

8. Both said the same thing, at the same time.

9. He walked in from east door, and placed his hand on the desk where Mr. Richie was sitting, and walked out, after Mr. Luther and Mr. Grubb, through the north door.

11. Mr. Grubb walked out by the north door.

12. Mr. Luther also walked out by the north door.

13. When Mr. Keedy came in Mr. Wigmore was astonished, and when Mr. Grubb and Mr. Luther spoke, he said "This is an outrage."

*T. M. McKinney.* — 1. Mr. Keedy.

2. He slammed something which I could not see on the desk; evidently lifted a chair and placed it down rather abruptly.

3. I distinguished the word "poison."

4. He immediately left the room, back through the north door.

5. Mr. Grubb.

6. "Gompers has geology. Where is the thread (or bread)." Something relative, I think, to a pistol.

7. Mr. Luther.

8. I do not know.

9. He simply walked in the east door, and tapping Mr. Richie on shoulder, Mr. R. followed him out of the room, through north door.

10. Nothing.

11. I don't recall.

12. I don't recall.

13. He stood there and gazed on. Said "this is a most extraordinary proceeding."

*C. The Verdict.* [The jurors immediately retired and deliberated, without the stenographic report. They brought in a verdict in the form of answers to the specific questions put to the witnesses; as follows:]

1. Mr. Keedy, through the south door.

2. He slammed a book on the desk, and made a noise with a chair.

3. Examination papers. Why not poison then ?
4. He sat down in a chair at the rear of the room, in the last row center section nearest the left aisle.
5. Mr. Grubb.
6. I protest, I protest; the coffee spilled over the bread.
7. Mr. Luther.
8. The same as Mr. Grubb.
9. He came in by the east door, tapped Mr. Richie on the shoulder, and walked out by the north door, followed by Mr. Richie.
10. Charlie walked out at the north door, followed by Mr. Richie. See answer to No. 9.
11. He walked out at the north door.
12. He walked out at the north door.
13. He seemed astonished, and said, "This is an outrage."

294. JOHN H. WIGMORE. *The Psychology of Testimony*. (1909. Illinois Law Review. III, 426.) . . . The question has been asked whether the alleged percentages of testimonial error, as found in the laboratory experiments, do really, in trials, produce misleading results in the verdicts. The way to answer this is to include a jury (or judge of facts) in the experiment, and observe whether the findings of fact follow the testimonial errors or whether they succeed in avoiding them and in reaching the actual facts. In some of the experiments this method has been used, and the results are enlightening. For example, in Radbruch's experiment at Heidelberg (the subject being a dialogue of two persons L and E, about a telegram, with nine witnesses), one of the judges made two errors of finding — that L did not take his hat off, and that E had not reproved L for omitting to knock on the door — while the other judge "gave a finding substantially without error — which was not the case with the witnesses on whom he relied." Again, in Zavadski's experiment, "The findings were much more harmonious than the testimony; they unanimously avoided the grossest errors of the witness; and their average error, 20.6 per cent, was not so high as the witnesses' average, 27 per cent; . . . moreover, they all picked out the very same witness as the most trustworthy, and this witness was in fact the best one." Again in Detmold's experiment, he found that "in spite of the numerous omissions and errors in the testimony, it is possible by comparison of a number of them to put together a correct picture of the occurrence, at least in its essentials." And finally, in Gunther's experiment, he reports, "It is very satisfactory to note that, in the identification of the person charged, in spite of the great inconsistencies of the testimony, the correct result was found; for both findings were 100 per cent correct, though the average correctness of the witnesses was only 80.6 per cent. . . . The average for correctness of the entire finding was 90.6 per cent for one judge, and 87.4 per cent for the other, though the average of correctness for the witnesses was only 79.9 per cent." Is it not safe to say that neither the absolute nor the relative inefficiency or untrustworthiness of a jury's or judge's finding of fact ought to be positively asserted until after an extended series of experiments in which such a finding has been included ?

The few such experiments hitherto made give some ground for assuming that the testimonial errors, as detected in the experiments, are to a greater or less extent without influence on the verdict.

**TITLE III (continued): TESTIMONIAL INTERPRETATION**

**SUBTITLE B: EXTENT AND SOURCES OF ERROR AS INDICATED  
BY SOME COMMON TESTIMONIAL INCIDENTS**

**Topic 1. Defective Basis of Perception**

296. **ELIZABETH CANNING'S TRIAL.** (1754. *HOWELL'S State Trials*. XIX, 576.)

[One of the facts in issue was whether the woman Squires, alleged to have kidnaped Canning and imprisoned her near London, was at the very time more than a hundred miles distant, at Enfield. Canning is here tried for perjury in having accused Squires of the kidnaping.]

*Hannah Fensham* sworn [for the prosecution.]

*Mr. Williams*. — Where do you live? — I live at Enfield.

Are you a married woman? — I am; my husband's name is John Fensham; he is a gardener.

How long have you lived at Enfield? — Fifteen or sixteen years.

Look at that old woman, take a full view of her. — I know her; I have seen her before.

When? — On the 16th of January, 1753, I mean after New Christmas-day, I saw her in Trotts-walk, on the side of Madam Crow's garden, in Enfield, pretty near the highway.

What was she doing? — I met her in the walk.

What time of the day? — In the fore part of the day.

What day of the week? — I can't recollect what day of the week. . . .

Did you see her often between the 16th of January and 1st of February? — I did divers times.

Did you see her after she was taken up? — I did in Newgate, and I recollected her then.

Look at her again; are you certain this is the same person? — Yes, Sir, I am certain of that.

What may be your reason for recollecting the 16th of January? — There was a snow on the 15th at night, and the 16th it was wet; and walking along, I had like to have fell, as my pattens were on; she stopped and looked at me, and I at her; when I came home, my neighbors said, this snow is come in the right season, yesterday was the 15th; then I said, this must be the 16th; and not only that, but I went to the almanac, and looked that very day.

Did she speak to you? — No, nor I to her; but her person is so particular, that I can swear she is the same.

What did she appear to be? — A gypsy, which I had heard of before; I was asked, if I had seen the gypsy, because she went up and down telling fortunes. . . .

By *Mr. Willes* [for the defense].

Did you look directly to the almanac? — No, Sir, not till the 16th at night.

Are you very well skilled in almanacs? — Why not? I can read and write a little.

Do you know what day of the week it is by the almanac? — I can, I think so; my head is good enough for that.

Look in this almanac, and tell me what day of the week it is? —



(She takes it in her hand, which was a common sheet almanac, folded up into a book.) I can't see by this, it is so small.

Look at it again, and take your time. — I cannot see without my spectacles (she puts them on); you shall not fool me so.

Tell me by this the day of the week for the 14th of December. — This is not such an almanac as I look in; I look in a sheet almanac; I cannot tell by this.

Give it me again, if you cannot tell. All the reason you have to

fix it is, that the snow fell on that day upon which you refer to your almanac; and now you have shown your skill in almanacs.

By Mr. Williams —

How long was it after New Christmas? Was it a fortnight, or three weeks, or a month? — It was not much above a fortnight after.

Do you know which is Sunday in the almanac? (She takes it again.) Look in the month of January. (She tells down from the 1st to the 7th day, and said that was Sunday, which happened to be Tuesday.)

297. **HEATH'S TRIAL.** (1774. HOWELL'S *State Trials*. XVIII, 65.)...

[Mrs. Cole had testified to the presence of Mrs. Heath, another witness, on an important occasion;] cross-examined: "Madam, do you remember that Mrs. Heath came to awaken your mother?" "I do remember that she came." — "Was there a light in the room?" "There was not." — "Had Mrs. Heath a light with her?" "She might have had a candle in her hand." — "Was there light or not?" "There was

not; I believe there might be a fire." — "Had she a candle in her hand?" "Indeed, I cannot tell." . . . — "The reason of the question is this; look at that woman; will you swear positively that that is the woman that came into the room to call your mother?" "Mrs. Heath was the person, and I believe that is the same." — "How can you tell it was her when there was no light?" "I knew her voice."

298. **BROOK'S CASE.** (W. WILLS. *Circumstantial Evidence*. Amer. ed. 1905. p. 160.)

In a case of burglary before the Special Commission at York, January, 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash near his face, and enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-colored topcoat and a dark-colored handkerchief, and was a large man, from which circumstances and from his voice, he believed the prisoner to be the same man. (*Rex v. Brook*, 31 St. Tr. 1135, 1137.) But see "Traité de la Preuve," par Desquiron, 274, where it is stated that after the condemnation of a man for murder, on the testimony of two witnesses, who deposed that

they recognized him by the light from the discharge of a gun, experiments were made, from which it appeared that such recognition was impossible.

The late learned Recorder of Birmingham (M. D. Hill, Esq., Q.C.) gave the Editor the particulars of a remarkable case, in which he was retained as counsel for a prisoner accused of shooting at a young woman, and in which the intended victim was prepared to swear that she recognized the prisoner by the flash of the gun which was fired at her. The trial, which was to have taken place at the Derby Spring Assizes, 1840, was prevented by the suicide of the prisoner, after the business of the Assizes had begun; but Mr. Hill was present at a series

of experiments made with a view to test the possibility of the alleged recognition, and the conclusion he drew was "that all stories of recognition from the flash of gun or pistol must be founded upon a fallacy." There were many circumstances in the case calculated to produce a strong impression on the young woman's mind that the prisoner was her assailant, and she doubtless mistook the impression

so created for ocular demonstration. On the other hand, it is asserted in Taylor's "Medical Jurisprudence" (4th ed. 1894, Vol. I, p. 729) that from information which the author was able to collect on this point, there appears to be no doubt that an assailant may be thus occasionally identified. No doubt it depends largely upon the quickness of individual sight.

299. **CAL ARMSTRONG'S CASE.** [Printed *post*, as No. 339.]

300. **THE BEER-WAGON CASE.** (AMOS C. MILLER. *Examination of Witnesses.* Illinois Law Review. 1907. Vol. II, p. 247.)

I remember two cases in my own experience, both of which have always been very interesting to me, as they illustrate how easy it is for one to be mistaken as to the real facts in a case which he has studied well. The first one was a personal injury suit where a boy about twelve years of age was suing for the loss of a leg, claiming to have been carelessly run down by the driver of a brewer's wagon while crossing South Halstead street upon a crosswalk. In preparing the defense of this case I several times talked with the driver of the wagon which was alleged to have caused the injury. He appeared perfectly honest, but insisted that he knew nothing of the accident, and that he did not run over anybody. He was a purely negative witness, and in the presence of anything like a strong array of positive evidence, his testimony would manifestly amount to nothing. Just before the trial, he came in with a new idea; our evidence showed that the accident had happened at 3.30 P.M. on the 17th of December, 1896, one of the shortest days of the year. This driver said that he had discovered and could prove by other witnesses in the employ of the defendant that while he ordinarily passed the point of the accident at 3.30 o'clock P.M., on this particular day he went to a

funeral and left the brewery an hour late, which brought him to the point of the accident at 4.30 P.M., an hour after the accident. I replied, "Then your story is that on 364 days of that year you passed the point of the accident at the hour of the accident, but on the 365th day you passed there an hour later." He said that was right. I did not believe it; and my fear that we were in the wrong was strengthened by this apparent willingness of the person charged with the delinquency to put forward an unbelievable story; and I went into the trial not very hopeful.

What then was my surprise to hear the plaintiff's counsel, an able and well-known trial lawyer, state to the jury in his opening statement that he would prove that the accident happened at 4.30 P.M. That he would show out of the mouths of the defendant's witnesses that this driver, while he ordinarily passed that point at 3.30 P.M. was late and did not get there until 4.30 P.M. As a matter of fact, that driver had told me the truth, and the plaintiff's counsel by a careful investigation had learned that it was the truth, and had therefore shaped his other testimony to meet it.

I lost no time in shifting my own course to suit this sudden develop-

ment. As luck would have it, this trial began on the 15th of December, 1899, three years after the accident, lacking two days. In my opening statement I said nothing about the time of the accident; but in cross-examining the large number of plaintiff's witnesses I incidentally brought out the fact that it was broad daylight at the time of the accident and for more than a half-hour thereafter, and that the witnesses had read the name upon the wagon and the number of the telephone, and had recognized the driver when the wagon was almost a block away. The plaintiff's counsel put upon the stand the driver of the wagon, and showed by him that he had left the brewery an hour late.

On the 17th day of December at 4.30 o'clock, just three years to a minute from the time the defendant's wagon was at the scene of the accident, I arose and interrupted the proceedings and called the attention of the court and the jury to the clock upon the wall recording the hour of 4.30, and then to the looks of things outdoors. Every one, of course, looked out of the windows. The sun had set long since, a heavy snow was falling, and it was as dark as the blackest midnight.

The facts were so clear that there was scarcely room for argument. The boy *had* been run over, by a wagon, but *not* by *our* wagon, and the driver had been telling me the exact truth.

301. **THE BOTTOMRY BOND CASE.** (Boston "Transcript," July 15, 1910; reprinted from the "National Magazine.")

The master of a vessel in a port in the Gulf of Mexico being in need of money borrowed it and to secure its repayment executed what is called a bottomry bond. By this bond it was agreed that if the money was not paid within so many days after the vessel arrived at New York proceedings might be taken to have the vessel sold and the debt paid out of the proceeds. The money was not paid and I was retained to enforce the bond and began a suit. Some one interested in the vessel appeared in the suit and denied that the bond had been executed by the master, as had been alleged.

It became necessary to take the testimony on this point of a sailor whose name was subscribed to the bond as having witnessed its execution. In answer to my questions the sailor said that the captain called him into the vessel's cabin and asked him to be a witness to the bond, and he signed his name to it as a witness, and he spoke of the paper as the bottomry bond. The opposing counsel in a sharp cross-examination asked him how he knew it was a bottomry bond, and the witness

answered that he read enough of it to know what it was. Some other skillful questions brought out the fact that when the sailor came into the cabin the captain was sitting on the other side of a table with the paper before him and the sailor sat down at the side of the table facing the captain, so that the paper was between them; that the paper was not read to him, that the captain turned over the first leaf of the paper and signed his name at the end of it, and told the sailor where to sign his name, which he did and then left the cabin.

My heart sank, for I saw that it was open to the other side to say that the document lay on the table upside down to the sailor, and that his statement that he read enough of the document to know it was a bottomry bond was false, because, of course, he could not read writing which was upside down, and, therefore, his whole evidence should be disbelieved. The lawyer opposed to me saw the point also; but, instead of leaving the matter where it was, he concluded to clinch it, and taking the document he laid it down on the

table before the witness upside down, and said to him, "Let us see you read the paper now." To my great surprise and relief the witness *read the writing*, upside down as it was, with nearly as much fluency as if it had been right side up.

That ended the contest over the execution of the bond. This sailor's ability to read writing when it was upside down was a curious instance of the many curious things which sailors do to occupy their time during idle watches on long voyages.

**302. THE POISONED COFFEE CASE.** (JOHN C. REED. *Conduct of Lawsuits*. 2d ed. 1912. § 403.)

We add some illustrations. A master one morning at breakfast suspected that there was poison in his coffee, and he immediately accused his cook. The negro was thought to evince manifest signs of guilt. The whole family showed alarming symptoms, and the master in his rage made the cook drink all the remaining coffee. She fell into convulsions. Of course it was poison. They all saw in the coffee grounds fragments of the fatal buckeye. The doomed slave was hurried through an examination. A lawyer, whose heart went out in yearning love to the poorest and lowliest in distress, inquired into her case and quietly learned all of the testimony against her. Every one who had drunk the coffee had sworn to its unusually bitter taste. It chanced that our lawyer had been lately prescribed by his dentist a decoction of buckeye for toothache, and he knew that its taste was sweet and not bitter. He was too prudent to proclaim his dissent, for, the infuriated family learning, the mob might have balked him. He waited until the trial, when he volunteered to defend the friendless woman. The court of course assigned him to her as counsel. He made all of the witnesses for the State dilate upon the bitterness which they had testified to at the examination; he almost made them quarrel with him by appearing to doubt what they said on this point: bitter tasted the coffee was; they had never tasted anything so bitter. His only evidence was a glass of fluid, proven by the dentist — a man well known to the jury —

to be a decoction of buckeye. The glass was handed to the judge; he tasted; then to the jury, and all of them took a timid sip; and in a few minutes there was an acquittal. The bitterness had no doubt been the result of negligence with the coffeepot, and fright had caused the convulsions of the cook. Witches however have been burnt, and other women both bond and free have been convicted on evidence less satisfactory than that produced against this slave before the magistrate, and, with sadness be it said, executed. This great advocate [Alexander H. Stephens] had often delivered prisoners from the dread penalty, and his name was in all men's mouths for his matchless tact and unrivaled eloquence. But to his immortal honor be it told that he ever counted his unfeared and unostentatious defense of this helpless slave among the proudest of his victories.

The following is related by David Paul Brown: A young and interesting girl, of respectable position, had trusted and been betrayed. She became a mother. At the age of three weeks the child died somewhat suddenly. A post-mortem examination took place. The death was said to have been produced by arsenic, and the medical witnesses strengthened that opinion by testimony. The mother was indicted for murder, and was tried before Judge Symser, of Montgomery County, a humane and industrious and eminent judge. In addition to the scientific evidence and in strong corroboration of it, it was

shown that a day or two before the death of her infant the mother had sent for half an ounce of arsenic to a grocer's; that after the death the arsenic was taken to the grocer's and weighed, and had lost twenty-four grains in weight. The circumstance, together with the opinion of the chemist, presented a strong case. Neither was sufficient in itself, but together they were dangerous. Of course the cross-examination as to the weight was very rigid and severe. Upon this particular point it ran thus: "When the arsenic was purchased, how did you weigh it?" "I weighed it with shot." "How many shot?" "Six." "Of what description?" "No. 8." "When it was returned to you, did you weigh it in the same scales?" "Yes." "Did you weigh it with the same shot?" "I weighed it with shot of the same number, for I had no other number." "How much less did it weigh?" "Twenty-four grains less." It was plain that the testimony bore hard upon the prisoner, but at this stage of the case the court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers and took from various uncut bags of No. 8 the requisite number of shot, subjected them to weight in the most accurate scales, and found that the same number of these different parcels of shot varied more in weight than the difference referred to as detected in the arsenic at the time of its return. The shot, the grocers, the apothecary, the scales, were all brought before the court. They clearly established the facts stated. . . .

We give another example from the practice of a celebrated lawyer. Action for a cargo of goods sold on credit. Plea, that plaintiff had represented the goods to be mer-

chantable, and that defendant, relying on the representation, had bought and shipped the goods to a foreign market, where he suffered great damage because they proved to be unmerchantable. The main witness for the defense appeared to be reliable. He had been employed in the ship that carried the goods, he explained how they were made of bad material, not fit for use, and he alone testified to the false representation alleged. The counsel who had brought the action and prepared the case said to Choate, whom he had called in at the last moment, that the witness was inventing. "No," replied the leader, "he is truthful, but mistaken." He began his cross-examination by establishing a friendly understanding. He made the witness report the appearance of the seller of the goods as to size, dress, complexion, and whiskers. The picture given was so unlike the plaintiff that it became manifest he had a different person in mind. When he was made to name the ship, the plaintiff easily proved that his goods were sold two weeks later and shipped in another vessel; whereupon the defense collapsed. At the beginning of the trial, Choate, noticing the indignation which the defense excited in the plaintiff, said of him to his associate, "He is honest, and we shall find our way out of the scrape." The certainty with which he discerned the honesty of the plaintiff and the witness at the first glance made him see that the only possible explanation of their apparent conflict was that the latter had mistaken a seller of other goods for the former, — a solution which had not occurred to the associate, who had had sole charge of the plaintiff's case until the trial.

304. CAPTAIN BAILLIE'S TRIAL. (1778. *HOWELL'S State Trials*. XXI, 216.)

[Captain Baillie, Lieutenant Governor of the Greenwich Royal Hospital for Seamen, had published a pamphlet exposing the abuses in its management, due to political spoilsmen on the Board of Directors. After a prosecution for libel against Captain Baillie had fallen through, the House of Lords undertook an investigation into the abuses. One of the charges was that "in many parts of the clothing, such as shoes, stockings, linen, beds, washing, etc., there are great abuses."] . . .

Thursday, March 25, 1779.

Captain *Baillie* called in.

Whether there have been any abuses in the linen in Greenwich Hospital?—There have been many complaints made to me by the pensioners of Greenwich Hospital, that the quality of the linen has been very different from what it used to be, that it has decreased in size as well as in goodness.

Inform the House whether you made any experiments, to know whether it was decreased in size?—In consequence of that information, I sent the proper people, as I thought they were, the boatswains and nurses, into the different quarters of the hospital, to measure the linen throughout the hospital, in particular in the infirmary, where I thought it was of the most consequence; the persons who measured the linen there, brought reports to me that all the men's sheets, upon an average, were deficient in half a yard in every pair, one with the other; some wanted a yard, some three quarters of a yard, and the average about half a yard upon the whole, generally throughout the hospital.

Is there anybody here that can speak to that?—There are the people here who measured it; they likewise measured the shirts; Thomas Field measured them. . . .

*Thomas Field*, one of the boatswains, called in.

Did you measure any linen belonging to the hospital at any time?—Yes.

How much did you measure?—I measured 388 pair of sheets in the infirmary.

How much did they measure?—They measured half a yard short and better in each pair of sheets.

Half a yard of what?—Of the cloth; I had been told by the lieutenant governor, that they were to be two yards and one half long, five yards in each sheet.

Upon an average, how much did they measure short of that?—Better than half a yard.

In each pair, or in each sheet?—In each pair.

Upon what number of sheets did you say you made this measurement?—388 pair.

And upon each of the 388 pair, if I understood you right, there was a deficiency of half a yard?—There was in each pair.

Did you measure any other linen?—Yes, all the boatswains in the House had orders to measure the linen that belonged to the pensioners that were in their division.

Did you measure them?—I measured the linen that was in the division that I belonged to; they run 95 yards short upon shirts and sheets, 160 sheets and 160 shirts.

What you mentioned before related to the infirmary?—Yes.

What you speak of now relates to your ward?—Yes.

And in your ward how much did you find short in the sheets and shirts?—95 yards.

What do you imagine was the allowance for shirts?—I was told three yards and a half.

Did you measure the linen in any other wards?—No, none at all but the division I belonged to, and the infirmary sheets. (*Thomas Field* withdrew.)

*Mr. Godby*, the Steward, called in.

Is there any allowance made in the hospital for the measure of sheets and shirts?—Three yards and a half for a shirt, and five yards for a sheet.

Were the sheets less than they used to be the last time they were cut, at the time that they mention?—I believe they are full as long now as ever they were, and are made in the same manner in every respect.

But were they not half a yard less in each pair of sheets than before?—No.

Are you positive and clear in that?

—Yes; it cannot be; if any sheets are shorter than the standard, it is because the pieces of sheeting run a certain length, and we cut them so as not to leave any remnants; that is the establishment in the hospital, and has been always the practice; at least for 40 years back to Mr. Bell's time; I have pursued the same method, and employed the same people, and I have no reason to believe that they have made away with any of it.

You say there is the same quantity now in the sheets as formerly?—The same.

How could it happen, that the sheets, when measured, appeared to be half a yard less?—I fancy it will not appear so, when your lordships call upon the clerk-of-the-check's clerk, who is a check upon my office; he receives these sheets, and is a check upon them.

You are positive they are the same size as usual?—Yes, the same size as usual.

Whether you speak absolutely from having measured the present sheets?—I have seen a great many of them measured, and I believe all the linen is accounted for very clearly; it appears so to me.

I wish to have a direct answer; have you measured all these sheets yourself?—Not all: it is impossible I can measure eight or nine thousand pair of sheets; that cannot be supposed, I should imagine; I have seen a great many of them measured.

. . . What quantity may you have measured yourself?—When there have been two or three hundred pair delivered into my office, I have measured three or four, and have been satisfied. If I have found a deficiency in any respect, I have looked farther into it.

What is the measure?—Of the sheets five yards.

Did those you measured measure five yards?—They measured something under, because we cut them so as not to make any remnants.

I ask you the positive measure of what you measured yourself?—Sometimes a nail of a yard short, sometimes two nails short.

But none of them were positively five yards long?—Some of them were.

Of what length were the sheets that you did measure yourself?—Sometimes a full length, sometimes wanting a nail of a yard, at other times two nails perhaps. But then, when I came to inquire into the matter, I found that it should be so. A piece of sheeting, if it runs 40 yards, would make five pair of sheets, but they run 38 and a half, and 39, and 39 and a half; they are generally about that length, and then we make just the same sheets as if they run 40; it is an advantage to the hospital, and is the method that was always adopted by the former stewards.

Is it not somebody's province to measure all the sheets?—The people in my office measure a number of them, but not all of them, I dare say.

Whether or not the measurement you have taken of these sheets was before or after the complaint was made by Captain Baillie?—I have measured them since the complaint, and I have measured them before.

Is it your office properly to measure this linen?—It is, with the clerk of the check, never without him. . . .

Have you always took the measure upon the faith of the contractor to be according to the contract?—No, I measure here and there a piece; if I find a deficiency of a yard, or

half a yard, I go farther, and measure more, and if there is a yard deficient in any one of those pieces, I deduct a yard from every one of those pieces I receive.

If from the number of sheets you have spoken to, you had found a deficiency of half a yard upon every pair of sheets, should not you have thought it worth your while to complain to somebody of the hospital, in order to rectify that abuse?—Certainly not, these sheets have been delivered out of my care a twelvemonth.

If in the measurement of the sheets you yourself had discovered a deficiency, whether you would not have thought the hospital greatly defrauded by such a deficiency?—It could not happen in my office.

But I ask you if you had discovered a deficiency?—If so, certainly.

If again, if in the measurement of 388 pair of sheets, you had discovered, as the witness discovered, a deficiency of 195 yards, which he has sworn to upon his measurement, would not you have thought that a fraud too?—Not if it was accounted for some other way.

I ask you, if upon your measurement you had found the deficiency?—No doubt of it; if there was a deficiency of 190 odd yards, there must be a fraud somewhere.

Do you know of any complaints being made to the council of a deficiency in the linen?—None. . . .

How far is your rule to go by, when you find a piece short of its measure? You say forty yards ought to make five pair of sheets?—Yes.

Suppose a piece of linen is thirty-nine yards?—Then we will make an allowance accordingly, we divide it equally.

Suppose it is thirty-eight yards?—We divided it accordingly; but if it is only thirty-seven or thirty-seven and a half, so that we think the piece would be too short for use,

that there would be a complaint, we make only seven sheets and leave a remnant.

What is the precise rule you go by to term the piece too short, whether it is thirty-seven yards, or thirty-seven yards and a half?—It is left to the judgment of the persons that cut them.

Who are those persons?—Two of the clerks' wives have cut them for late years before my appointment, and before my predecessor's, I believe. . . .

Mr. *Maule* called in.

Whether the sheets are of the right length at present?—I believe so.

What reason have you to think that they are?—I have known the hospital a great many years, and, till very lately, I never heard of a complaint at all of the kind.

What reason have you to think that they are not shorter than they were formerly?—I don't know that they are shorter than they were formerly.

Did you never hear a complaint of the kind?—Not till very lately. . . .

Are the pieces of linen not always of the same length?—They run from 37 to 37½, 38, and so on to 39½; very seldom to 40.

You seldom find any pieces of the full length?—Very seldom.

Do you speak from your certain knowledge, that the sheets are not now shorter than they were before?—I don't say that they are at present.

You say they are not shorter now; whether they were not shorter before the complaint was made by Captain Baillie?—I believe they are now as they have been made for many years past.

Do you speak from your certain knowledge that the sheets are now no shorter than they were before?—I never heard till very lately, as I said before, that the sheets were shorter now than they were formerly.

Answer that question directly;



do you know of your own knowledge, that the sheets are now of the same length as they were before?—All that have come within my knowledge.

How many have come within your knowledge?—A great many.

How many?—I suppose 100 pair or more.

Out of how many?—Some thousands.

How many thousands?—Very likely three or four thousand.

How many hundred pair, out of these three or four thousand, have you measured?—I suppose an hundred pair I have seen measured.

And were those equal to the standard?—I have already told your lordships, that I never knew that they were to the standard.

What rule have you to go by to say, that in former times the sheets were shorter than the standard? By how much were they shorter?—I cannot speak particularly to that; but I do, from my own knowledge, know that the sheets were formerly made as they are now, and in the same manner, and by the same people.

You say they were shorter, but don't know by how much; I desire you will say then, how you can possibly know that the present sheets are not shorter than those were?—I said, at the same time, that though it was a nominal thing that the sheets were to consist of five yards, yet I believe they never were of that quantity.

But how much were they shorter?—I cannot particularly say.

If you don't know by how much they were shorter, how can you possibly say, that you don't know that they are now shorter than they were then?—I never heard a complaint.

That is not the question; you say, that from your knowledge, the hundred sheets you measured were the same length as those before; now you say, you don't know the exact length of those before; how then can you know that these are of

the same measure?—I have measured them frequently formerly, when I was a clerk in the clerk of the cheque's office; and I have seen them measured since I have been in the present office, and since I have been clerk of the cheque myself I have often seen them measured, and I don't know that there is any difference between those made formerly and those made now.

When you measured the sheets formerly, of what length were they?—... I believe short a quarter of a yard; I have seen them so very often.

Have you measured any number of sheets latterly?—I have seen a great many measured lately.

Have you made any computation, and cast it into an average, to see how much they were short?—No; but I apprehend they were not more than that short; none that I have measured have been more than that short. . . .

Can you speak to any certain number that you have seen measured, that do all of them come within a quarter of a yard exactly, or nearly?—No; I have only seen here or there some measured when a quantity have been delivered in. . . .

Whether you have any reason to believe that the measurement that Mr. Field made was not a fair measurement?—I believe a fair one. (Mr. Maule withdrew.) . . .

Captain *Baillie* called in.

Whether you know anything of the method in which the linen is cut out in Greenwich Hospital?—Do you speak of sheets or shirts?

The sheeting.—A piece of sheeting is generally cut into sixteen lengths, to make eight sheets; each length ought to consist of two yards and a half; a piece of Russia sheeting generally contains thirty-seven yards and a half; that being cut into sixteen lengths, does not run to the standard of the hospital; instead of sixteen lengths, it ought to be cut into fifteen only; by which means two pieces will make fifteen sheets; and by cutting four pieces in that man-

ner, they will make exactly fifteen pair of sheets; instead of which the practice is, to cut four pieces into sixteen pair of sheets, by which means there is a pair of sheets more than there ought to be by the establishment. . . .

Whether the pieces of linen in general run thirty-seven yards and a half?—They are bought for thirty ells, that is exactly thirty-seven yards and a half; and if you search Cheapside, from one end to the other, I believe it will be found to be the length. . . . There is a gentleman I have seen here to-day, who is a draper, he can tell the exact length of the pieces.

What is his name?—His name is

Price; I do not know his Christian name, for I never saw him before. (Captain Baillie withdrew.) . . .

Mr. Price was therefore called, and sworn at the bar. The House being again resolved into a committee.

What is your name?—Edward Price.

Where do you live?—I live in Blackmoor street, Clare market.

Are you a linen draper?—I am. Do you deal in Russia linen?—I do.

What length are pieces of Russia sheeting, upon an average?—The fabric is thirty ells, or thirty-seven yards and a half each piece, seldom more or less. (Mr. Price withdrew.)

### 305. JAMES BYRNE'S TRIAL. [Printed *post*, as No. 350.]

306. HANS GROSS. *Criminal Investigation*. (transl. J. and J. C. Adam. 1907. p. 22.) . . . A thousand mistakes of every description would be avoided if people did not base their conclusions upon premises furnished by others, take as established fact what is only possibility, or as a constantly recurring incident what has only been observed but once. . . . I am assuming that the witness is really desirous of speaking the truth and is merely a bad observer.

In general, the matter should be elucidated by experiment, by ocular demonstration. Suppose a witness affirms that he was beaten by H for ten minutes. Let a watch be placed before him and ask him to take good note of how long ten minutes lasts and then say whether it was really ten minutes. After a quarter of a minute he will exclaim, "It certainly did not last longer than that." . . . Again, a witness declares, "When once I see a man I always recognize him again." "Did you see the prisoner who was being taken out as you came in?" you ask him. "Certainly, I saw him very well," he answers. "All right, go and pick him out from ten other persons." A witness estimates an important distance at, let us say, 200 yards; let him be brought out of doors and say how far might be 100, 200, 300, 400 yards; if now these distances be measured, one can easily judge if and with what degree of accuracy, the witness can judge distances. . . . Such checks give the most instructive and remarkable results; whoever practices them will soon be convinced that their importance cannot be exaggerated. . . .

### Topic 2. Incomplete Recollection

308. LANGHORN'S TRIAL. (1679. HOWELL's *State Trials*. VII, 452.)

[Oates, the informer, had testified that the Popish Plotters met in London on April 24, and that he had come over to the meeting from the

Jesuit College at St. Omer in France with Sir John Warner. One of the Jesuit attendants was put on by the defense to prove that Warner had not left the College at that time.] *Witness*: "He lived there all that while."

Mr. J. *Pemberton*: "Was Sir John Warner there all June?" *Witness*: "My lord, I cannot tell that; I only speak to April and May."

L. C. J. *Scroggs*: "Where was Sir John Warner in June and July?" *Witness*: "I cannot tell."

L. C. J.: "You were gardener there then?" *Witness*: "Yes, I was."

L. C. J.: "Why cannot you as well tell me, then, where he was in June and July, as in April and

May?" *Witness*: "I cannot be certain."

L. C. J.: "Why not so certain for those two months as you are for the other?" *Witness*: "Because I did not take so much notice."

L. C. J.: "How came you to take more notice of the one than the other?" *Witness*: "Because the question that I came for, my lord, did not fall upon that time."

L. C. J.: "That, without all question, is a plain and honest answer."

Mr. J. *Dolben*: "Indeed, he hath forgot his lesson; you should have given him better instructions."

L. C. J.: "Now that does shake all that was said before, and looks as if he came on purpose and prepared for those months."

### 309. QUEEN CAROLINE'S TRIAL. (1820. Linn's ed. I, 67, 91, 96.)

[Among the various charges of adultery and improper intimacy between the Queen (then Princess) and her servant Bergami during her tour in Germany, Austria, Italy, and the Mediterranean, one charge was made of adultery on board a polacca during a sea voyage to Palestine. The witness Majocchi, a servant in her suite during most of her journeys, had testified specifically to this charge, under the following questions from]

Mr. Solicitor-General *Copley*: "Did the Princess sleep under that tent [placed on deck] generally on the voyage from Jaffa home?" *Majocchi*: "She slept always under that tent during the whole voyage from Jaffa to the time she landed."

Mr. *Sol.-Gen.*: "Did anybody sleep under the same tent?" *Majocchi*: "Bartolomo Bergami."

Mr. *Sol.-Gen.*: "Did this take place every night?" *Majocchi*: "Every night." . . .

[On cross-examination Mr. *Brougham* sought to test his trustworthiness by inquiring as to other

details of the sleeping arrangements of the suite].<sup>1</sup>

"[On this voyage] Where did Hieronimus sleep in general?"

*Majocchi*: "I do not recollect [Non mi ricordo]."

Mr. *Brougham*: "Where did Mr. Howman sleep?" *Majocchi*: "I do not recollect."

Mr. *Brougham*: "Where did William Austin sleep?" *Majocchi*: "I do not remember."

Mr. *Brougham*: "Where did the Countess Oldi sleep?" *Majocchi*: "I do not remember."

Mr. *Brougham*: "Where did Camera sleep?" *Majocchi*: "I do not know where he slept."

Mr. *Brougham*: "Where did the maids sleep?" *Majocchi*: "I do not know."

Mr. *Brougham*: "Where did Captain Flynn sleep?" *Majocchi*: "I do not know."

Mr. *Brougham*: "Did you not, when you were ill during the voyage, sleep below [in the hold] under the deck?" *Majocchi*: "Under the deck."

Mr. *Brougham*: "Did those excellent sailors always remain be-

<sup>1</sup> These questions were not all put in direct sequence; a few intervening questions are here omitted.

low in the hold with you?" *Majocchi*: "This I cannot remember if they slept in the hold during the nighttime or went up."

*Mr. Brougham*: "Who slept in the place where you used to sleep down below in the hold?" *Majocchi*: "I know very well that I slept there, but I do not remember who else."

*Mr. Brougham*: "Where did the livery servants of the suite sleep?" *Majocchi*: "This I do not remember."

*Mr. Brougham*: "Were you not yourself a livery servant?" *Majocchi*: "Yes."

*Mr. Brougham*: "Where did the Padroni of the vessel sleep?" *Majocchi*: "I do not know."

*Mr. Brougham*: "When her Royal

Highness was going by sea on her voyage [at another time] from Sicily to Tunis, where did she sleep?" *Majocchi*: "This I cannot remember."

*Mr. Brougham*: "When she was afterwards going from Tunis to Constantinople on board the ship, where did her Royal Highness sleep?" *Majocchi*: "This I do not remember."

*Mr. Brougham*: "When she was going from Constantinople to the Holy Land on board the ship, where did she sleep then?" *Majocchi*: "I do not remember."

*Mr. Brougham*: "Where did Bergami sleep on those three voyages of which you have just been speaking?" *Majocchi*: "This I do not know."<sup>1</sup>

### 310. THE DOCTOR'S CASE. (1900. HON. J. F. DALY, in "The Brief," III, 10.)

One of the neatest effects ever witnessed was produced by a single question put by one of the young leaders at our bar in the course of an inquiry on habeas corpus as to the sanity of an interested party. A medical expert had testified to his mental unsoundness, and had detailed with great clearness the tests he applied to his case, and the results which established to his satisfaction an advanced stage of paresis. He finished his direct examination one afternoon, and next day was cross-examined for the purpose of eliciting that many of the conditions he described could be found in every sane person. After

(1900. HON. J. F. DALY, in "The

being questioned as to the first indication of mental feebleness he had specified, he was then asked what was the second feature of the cases he had mentioned as indicating paresis. The witness was unable to recall which he had mentioned second.

"What, Doctor, you can't recall the second indication of progressive mental decay which you spoke of yesterday?"—"No, I cannot, I confess."

"Well, that's funny. Your second indication was 'loss of memory of recent events'!"

The doctor admitted cheerfully that he had the symptoms himself in a marked degree.

### 311. LORD GEORGE GORDON'S TRIAL. (1781. HOWELL's *State Trials*. XXI, 511.)

[Since the Revolution of 1688, under serious disabilities, political Roman Catholics had been kept and religious; and a movement was

<sup>1</sup>[In his opening address for the defense (II, 33), Mr. Brougham made forcible use of these significant answers of Majocchi, prophesying that "as long as the words 'I don't remember' were known in the English language, the image of Majocchi, without the man being named, would forthwith arise to the imagination"; and his iteration of that betraying phrase "*non mi ricordo*" has indeed become an indelible episode of forensic history.

But the notable thing is that the main assertion of Majocchi, so discredited by his collateral failures of memory as to the tent and Bergami's sleeping there, was, after all, *correct*. This has been pointed out by Mr. G. Lathom Browne, in his "*Narratives of State Trials, 1801-1830*." (1882. Vol. II, p. 418.)—Ed.]

begun to abolish these discriminations. Popular prejudice against popery was thus revived; and a monster petition was presented to Parliament to dissuade it from legislation. Lord George Gordon was a prime mover in the Protestant Association formed for this purpose. But the movement was believed by many to tend to violence and the overthrow of government; and in fact, on the night when the petition was taken to Parliament, a vast mob formed, burned the Fleet Prison, and other places, and pillaged the city. The important issue was whether Lord George Gordon's action was that of encouraging this violence, or merely of presenting peaceably a lawful petition.] . . .

*William Hay* sworn. Examined by Mr. *Solicitor-General*.

Do you know the prisoner, Lord George Gordon?—Yes.

Do you remember seeing him at any time at Coachmaker's hall?—I saw the prisoner at Coachmaker's hall on the 7th of January, 1780.

Did you see him at different times at that meeting between the 7th of January and the 2d of June, the day the multitude went to the House of Commons?—Five or six times, but not at that place, the association.

What association?—The association, called the Protestant Association, was adjourned from place to place. It was adjourned to Greenwood's rooms, in the Hay-market; to the Old Crown and Rolls, in Chancery-lane; to the London tavern, in Bishopsgate street; and to St. Margaret's hall, in the borough of Southwark.

Did you see the prisoner at all or any of those places?—Not at all, but at most of them.

Do you recollect which of them you saw him at?—I saw him at St. Margaret's hall, at Greenwood's rooms, at the Old Crown and Rolls tavern, Chancery-lane, and at Coachmaker's hall.

Do you remember seeing him at

Coachmaker's hall, at the last meeting previous to their going up to the House of Commons?—I remember it very well.

Do you recollect at that time anything said by the prisoner, and if you do, mention what it was?—It was on the 29th of May I heard the prisoner announce to a very numerous assembly, the hall was crowded, "That the Associated Protestants (as they were called) amounted to upwards of 40,000 in number; that on Friday the 2d of June, it was resolved, they should meet, at ten o'clock in the morning, in St. George's fields, in four separate divisions or columns, arrayed or dressed in their best clothes."

. . . His lordship gave orders how these four different bodies should take their ground, and what fields they should assemble in. I cannot charge my memory exactly with the positions of those four columns, but I think the London division were to go to the field on the right of the road.

Did you go to the meeting in St. George's fields, on the 2d of June?—I went there, but did not mix among the people.

Did you see a multitude of people gathered together there?—A vast multitude. . . .

Had they any particular marks or badges?—They had all cockades, and there were banners.

Was anything written upon the banners or the cockades?—Nothing on the cockades that I observed. On the banners I think I saw Protestant Association; and one banner I believe had No Popery! on it. . . .

Which way did this multitude march?—I can say nothing of their marching, further than what I saw in Fleet street. I came home and saw them come through Fleet street, and march by St. Dunstan's church, in their way to the House of Commons.

Was there a large number came that way?—Yes.

Had they the same cockades and

banners?—Yes, the same cockades, and one or two of the banners.

Did you afterwards on that day come down towards the House of Commons?—I did.

Did you see a number of the same people about the house?—I did; they appeared to be the same people.

Had they the same cockades and banners?—Yes, they had.

Did you get into the lobby of the House of Commons?—I was there about three hours.

Was that filled with some of this multitude?—The lobby was crowded with them.

What was their behavior?—Very riotous. The noise was generally occasioned by chiming of Lord George Gordon's name. . . .

Do you remember the mob crying out to the people in the lobby?—I cannot pretend to say, there was such great confusion and noise. . . .

Do you recollect seeing any flags at any other place in the course of the mischief which followed?—I saw one of the flags at the burning of the Fleet Prison; that flag which had the words No Popery! on it.

Could you perceive whether the person who had the flag at the Fleet Prison was one you had seen in St. George's fields, or about the House of Commons?—I am very clear it was the same man, for I looked at him.

Where was it you had before seen that man, you saw with the flag at the Fleet Prison?—I saw him carrying that flag in Fleet street.

Do you mean at the time when the multitude marched to the House of Commons?—Yes; and I saw that very man at Westminster. . . .

What was the cry of the people who were employed in that business?—It generally was, No Popery! . . .

Did the people with blue cockades join with the people who were crying No Popery?—It was while I was within the chapel, I heard the cry without the chapel. The person who did all the mischief, whom I saw in the chapel, had no hat on; there

were about five or six people in the chapel, but that man was the most active. . . .

Cross-examined by Mr. *Kenyon*.

Pray what are you?—By trade, a printer.

Do you print on your own account, or are you a servant to any person?—I print on my own account.

I believe you have had misfortunes in the world, you were a bankrupt?—Yes.

When did you first resort to these meetings of the Protestant Association, as they called themselves?—I said on the evening of the 10th of December.

Was that the first time?—Yes.

And you went, from time to time, to all the meetings that were held afterwards?—Yes, to the public meetings.

You were at several places where Lord George Gordon did not attend?—Yes.

You have mentioned one place where Lord George Gordon was, at Greenwood's rooms; now I desire you to recollect, and say, whether you saw him at Greenwood's rooms?—I think I saw my lord once there, and I was there once when he was not; I was there twice.

I caution you to be upon your guard.—I will; it is a very serious matter; I think Lord George was once at Greenwood's rooms, and that the association was there once without his lordship.

Then you cannot speak with certainty?—Unless I look at some notes I cannot tell; I have some notes here.

Did you make them at the time?—Yes, I generally made them that evening.

*Court*.—You may refresh your memory with them. (Looks at his notes.)—On the 21st of January, Lord George Gordon was not, I find, present at Greenwood's.

Then you were mistaken in that part of your evidence?—I was mistaken.

How came you, from time to time, to make notes of what passed at these several meetings?—I shall be very free in telling you, that I had an idea then, that this would be the consequence of these meetings, I went almost purposely to take notes of them.

And you went on that account to take notes of what passed?—A curiosity first led me there; but, when I saw what sort of people they were, I was willing to look farther after them, for I dreaded the consequence of their meetings.

How soon had you this foresight of what would happen? In the month of December you foresaw what would happen?—I did not, I said no such thing; I foresaw it on the 20th of February.

Then the first time you foresaw it was on the 20th of February?—I had foreseen the evil consequences, as far as man could, before that time, but on the 20th of February I had even written my thoughts upon it.

Then the 20th of February was the first time you began to draw your conclusions?—It was.

Then how came your notes and memorandums to have a date prior to that, you have notes so early as the 21st of January?—Without those notes, I could not come to that conclusion in my own mind about the consequences; I took notes on the 10th of December.

I must return again to the question I asked before; how came you first to take notes?—I never go to any public meeting but I have an errand; I wished to learn what those gentlemen would be at; I put down then what occurred, and then entered it down after I came home.

That is your constant course in all occurrences of life?—Yes.

Can you tell us any one occurrence of your life, where you have committed to writing everything that passed?—I do not know any one meeting of that kind, but I have put down as much as my memory would help me to.

How many meetings of this kind have you resorted to?—I never resorted to any others of this kind.

You said you never attended any meetings respecting this kind of business, where you did not commit to writing what passed; now I want to know, what other meetings besides the Protestant Association you have attended?—I have attended a great many meetings, but I cannot pretend to recite them.

Have you, upon your oath, before God and your country, put down everything that passed at those meetings?—I do not comprehend the nature of your question.

Have you set down any transactions at any other meetings, except those of the Protestant Association?—I have many times undoubtedly.

Tell me when and where?—The first notes I made in my life, were in the general assembly of the church of Scotland, the very first church I was ever in, in my life.

How long is that ago?—Twenty-two years ago; so early as that, and in 1765 and 1766, I took notes again.

Did you do that because you had a foresight of any ill consequences that would ensue from those meetings?—I wished to know what was going on there, or to oblige a friend to inform him what was doing. . . .

You say you were in the lobby of the House of Commons?—I was.

Did you go into the lobby with persons who had blue cockades in their hats?—They were all there long before me. I went down after I had dined. . . .

You say at the time you were in the lobby, there was a great riot and confusion, and you could not hear what passed there?—I heard exceeding well. . . .

The lobby is not a very large room. Were there a good number of people of the same description as yourself, that were there merely from curiosity?—I saw none such, it did not come from curiosity.

Then you were the single indi-

vidual, that stood distinguished from all the rest who were there? — There were more than I there; there was that man M'Millan, and an apprentice of my own, I took them on purpose with me.

That they might be of what use? — I wanted to inquire after some particular friends; I was afraid they might be hurt, I was afraid of myself.

Being afraid of yourself, you who were not in the crowd before, nor in danger of being hurt, under ideas you might be hurt you went into the crowd in the lobby? — I was willing to see what they were about.

Which of your friends did you conceive to be in danger? — When an alarm of that kind is gone out, one cannot but have some friend in danger; I cannot charge my memory with any particular friend. . . .

In St. George's fields, you were a considerable distance from Lord George; how near were you to the persons who carried the two flags? — I saw one of the flags carried by a constable on my left hand; I was in the road; I did not go into the field. . . .

By what good luck then did you happen to see the flag in Fleet street? Where is your house? — Next St. Dunstan's church; I went upon the leads on purpose to see them with this Mr. M'Millan.

One of the persons you saw with a flag in Fleet street you saw afterwards? — Yes; at the Fleet Prison and in Westminster.

Can you describe his dress? — I cannot charge my memory; it was a dress not worth minding, a very common dress.

Had he his own hair or a wig? — If I recollect, he had black hair; shortish hair I think.

Was there something remarkable about his hair? — No; I do not remember anything remarkable; he was a coarse-looking man; he appeared to me like a brewer's servant in his best clothes.

How do you know a brewer's ser-

vant when he is in his best clothes from another man? — It is out of my power to describe it better than I do; he appeared to me to be such.

I ask you how, by what mark, do you distinguish a brewer's servant from another man? — There is something in a brewer's servant, in his condition of life, different from other men.

There may be, for what I know; but tell me how *you* distinguish a brewer's servant from another man? — Be so good as to state the question again.

If there can be a doubt what the question means in any one of this audience, you shall have it repeated; you said this man was like a brewer's servant; I asked you by what mark *you* are able to distinguish a man to be a brewer's servant rather than of any other trade? — I think a brewer's servant's breeches, clothes, and stockings have something very distinguishing.

Tell me what, in his breeches, and the cut of his coat and stockings, it was by which you distinguished him? — I cannot swear to any particular mark.

Then you had no reason upon earth to use that word which came so flippant over your tongue, that he was like a brewer's servant? — I cannot answer that question if you put it to me a hundred times. . . .

The Hon. *Thomas Erskine* (for the defense):

Gentlemen of the jury: Mr. Kenyon having informed the court that we propose to call no other witnesses, it is now my duty to address myself to you, as counsel for the noble prisoner at the bar, the whole evidence being closed. . . . The first witness to support this prosecution is William Hay — a bankrupt in *fortune*, he acknowledges himself to be, and I am afraid he is a bankrupt in *conscience*. Such a scene of impudent, ridiculous inconsistency, would have utterly destroyed his credibility, in the most trifling civil suit; and I am, therefore,



almost ashamed to remind you of his evidence, when I reflect that you will never suffer it to glance across your minds on this solemn occasion. This man I may now, without offense or slander, point out to you as a dark Popish spy, who attended the meetings of the London Association, to pervert their harmless purposes. . . . Attend to his cross-examination. He was *sure* he had seen Lord George Gordon at Greenwood's room in January; but when Mr. Kenyon, who knew Lord George had *never* been there, advised him to recollect himself, he desired to consult his notes. First, he is positively sure, from his memory, that he had seen him there; then he says he cannot trust his memory without referring to his papers; on looking at them, they contradict him; and he then confesses, that he *never* saw Lord George Gordon at Greenwood's room in January, when his note was taken, *nor at any other time.*

But *why* did he take notes? He said it was because he foresaw what would happen. How fortunate the crown is, gentlemen, to have such friends to collect evidence by anticipation! *When* did he begin to take notes? He said on the 21st of *February*, which was the first time he had been alarmed at what he had seen and heard, although not a minute before he had been reading a note taken at Greenwood's room in *January*, and had sworn that he attended their meetings, from apprehensions of consequences, as early as *December*. Mr. Kenyon, who now saw him bewildered in a maze of falsehood, and suspecting his notes to have been a villainous fabrication to give the show of correctness to his evidence, attacked him with a shrewdness for which he was wholly unprepared. You remember the witness had said, that he always took notes when he attended any meetings where he expected their deliberations might be attended with dangerous consequences. "*Give me one instance*"

says Mr. Kenyon, "*in the whole course of your life, where you ever took notes before.*" Poor Mr. Hay was *thunderstruck*; — the sweat ran down his face, and his countenance bespoke despair, — not recollection. "Sir, I must have an instance; tell me when and where?" Gentlemen, it was now too late; *some* instance he was obliged to give, and, as it was evident to everybody that he had one still to choose, I think he might have chosen a better. *He had taken notes at the General Assembly of the church of Scotland six and twenty years before!* . . . Mr. Hay thought it of moment to *his own credit* in the cause, that *he himself* might be thought a Protestant, unconnected with Papists, and not a Popish spy.

So ambitious, indeed, was the miscreant of being useful in this odious character, through every stage of the cause, that after staying a little in St. George's fields, he ran home to his own house in St. Dunstan's churchyard, and got upon the leads where he swore he saw the *very man* carrying the *very same flag* he had seen in the fields. Gentlemen, whether the petitioners employed the same standard man through the whole course of their peaceable procession is certainly totally immaterial to the cause, but the circumstance is material to show the wickedness of the man. "How," says Mr. Kenyon, "do you know that it was the same person you saw in the fields? Were you acquainted with him?" — "No." — How then? Why, "he looked like a brewer's servant." *Like a brewer's servant!* — What, were they not all in their Sunday's clothes? — "Oh! yes, they were all in their Sunday's clothes." — Was the man with the flag then alone in the dress of his trade? — "No." Then how do you know he was a brewer's servant? Poor Mr. Hay — *nothing but sweat and confusion again.* At last, after a hesitation, which everybody thought would have ended in his running out of

court, he said, he knew him to be a brewer's servant, *because there was something particular in the cut of his coat, the cut of his breeches, AND THE CUT OF HIS STOCKINGS.* You see, gentlemen, by what strange means villainy is sometimes detected; perhaps he might have escaped from me, but he sunk under that shrewdness and sagacity, which ability, without long habit, does not provide. Gentlemen, you will not, I am sure, forget, whenever you see a man, about whose apparel there is "anything particular," to set him down for a brewer's servant!

Mr. Hay afterwards went to the lobby of the House of Commons. What took him there? He thought himself in danger; and therefore, says Mr. Kenyon, you thrust yourself voluntarily into the very center of danger! *That would not do.*

Then he had a *particular friend*, whom he knew to be in the lobby, and whom he apprehended to be in danger. "Sir, who was that particular friend? Out with it: Give us his name instantly." *All in confusion again. Not a word to say for himself; and the name of this person, who had the honor of Mr. Hay's friendship, will probably remain a secret forever.*

It may be asked, Are these circumstances material? And the answer is obvious: *they ARE material*; because, when you see a witness running into every hole and corner of falsehood, and as fast as he is made to bolt out of one, taking cover in another, you will never give credit to what that man relates, as to any possible matter which is to affect the life or reputation of a fellow citizen accused before you.

312. WILLIAM WINTERBOTHAM'S TRIAL. (1793. HOWELL'S *State Trials*. XXII, 878.)

[The Rev. Mr. Winterbotham had attracted attention by his sermons with liberal political bearings. The French Revolution then being at its height, and liberal views in England being much suspected, Mr. Winterbotham was charged with seditious utterances in one of his sermons.] . . .

*Edward Lyne* examined by Mr. Sergeant *Lawrence*.

Were you at the meeting in How's lane on the evening of the 18th of November last? — Yes; I went there with Mr. Darby, in consequence of a report that Mr. Winterbotham had preached a seditious sermon on the 5th of November.

Were you there before the defendant began his sermon? — Yes, we were; we heard him begin.

Do you recollect the text he preached from? — Yes, it was from Rom. 13th ch., 12 ver.: "The night is far spent, the day is at hand, let us therefore cast off the works of darkness, and let us put on the armor of light."

How did he treat this text? — After the preamble to his sermon, he said, he felt himself bound by the present juncture of affairs, to apply the text politically. We were then in the aisle, but on Mr. Winterbotham's proposing his intention to treat his subject politically, we went into a pew and sat down. He then repeated the words of his text, and said, "Darkness has long cast her veil over the land, persecution and tyranny have carried universal sway." He then expatiated on that head, and proceeded, "Magisterial powers have long been a scourge to the liberties and rights of the people; it does not matter by what names these usurped powers were known, whether by king, senate, potentate, or stadtholder, they are in either sense usurped." This he endeavored to prove by the following part of his discourse, which I do not recollect. He then adverted to the affairs of France, and said, "The yoke of bondage amongst our neighbors seems now to be pretty well

broken, and it is expected the same blessing is awaiting us; when persecution and tyranny shall be no more, when enjoying the liberties of a free people we shall boast of having introduced amongst us that equality our neighbors have acquired." He then immediately, or soon afterwards, rejoined, "To possess such an acquisition, we were to cast off the works of darkness and put on the armor of light."

Do you recollect anything more of the sermon?—There is no other particular passage that I can recollect the words of.

Did you ever take minutes of what you heard?—Immediately on leaving the meeting, with those observations strongly impressed on my mind, I went home to my lodgings, and there made minutes; and I am sure these are the very expressions the defendant used.

Cross-examined by Mr. Gibbs.

Pray, Mr. Lyne, how came you to go to the meeting on the evening on which this sermon was preached?—I went with Mr. Darby, in consequence of the rumors which were circulated respecting the former sermon.

You say you went in consequence of certain rumors which had been circulated respecting the former sermon; I would ask you if you believed those rumors?—No; I disbelieved the report.

I believe you are not one of Mr. Winterbotham's congregation?—No, I am not.

Then as you are not in the habit of attending Mr. Winterbotham, and as you disbelieved the reports in circulation respecting the former sermon, I would ask you what were the motives with which you went on that evening?—I went as the friend of Mr. Winterbotham, to take his part, that I might have an opportunity to defend him against the accusations concerning him.

You say you went as the friend of Mr. Winterbotham, that you might have an opportunity to take his

part; that was your motive for going?—Yes; and if I had thought he would have been prosecuted I would not have gone.

Then it was your general Christian philanthropy that led you to the meeting as the friend of Mr. Winterbotham?—Yes, it was my general Christian philanthropy that led me to go there.

As the friend of Mr. Winterbotham, I would ask you, what is your opinion of the whole of the sermon?—I considered the whole of the sermon as totally seditious.

Was there no part of it but what was seditious?—There were many moral and religious sentiments, but the whole, in a chain, was seditious.

Pray how long do you think Mr. Winterbotham was in preaching this sermon?—About three quarters of an hour.

And though you went to the meeting as the friend of Mr. Winterbotham, and though Mr. Winterbotham was three quarters of an hour in preaching, you do not recollect any passage in the discourse but what was seditious?—At that time I did not wish to recollect any that were not seditious.

Though you were the friend of Mr. Winterbotham, you had no wish to retain any passage in your memory but those you thought seditious?—I endeavored to retain in my mind those which were so strong.

But you don't recollect any other sentence in the whole sermon, but those you have given in evidence?—I can't repeat any other sentence.

In what part of the meeting were you, during the time Mr. Winterbotham was preaching?—I remained in the aisle till he talked upon politics, and then I sat down in a pew.

I think you said, if you had thought Mr. Winterbotham would have been prosecuted you should not have attended; pray how came you then to be an evidence?—When he said he should treat his subject politically, I then determined to

attend to what he said, intending to take part against him if called upon.

Pray in what manner did Mr. Winterbotham begin his sermon?—He gave a moral exposition of the text at first; but I don't remember what he said, neither the words nor the tenor of them.

Then there was nothing seditious in the first part of the sermon?—I really think the first exposition of the text was such as any clergyman might have used in any place of devotion.

But you don't remember anything of this part of the subject which you think was unexceptionable?—I cannot repeat any sentence; I did not endeavor to store in my mind any part of it.

Though you went to the meeting as the friend of Mr. Winterbotham, and for the express purpose of vindicating him from what you conceived to be false accusations, yet you did not endeavor to store in your mind any sentence of that part of the sermon which you conceived to be unexceptionable?—No, I did not.

As you say you cannot repeat any sentence that Mr. Winterbotham uttered besides those you have given in evidence, I'll endeavor to call a few passages to your mind. . . . Do you recollect Mr. Winterbotham's saying, the man who could entertain an idea of equality, either in character or property, was a fool or a madman, and ought to be dealt with as such?—If such arguments had been used, they would appear quite inconsistent; they would appear quite contrary to the drift of the sermon.

Might it not have escaped your notice?—I do not know whether it could or not.

I think Mr. Winterbotham in his sermon insisted on some motives, which ought to induce persons to obey the powers ordained?—I do not know whether he did nor not. . . .

Pray did not Mr. Winterbotham say something in his sermon about

the Africans, about their deliverance from slavery?—I have some faint idea that there was something said about the Africans, but I cannot tell what; I do not recollect anything of the sermon but what I have already proved.

You say you don't recollect anything of the sermon but what you have already proved; I'll endeavor to refresh your memory: I think Mr. Winterbotham, in his sermon, stated the absolute necessity of a chief magistrate, whether dignified with the title of emperor, king, stadtholder, doge, president, or any other?—I do not recollect. . . .

Did you see Mr. Darby at any time afterwards that evening?—Yes, Mr. Darby came to me the same night.

And then I suppose you made minutes?—Mr. Darby did not then see the minutes I had made.

Has he ever seen them since?—Yes, perhaps in the space of ten days after, or it might be a shorter space.

Then you had no communication with Mr. Darby that night about the sermon? you did not say anything to him that you had made minutes of it?—I had no communication about the minutes; I only expressed my resentment to Mr. Darby. . . .

*John Darby sworn. Examined by Mr. Fanshawe.*

Were you at the meeting in How's—lane, on the 18th of November? Yes; I went there with Mr. Lyne.

Do you remember who preached?—Yes, Mr. Winterbotham preached; the text was 13th Rom., 8th verse.

And what did he say about the text?—He made some observations which I did not attend to, and then said, at this juncture it was necessary to apply it politically; I then paid attention, and Mr. Lyne went into a pew, and sat down, but I remained in the aisle; Mr. Winterbotham then proceeded: "Darkness has long cast her veil over the land; persecution and tyranny have car-

ried universal sway." He then expatiated upon that head, and proceeded: "Magisterial powers have long been a scourge to the liberties and rights of the people; it does not matter by what means these usurped powers are known, whether by king, senate, potentate, or stadtholder, they are in either sense usurped." He then introduced the former part of his text — "the night is far spent, the day is at hand," and followed it up with this observation: "The yoke of bondage amongst our neighbors seems now to be pretty well broken, and it is expected the same blessing is awaiting us, when persecution and tyranny shall be no more; when enjoying the liberties of a free people, we shall boast of having introduced amongst us that equality our neighbors have acquired." I then had occasion to leave the meeting: I afterwards returned, and found the service done, and Mr. Lyne gone.

Are you certain that what you have given in evidence are the defendant's exact words?—I am certain it was the sense, if not the exact words.

Cross-examined by Mr. *East*.

Did you make any minutes of what you heard?—I made no minutes at that time, but have done it since.

Pray was what you have given in evidence connected together in one connected sentence?—These expressions which I have stated did not follow each other immediately.

How long was it before you took the minutes?—The day after I heard the sermon.

When did you see Mr. Lyne's notes?—The next day.

Then the minutes you made were copied from Mr. Lyne's?—Mr. Lyne's minutes recalled the words to my recollection.

How came you by Mr. Lyne's minutes?—I asked him for them; that which I recollected I copied merely for my own satisfaction.

You had no idea then that you should be called on as an evidence?

—At that time I had no idea of a prosecution.

Mr. *Gibbs*.—As you only copied from Mr. Lyne's minutes what you recollected to have been spoken, those words must at the time of their delivery have made a very deep impression on your mind?—I never heard a sermon that struck me so forcibly.

What were the parts that made such an impression?—I do not recollect the particular parts.

I believe there were no particular parts but what you found in Mr. Lyne's minutes?—There was a part of Mr. Lyne's minutes I did not copy, what passed after I left the meeting.

You copied all that was in Mr. Lyne's minutes that was said before you left the meeting?—I did copy all that part.

How long were you at the meeting?—About twenty minutes.

And you take upon you to swear that what you have given in evidence were Mr. Winterbotham's identical words?—I do not say the defendant used the identical words, but only words to that tendency. . . .

Mr. *Gibbs* (arguing for the defense).—A miracle was once stated to have happened relative to the translation of the Septuagint. Seventy old men were put into different cells to translate the Testament, and they all translated it in the same words. It is necessary for the jury to believe that the same kind of a miracle has again happened, if they think that the two witnesses for the crown—one of them a clerk to the collector of excise, the other a midshipman in the navy—could both go to a meeting—hear a sermon preached which lasted three quarters of an hour—come out again, collect a great number of sentences in the sermon—retain them in their memory—and come here nine months afterwards, and repeat them precisely in the same words. This I have not stomach to digest. One of the witnesses took notes of the particular passages, which the other saw

and copied; yet he said he did not speak from them, but from his own recollection of what passed at the time. If that witness spoke from what he copied from the notes of the other, all his evidence is to be left out of the case; and the jury are either to believe the miracle of the Septuagint to be again realized—they are to believe that those two witnesses recollected exactly the same words—and no other; or they must lay out of the case the evidence of the last witness. . . . The witnesses for the prosecution are both young men, the latter at least, not very likely to carry off in his memory such a string of sentences as those he repeated. On the credit of those witnesses, I shall not much trouble the jury.

And yet Mr. Lyne (the first witness) gave such an account that I think he could not well be believed. . . . He told the jury that it was his "general Christian philanthropy" (those were his words) that brought him there, thinking Mr. Winterbotham would not again preach a seditious sermon. . . . And yet he should not recollect a single passage in the whole sermon but what had a contrary tendency? He went there not with a view to accuse, but to defend: his attention then must have been to those points of the sermon which would rather exculpate than accuse Mr. Winterbotham. We generally attend to what we wish, and yet the witness could remember no one passage in the course of the defendant's sermon, but those which he had given in evidence to criminate him, and which Mr. Darby had echoed back to Mr. Lyne again. This witness has said he did not recollect a single sentence of all those passages in the sermon which I asked him about; but I shall prove that those passages which I questioned the witness to the truth of, were uttered by Mr. Winterbotham, and are to be found in Mr. Winterbotham's sermon.

The line of defense which I shall

adopt is, that the words used by Mr. Winterbotham are explained by other sentences in the sermon, and that they bear quite a different sense from that stated by the witnesses for the crown, which is inconsistent with the context. . . . It is true that Mr. Winterbotham chose the text which they have mentioned, but he did not confine his discourse to that verse; he went through the whole of the chapter, and the sermon was a running commentary upon it; he explained the former part of the chapter, which breathed nothing but loyalty, and a proper subordination to government, and he particularly stated "that every soul was to be subject to the higher powers—that the powers that be are ordained of God"; yet of this the witness does not remember a single passage. . . . Mr. Lyne said he could recollect nothing in the sermon that recommended obedience to the civil magistrates, nothing of subordination, when every passage of the chapter was explained. And yet he went as the friend of Mr. Winterbotham! He could not recollect that the defendant said, the magistrate was the minister of God for good; that the good was mentioned, or that he mentioned any motives for obeying the magistrate! He had no recollection that the former words of the text were commented upon. . . . The general scheme of this sermon, I contend, was that we were to obey the rulers that were set over us for good; and that this was the duty of Christians. . . . He stated, that the power of government could only be exercised by a chief magistrate, whether emperor, king, stadtholder, doge, president, or any other; and those are the words which the witnesses for the crown have so misunderstood, and who supposed the following were the words: "Magisterial powers have long been a scourge to the liberties and rights of the people; it does not matter by what names these usurped powers

are known, whether by king, senate, potentate, or stadtholder, they are in either sense usurped." . . . The witnesses I shall call are used to attend to the sermons of Mr. Winterbotham; I doubt not but their testimony will gain credit with candid, disinterested, and impartial men. . . .

Mrs. *Jane Pearce* was sworn. Examined by Mr. *East*.

Were you at the meeting in How's lane on the 18th of November last? — Yes, I was.

Were you there when Mr. Winterbotham preached this sermon? — I was.

Were you there the whole time? — Yes; and paid attention to the sermon.

I would ask you then — did Mr. Winterbotham utter the words laid in the first count? — No, he did not; nor anything like them; he said nothing about darkness having cast her veil over the land, or that magisterial powers were usurped. . . .

Then Mr. Winterbotham did not say magisterial powers had long been a scourge to the liberties and rights of the people? — No, he said "they were a terror to evildoers," but not to others; he on the contrary said they were the ministers of God for good.

Do you recollect Mr. Winterbotham's saying anything about the titles and dignities by which magistrates are known or distinguished? — He said there must be a chief magistrate, whether dignified with the title of emperor, king, stadtholder, doge, president, or any other.

He said there must be a chief magistrate, did he? — He did, under whatever form government was administered.

Then he did not say that magisterial powers were usurped? — If he had said they were usurped, it would have made nonsense of what he said before — on the contrary, he said they were God's ministers. . . .

Cross-examined by Mr. Sergeant *Rooke*.

Pray how comes this sermon to be so very fresh in your memory? — Because the very next day after it was preached, I heard persons had said it was seditious.

Did you ever see the sermon? — Yes, three or four days after it was preached.

Who showed it to you? — It was lying in the parlor and I perused it.

Mr. *William Pearce* sworn. Examined by Mr. *Dampier*.

Were you at the meeting in How's lane on the evening of the 18th of November last? — I was.

Did Mr. Winterbotham preach that evening? — He did.

Did you hear the whole of the sermon? — I did, and heard distinctly.

Did Mr. Winterbotham utter the words laid in the first count? — No, he did not.

Did the defendant say anything about magisterial power? — There was some part of his sermon about magisterial powers; he said they were of God, and to be obeyed.

Then Mr. Winterbotham did not say they were a scourge to the liberties and rights of the people — did he? — No, he did not; he said, "magisterial powers were a terror to evildoers, and a protection to the good." . . .

Did the defendant utter the words in the second count? — No, he said nothing similar or tending that way. I attended the mayor of Plymouth a few days after the sermon was preached, and was astonished at the time to hear of such a charge against him. . . .

Had the sermon any seditious tendency? — The whole sermon was as contrary to sedition as light differs from darkness. . . .

Cross-examined by Mr. Sergeant *Lawrence*.

Pray Mr. *Pearce*, how can you be so particular in remembering this discourse? — . . . I heard of Mr. *Lyne's* intention to prosecute, and therefore called up my recollection, and made minutes of it. . . .

witness for the prosecution was Anne M'Garahan, the supposed victim of the defendant; and upon her cross-examination by Mr. Daniel O'Connell, the following passages took place:]

Mr. O'Connell: "Did you ever take a false oath about the business?" *Witness*: "Not that I recollect."

Mr. O'Connell: "Great God, is that a thing you could have forgotten?" *Witness*: "I believe I did not. I am sure I did not."

Mr. O'Connell: "Oh, I see I have wound you up. Perhaps, then, you will tell me now, did you ever swear it was false?" *Witness*: "I never took an oath that the charge against Mr. Maguire was false. I might have said it, but I never did swear it." . . .

Mr. O'Connell: "Did you ever say that your family was offered £500 or £600 for prosecuting Mr. Maguire?" *Witness*: "I don't recollect." . . .

Mr. O'Connell: "Did you ever say that you would get £600 for prosecuting him?" *Witness*: "I never did."

Mr. O'Connell: "Or write it?" *Witness*: "Never."

Mr. O'Connell: "Is that your handwriting?" here a letter was handed to her. *Witness*: "It is."

Mr. O'Connell: "And yet you never wrote such a letter!" The letter read in part: "Dear Mr. Maguire, . . . I am the innocent cause of your present persecution. . . . Is there a magistrate in this county you can safely rely upon? If there is, let him call here, as it were on a journey to feed his horse; let him have a strong affidavit of your innocence in his pocket; let me in the meanwhile know his name, that I may have a look out for him, and while his horse is feeding, I will slip downstairs and swear to the contents; I have already sworn to the same effect, but not before a magistrate. . . . £600 have been offered our family to prosecute you, but money shall never corrupt my heart." *Witness*: "I did not think when you were questioning me that you were alluding to this letter. I could not have supposed Mr. Maguire would have been so base as ever to have produced this letter, after swearing three solemn oaths that he would not. If I thought he would, I should have certainly told my counsel about it."

After further questioning, "the witness seemed overcome; and she turned to the defendant, exclaiming, 'Oh, you villain! you villain!'"

317. **PARNELL COMMISSION'S PROCEEDINGS.** (1888. 54th day, *Times' Rep.*, pt. 14, pp. 194, 195.)

[This was virtually an action by Mr. Parnell and others, against the London "*Times*," for defamation, in charging among other things that Mr. Parnell had approved the Phoenix Park assassination; this charge was based on alleged letters of Mr. Parnell, plainly admitting complicity, sold to the "*Times*" by one Richard Pigott, an Irish editor, living in part by blackmail, who claimed to have procured them from other Irishmen. Pigott himself turned out to have forged them; but the case for their authenticity

seemed sound, until Pigott was placed on the stand for "*The Times*" and came under the cross-examination of Sir Charles Russell. The object of the ensuing part of the cross-examination was to bring out Pigott's shiftiness in first selling the letters as genuine to the "*Times*," and then offering to the Parnell party for money to enable them to disprove the letters' genuineness. The letters had been first published in a series of articles entitled "*Parnellism and Crime*," beginning March 7, 1887, and bringing temporary obloquy



to the Parnell party and causing the passing of the Coercion Act. Archbishop Walsh, mentioned in the examination, was an intimate friend of Mr. Parnell. Pigott, in his prior examination, had claimed that he had handed the letters to the "Times" merely for the latter's protection, to substantiate the articles, and that the publication of the letters "came upon me by surprise"; the falsehoods exposed in the following answers were in a sense partly immaterial, but they served all the more to show the man's thoroughly false character.]

Q. You were aware of the intended publication of that correspondence? A. No, I was not at all aware.

Q. What? A. Certainly not. . . .

Q. You have already said that you were aware, although you did not know they were to appear in the "Times," that there were grave charges to be made against Mr. Parnell and the leading members of the Land League? A. I was not aware till the publication actually commenced.

Q. Do you swear that? A. I do.

Q. No mistake about that? A. No.

Q. Is that your letter (produced)? Don't trouble to read it. A. Yes; I have no doubt about it.

Q. My Lords, that is from Anderton's Hotel, and is addressed by the witness to Dr. Walsh, Archbishop of Dublin. The date, my Lords, is March 4, 1887, three days before the first appearance of the first series of articles known as "Parnellism and Crime." (Reading.) "Private and confidential. My Lord,—The importance of the matter about which I write will doubtless excuse this intrusion on your attention. Briefly, I wish to say that *I have been made aware of the details of certain proceedings that are in preparation with the object of destroying the influence of the Parnellite party in Parliament.*" (To

witness.) What were these certain proceedings that were in preparation? A. I do not recollect.

Q. Turn to my Lords, Sir, and repeat that answer. A. I do not recollect.

Q. Do you swear that, writing on the 4th of March and stating that you had been made aware of the details of certain proceedings that were in preparation with the object of destroying the influence of the Parnellite party in Parliament less than two years ago, you do not know what that referred to? A. I do not know really.

Q. May I suggest? A. Yes. . . .

Q. Did that passage refer to these letters, among other things? A. No, I rather fancy it had reference to the forthcoming articles.

Q. I thought you told us you did not know anything about the forthcoming articles? A. Yes, I did. I find now that I am mistaken, but I must have heard something about them.

Q. Try and not make the same mistake again, if you please. (Reading.) "I cannot enter more fully into details than to state that the proceedings referred to consist in the publication of certain statements, purporting to prove the complicity of Mr. Parnell himself and some of his supporters with murders and outrages in Ireland, to be followed in all probability by the institution of criminal proceedings against these parties by the government." Who told you that? A. I have no idea.

Q. Did that refer, among others, to the incriminatory letters? A. I do not recollect that it did.

Q. Do you swear it did not? A. I will not swear it did not.

Q. Do you think it did? A. No.

Q. Very well; *did you think that these letters, if genuine, would prove, or would not prove, Mr. Parnell's complicity with crime?* A. I thought they were very likely to prove it.

Q. Now, reminding you of that opinion, and the same with Mr.

Eagan, I ask you whether you did not intend to refer—I do not suggest solely, but among other things—to the letters as being the matter which would prove, or purport to prove, complicity? A. Yes, I may have had that in mind.

Q. You can hardly doubt that you had that in your mind? A. I suppose I must have had.

Q. (Reading.) “Your Grace may be assured that I speak with full knowledge and am in a position to prove beyond all doubt or question the truth of what I say. “Was that true? A. It could hardly have been true.

Q. Then you wrote that which was false? A. I did not suppose his Lordship would give any strength to what I said. I do not think it was warranted by what I knew.

Q. Did you make an untrue statement in order to add strength to what you had said? A. Yes.

Q. A designedly untrue statement, was it? A. Not designedly.

Q. Try and keep your voice up. A. I say, not, designedly.

Q. Accidentally? A. Perhaps so.

Q. Do you believe these letters to be genuine? A. I do.

Q. And did at that time? A. Yes.

Q. (Reading.) “And I may further assure your Grace that *I am also able to point out how the designs may be successfully combated and finally defeated.*” (To witness.) Now if these documents were genuine documents, and you believed them to be such, how were you able to assure his Grace that you were able to point out how the designs might be successfully combated and finally defeated? A. Well, as I say, I had not the letters actually in my mind at that time, so far as I can remember. I do not recollect that letter at all.

Q. You told me a moment ago without hesitation that you had both in your mind? A. But, as I say, it had completely faded out of my memory.

Q. That I can understand. A. I have not the slightest idea of what I referred to.

Q. Assuming the letters to be genuine, what were the means by which you were able to assure his Grace you could point out how the designs might be successfully combated and finally defeated? A. I do not know.

Q. Oh, you must think, Mr. Pigott, please. It is not two years ago, you know. Mr. Pigott, had you qualms of conscience at this time, and were you afraid of the consequences of what you had done? A. Not at all.

Q. Then what did you mean? A. I cannot tell you at all.

Q. Try. A. I cannot.

Q. Try. A. I really cannot.

Q. Try. A. It is no use.

Q. Am I to take it, then, that the answer to my Lords is that you cannot give any explanation? A. I really cannot. . . .

Q. Now you knew these impending charges were serious? A. Yes.

Q. Did you believe them to be true? A. I cannot tell you whether I did or not, because, as I say, I do not recollect. . . .

Q. First of all, you knew then that you had procured and paid for a number of letters? A. Yes.

Q. Which, if genuine, you have already told me would gravely implicate the parties from whom they were supposed to come? A. Yes, gravely implicate.

Q. You regard that as a serious charge? A. Yes.

Q. Did you believe that charge to be true or false? A. I believed that to be true. . . .

Q. Now I will read you this passage: “P.S. I need hardly add that *did I consider the parties really guilty of the things charged against them, I should not dream of suggesting that your Grace should take part in an effort to shield them.* I only wish to impress on your Grace that the evidence is apparently convincing, and would probably be suffi-

cient to secure conviction if submitted to an English jury." What have you to say to that? A. I say nothing, except that I am sure I could not have had the letters in my mind when I said that, because I do not think the letters convey a sufficiently serious charge to warrant my writing that letter.

Q. But as far as you have yet told us the letters constituted the only part of the charge with which you had anything to do? A. Yes, that is why I say that I must have had something else in my mind which I cannot recollect. I must have had some other charges in my mind.

Q. Can you suggest anything that you had in your mind except the letters? A. No, I cannot. . . .

[On the next day, when Pigott resumed his examination:]

Q. Then I may take it that since last night you have removed from your mind — I think your bosom was the expression you used — that this communication of yours [to the Archbishop] referred to some fearful charge, something not yet mentioned? A. No, I told you so last night, but I am sure that it is not so. I will tell you my reason.

Q. You need not trouble yourself. A. I may say at once that *the statements I made to the Archbishop were entirely unfounded*. . . .

Q. Then in the letters I have up to this time read — or some of them — you deliberately sat down and wrote lies? A. Well, they were exaggerations; I would not say they were lies.

Q. Was the exaggeration such as that it left no truth? A. I think very little.

**318. NETHERCLIFT'S CASE.** (C. AINSWORTH MITCHELL. *Science and the Criminal*. 1911. p. 88.)

. . . Netherclift, who was the chief expert in the days when Lord Brampton was at the bar, had such faith in his methods that finally he came to believe that he could never make a mistake. This belief received an amusing check in a case in which he was under cross-examination by Lord Brampton (then Mr. Hawkins). Netherclift had claimed that his system gave infallible results, and had further stated that his son, whom he had trained, made use of the same system. "Then," said the wily advocate, "your son working on your system is as good as you are?" — "Yes," replied the

(C. AINSWORTH MITCHELL. *Science*

father with some pride in his voice, "he is." — "That is to say, he, too, is infallible?" — "Yes," again replied the witness. — "Well, now, Mr. Netherclift, was there ever a case in which you and your son appeared on opposite sides?" — Netherclift tried to evade the question, which, he complained, was an unfair one, but on being pressed was forced to admit that on a certain occasion he had given evidence on one side and his son upon the other. Swift came the unanswerable retort, "How comes it then that two infallibles appeared on opposite sides?"

**319. CHRISTOPHER RUPPRECHT'S CASE.** (ANSELM VON FEUERBACH. *Remarkable German Criminal Trials*. transl. Gordon. 1846, p. 116.)

[The facts of the assault on Rupprecht are set forth in No. 159, *ante*.] Something, it was hoped, would be learned from the wounded man himself when he should have recovered consciousness. On the

evening of the following day, the 8th of February, the judge and two other officers of the court visited him. . . . The judge asked him the following questions, which were thus answered by the wounded man:

"Who struck you the blow?" — "Schmidt." "What Schmidt?" — "Woodcutter." "Where does he live?" — "In the Most." "With what did he strike you?" — "Hatchet." "How did you recognize him?" — "By his voice." . . .

The first though not the sole object of the judge now was to discover the Schmidt of whom Rupprecht was thinking. But in this town, as everywhere else, there were a vast number of people called Schmidt, several of whom were woodcutters. Three of these especially engaged the attention of the court. The first was a certain Abraham Schmidt, who lived in the Hohes Pflaster. The second was one John Gabriel Schmidt, commonly known as "big Schmidt," who lived in a street called the Walch. The third was big Schmidt's half-brother, distinguished from him by the name of "little Schmidt." . . . As equal suspicion attached to the three Schmidts above named, Abraham, as well as the big and the little Schmidt, were arrested that evening. . . . Abraham Schmidt behaved far differently: when asked whether he knew the man in bed, he at first answered, "I do not know him," but immediately added, "That is Mr. Rupprecht, I know him well; what is the matter with him?" When asked why he at first said he did not know him, he answered, "Because that is Mr. Rupprecht." He was then desired to give a proper answer, but only exclaimed, "I can give no answer; I did not do it; ah! good Lord! I did not do it; I am not the man; as I hope for mercy, I am innocent. I am a poor woodcutter. You may ask my neighbors, my wife, and my mother. On Friday night I was cutting pegs at the house of my mother-in-law till eleven o'clock, and on Saturday and Sunday I was at home." On being asked at what hour he had gone home on Friday night, he said, "I stayed until past nine with my mother-in-

law." When the manifest contradiction in his statement was pointed out to him, he only repeated, "From nine to eleven." . . .

Meanwhile suspicion strengthened against Abraham Schmidt. The police handed the hatchets belonging to the three suspected men into court and that of Abraham Schmidt was spotted apparently with blood. . . . He asserted that he was perfectly innocent of the murder of Rupprecht, whom he had neither known or seen. Hereupon he was reminded that when the wounded man was shown to him, he had at first said that he did not know him, but had immediately after recognized him as Rupprecht: how was this? He then replied, "I do not know why I said that, and I said it was Rupprecht directly, but I never saw him in my life before!" He was asked how then he had recognized him, and answered that "every one was talking of the murder, and that he had heard of it at the public house." Whenever he was questioned as to where he was on Friday evening at the time of the murder, he invariably involved himself in contradictions. The judge questioned him as follows: "Where were you last Friday?" — "I went to the house of my mother-in-law at nine o'clock in the morning, to help her cut pegs. I dined with her, and did not leave her house till nine o'clock at night, when I took my little boy home, went to bed directly, and did not get up again until seven o'clock Saturday morning." "When did your wife leave her mother's house?" — "At ten o'clock." "Why did you not go together?" — "Because she was still at work, and as the boy would not go to sleep, she asked me to take him home, which I did." "At what o'clock then did you go home on Friday?" — "At nine o'clock." "Yesterday you said it was at eleven; how is that?" — "After some hesitation, 'I don't know what you want of me; I went home with my wife

at eleven." "Just now you asserted that you went home at nine?" — "All my neighbors can testify that I always come home at nine." — "That answer will not suffice; first you say nine, and then eleven: which is the truth?" — "At nine o'clock with my wife and child. No, my wife stayed a little longer with her mother." "Who took the child home?" — "I took him home with me at nine o'clock." "When did your wife come home?" — "After ten o'clock." "How do you know that?" — "Because she always comes home at that time; I was asleep when she came, and can't tell exactly when it was. I did not wake, though I sleep in the same bed with her and the child." "Have you a key of the house?" — "Yes, but my mother has got it." "How then did your wife get in?" — "My wife took the key with her." "You said at first that your mother had the key the whole night through?" — "Yes, it lay upon the table." "Then your wife could not have used it to let herself into the house?" — "So I said, for my wife went home with me and put the boy to bed, and then she took the house-door key and went back to her mother." "How long did she stay there?" — "Till eleven." "You said before that she came home at ten?" — "I was asleep, I can't tell whether it was ten or eleven when she came home." . . .

[But Abraham Schmidt, nevertheless, was quite innocent.] The evidence of one Anna Keinitz, an

old woman of seventy-eight, proved that on the eighth of February Abraham Schmidt was in all probability ignorant of the murder committed on the previous evening. . . . His strange conduct in the presence of the dying man, and his contradictory statements, were thus accounted for. According to his mother's testimony, he was hard of hearing, timid, and awkward. The smallest trifle made him lose all presence of mind, and he was often so confused as to say the very opposite of what he meant about things the most familiar to him. "I believe," said the magistrate of his district, "that there is not any one in my whole district who is so blundering. For instance, he seldom calls any one by his right name; and when he does not understand what is said to him, or cannot express his meaning, he is apt to be angry." . . . The contrary statements which he made concerning many important details, were manifestly the result of the prisoner's habitual confusion of ideas and defective memory. His recognition of Rupprecht, joined to his declaration that he did not know him, would have appeared perfectly consistent had he possessed the power of expressing himself intelligibly; without ever seeing Rupprecht he must have guessed that the wounded man lying before him could have been none other than the Rupprecht whose accident was in every one's mouth.

### 320. FRANCIS WILLIS' TRIAL. (1710. HOWELL'S *State Trials*. XV, 618.)

[The defendant was charged with riot and sedition. The rioters pulled down meeting-houses and made bonfires of them. The leader was seen jumping hilariously about the bonfire. He was said to have worn a footman's dress with green coat and brass buttons, and was waving a flag made out of a curtain. The

accused's mistress testified that she had sent him out merely to find where the fire was, after it started. The principal witness for the prosecution was one Grove.] . . . Then *William Grove* was sworn.

*Atty.-Gen.* — Pray, acquaint my lord, and the jury, whether you saw the prisoner the first of March last.

— I never saw him till that night I saw him with a long pole and a curtain upon it, and he cried out, A High-Church standard! He stopped several coaches, and got money from them, and made them cry, High-Church. But to swear that this is the man, I cannot.

How many were there together? — Five or six hundred.

Was there anything like colors before them? — Yes, there was a curtain, and he that carried it, cried, High-Church standard! He stopped many coaches, and got money from them, and made them cry, High-Church!

*Sol.-Gen.* — Whence did he bring it? — From Mr. Bradbury's meeting, in Fetter-lane.

Did he carry it nowhere else? — I saw it nowhere but at the fire at Holborn.

Was there any fire in Hatton-garden? — Yes, there were three.

What were they made of? — Of the materials of Mr. Taylor's meeting-house.

Do you know of any others that were pulled down? — Yes, Mr. Burgess's.

Do you know of any others? — I have heard of others, but do not know them.

*Atty.-Gen.* — After Willis was taken, you went to Newgate; now give an account, did you make any particular observations at the time you saw the man display the banner? Did you take any notice of him? — Yes.

What did you take notice of him? — I took such notice, that I thought I should know him again.

Now, did you go to Newgate to see him? — Yes; but the place was dark, and his clothes and wig were altered.

What did you think of the man you saw in Newgate? — I did think it was the same man.

Now look at him, and see whether this is the same you saw in Newgate? — His clothes were so much altered, that I cannot tell.

Tell us, is that man the same? — I never saw him but that night, and in Newgate; and it was so dark, that I cannot say this is the man.

*Sol.-Gen.* — Do you remember what clothes he had? — I cannot tell whether they were blue or green.

Were there more that flourished colors; more than one? — I saw but one.

*Mr. Darnell* [for the defense]. — Pray, at the time you saw that banner displayed, was there any other fire in Hatton-garden? — No; I believe this was made first; and then the mob said, they would go to Mr. Taylor's.

What time was it that the fire was in Holborn? — About ten.

What time was that in Hatton-garden? — About eleven.

You say this curtain was brought out of Fetter-lane meeting. How do you know? Did you see it brought out of the meeting? — No; but I saw it brought out of the lane, and the people said it came from thence.

Do you remember what colored coat he had on? — I cannot tell; it was either blue or green.

Do you remember what sort of hat he had on? — No.

Was it a laced hat, or a plain one? — I cannot tell indeed.

You say you looked hard at him? — Yes; but I never minded his hat.

*Sol.-Gen.* — You heard people say, the curtain was taken out of Mr. Bradbury's meeting; who were they that said so? The people that were concerned in the fire, or them that stood by? — Them that stood by, as I might.

*L. C. Baron.* — You say you went to Newgate shortly after this, to see this man? — Yes, my lord.

And the man that you saw there, do you believe, or do you not, to be the prisoner at the bar? — Yes, I do believe it was.

*Mr. Darnell.* — Are you positive this is the man? — No, I am not.

*L. C. J.* — When you went to Newgate, the man that you saw

there, did you believe him to be the person that you saw displaying the colors? — Yes, I did.

How long was that after you saw him at the fire? — About ten days.

*L. C. Baron.* — Pray, what makes you less knowing, or believing, now, than you was then? — My lord, his clothes are altered, and he has another wig on.

*Mr. Darnell.* — Pray tell us any one thing you had, to know this man by? — No other instance, but that he flourished the colors.

Do you know the color of his coat? — I believe it was blue.

Are you sure it was not green? — I am not sure.

When you saw him in Newgate, what did you know him by? — By his features, I thought he was the same man.

Pray describe any one feature you knew him by.

*L. C. J.* — It is difficult to describe a man's face, and so it is to describe his hand. If you were asked how you knew a man's hand, it would be difficult for you to describe it; and so if you were asked, how you know any man's face in court, unless there was something very particular in his face: and yet there is something in the composition of a face, by which it is known, which none perhaps but a painter can describe.

*Sol.-Gen.* — You say he is altered from what he was in Newgate? Has he not the same clothes on? — He has quite another dress, and another wig; he had blue clothes on there.

And you say, you believed the man that had the colors, had blue clothes? — Yes, indeed I take them to be blue; but cannot be positive whether they were blue or green.

You have spoken about this matter already, on your examination, you have formerly considered it coolly, you ought to consider what you have said before, and to recollect yourself. The man you saw in

Newgate, what coat had he on? — He had blue.

I ask you, whether the man that flourished the colors had blue? — It was blue or green.

Which of the two do you believe it to be? — Indeed I cannot well tell.

The man in Newgate; what kind of wig had he? — A wig that fell more off from his face.

What sort of wig had the man with the colors? Was it that kind of a wig which the man had in Newgate? — I think it was not.

Do you believe this man to be him that you saw in Newgate? — Indeed I cannot believe him to be the same.

Pray who brought that man to you? — It was Mr. Hill, the keeper. Is he here? Let him be called.

Then Mr. *Hill* was sworn.

*Atty.-Gen.* — Do you remember Mr. Grove's coming to see the prisoner in Newgate? — I never saw anybody come while I was there.

Do you remember that he came to see any of the prisoners? *Grove.* — Justice Blackerby's clerk came with me, and we had a quartern of brandy.

*Hill.* — I did not remember him before, but I remember Justice Blackerby's clerk came, and somebody with him.

*Sol.-Gen.* — Who did you show him? — The prisoner at the bar.

What dress was he in then? Do you remember? *Hill.* — No.

Did you carry him to any other but the prisoner? — No; there were others upon the stairs, but they were women.

Was there any other prisoner? — No.

And is this the man? — Yes.

*L. C. J.* — Do you remember what clothes he had when he first came to Newgate; or at any time after? — I do not know any but them he has on; I was not in the way when he came in.

*Mr. Darnell.* — Did you go up with that man? — Yes.

Did you go into the room where the prison was?—I went to the grates.

*Atty.-Gen.*—When I asked you at first whether he was at Newgate, you could not remember till he refreshed your memory with a quartern of brandy.

*L. C. J.*—Are you sure you showed him the prisoner at the bar?—Yes.

Did you show him any other?—No. . . .

Then *Robert Cubwidge* was sworn.

*Sol.-Gen.*—Do you know Mr. Grove?—Yes.

Do you remember you went with him to see a prisoner?—Yes.

What prisoner did you see there?—The prisoner at the bar.

Did you see any other prisoner but him?—No; we saw *Dammaree* and *Purchase* below, but no other above.

What clothes had he on then?—He had a blue livery on. . . .

Then *Stephen Fletcher* was sworn [for the defense].

*Mr. Darnell.*—Had you any discourse with Grove after he had seen the prisoner in Newgate?—When he came from Newgate on Good-Friday at night, and had been to see the prisoner, I asked him what he said to him? Nothing, says he; for he was not the man that carried the curtain; for the man that carried the curtain had a green coat and brass buttons.

*Atty.-Gen.*—Are you an acquaintance of Grove's?—Yes; I lived in the same house.

Was it Good-Friday at night, after he had been at Newgate, that he told you this?—Yes.

Did you ask him any questions about the prisoner; or did he tell you of himself?—He told me he had been at Newgate to see Mrs. Miles's man; I asked if he said anything? He said no; that is not the young man that I saw with the curtain.

*Mr. Darnell.*—The account I have of Grove, is, that he was a

tradesman, and broke, and now lives by gaming.

*L. C. J.*—If you have anything to examine to his reputation, you will do well to call your witnesses to it. Grove, what do you say to this? *Grove.*—When I came from Newgate, I thought it was the man; and I told him no such thing; I told everybody I spoke with, that I believed it was the man.

*L. C. J.*—Did you tell him that you believed the man that had the curtain was in a green coat?—No, not that night.

*Mr. Darnell.*—Did you tell him so at any time?—Yes; but that was the Wednesday night; but when I went to Newgate, he had a blue coat; but I always believed him to be the same man.

*L. C. J.*—Did he tell you he had a green coat on that night he had been at Newgate, or before?—*Fletcher.*—It was before.

*L. C. J.*—I understood you, that when he came back from Newgate, he told you he had nothing to say to this man, for that the man that had the curtain had a green coat and brass buttons?—He said he could not be positive, for that man had a green coat and brass buttons.

Did he tell you that night that he had a green coat and brass buttons?—I cannot tell whether it was that night.

*Mr. Darnell.*—You say, once he told you he had a green coat and brass buttons; what did he say when he came from Newgate?—He said he could not be positive, for that he had a blue coat on.

*Just. Tracy.*—Did you, after you came from Newgate, say, you could not be positive he was the man? *Grove.*—I did tell him I could not be positive.

*Mr. Thomson.*—Did you tell him you believed him to be the man? *Grove.*—Yes; I said I did believe it, but I would not swear it was he. . . .

*Mr. Darnell.*—My lord, we will



not trouble your lordship with any more witnesses; we hope we have well accounted for the time he was out of his mistress's house, for that seems to be all that sticks upon him, that his being out so long might give room for him to be concerned in this tumult. But by the witnesses it appears, that the curiosity of seeing a mob, which he had never seen before, might take up some part of his time; and the two fires being so near, that he could not go from one, without seeing the other, engaged him to go to them both. There was a friend too that met him, with whom he walked up and down the street an hour; but we think it shows that he was not a ringleader, or aiding or assisting in pulling down the meetinghouses. . . .

But upon the main question, we must humbly insist, that there is no evidence to fix it upon the prisoner. There are not two witnesses to any overt act for the same treason, nor do those witnesses ascertain it to be the prisoner; for now it appears a little plainer, that his first charge was against a footman in a green livery; he declared it was a footman in green with brass buttons; and when he came to Newgate to see this man, he believes him to be the same man; that is the most of his evidence; but when he came home then to his companion, that he lived in the house with, he believed it was not the same man, and he could not swear it was the same man, because he had a blue coat; and now he would carry his belief so far as to believe, that he then had a blue coat, with black buttons; and surely, nobody could mistake a blue coat with black buttons, for a green coat with brass buttons; whatever may be supposed of the color of blue by firelight, altering by that light towards a green, yet it cannot turn black buttons into brass ones. . . .

*Attorney-General.*—My lord, we think the proof is sufficient; and notwithstanding anything that has been said by the counsel for the

defendant, it stands unimpeached, and it is clear, that the prisoner is guilty of this treason. . . . Mr. Darnell does not deny but that, in point of law, all those people that were gathered together, to execute this design, are equally guilty of high treason: so that the question is only, whether this prisoner was one of those people that were gathered together? That which he insists upon is, that though this man was there, yet no proof is made that he was aiding towards the carrying on this design; therefore we think what our witnesses say is consistent, and not impeached by what was said of the other side.

The first witness that we called, though he was not acquainted with the prisoner, yet he says, there was a man in a blue livery, that was so remarkable in leading the mob, with a curtain on a pole, that he could not but take notice of it; and that when he went to Newgate, to see the prisoner, he took him to be the same man that carried the colors; and though he cannot be so positive as to swear directly, yet he now believes it is the same man, though he cannot be positive. I am sure I should be very far from pressing anything further than the nature of the evidence will bear: therefore I hope I do not misrepeat what he says. Therefore it leaves it somewhat uncertain, yet, whether the prisoner at the bar was the man that carried those colors? But that which puts this out of dispute, and makes it clear that this is the man, is Lunt's evidence. . . . As to what they insist on, that they have called witnesses to invalidate the testimony of Grove, that he made some mistake about the color of his clothes, that is no great matter to be relied on; for blue and green, by candlelight, are pretty much of the same cast, especially at a transient view; but you see the view he had was sufficient to know his face, but the light of the fire occasioned

another cast upon his clothes, therefore his thinking it to be green when it was blue, will make no difference: and though he does not speak positively, but speaks with caution, and not as a man would do, that was prejudiced, and came to take away a man's life: though he says he cannot positively say this is the man, yet he says he does really think it is. . . .

*L. C. J.*—Gentlemen of the Jury, Francis Willis, the prisoner at the bar, stands indicted before you, for that he, upon the first day of March last, with a great number of others, did levy public war against her majesty. . . . You are to consider what is proved on him that he did. You observe what is objected as to Grove, that there is a great uncertainty as to his evidence, and that his credit is not fair. He does not charge the prisoner positively, nor ever did. He differed as to the color of his clothes. And though it is rightly observed, that blue and green are not easily distinguished

by the light of the fire, yet that is not the objection; the objection is, that the witness at first declared, he believed it to be green, and now he has told you, that he believes it to be blue, and that is not consistent, and does therefore a little concern his credit in this matter, that he has changed his evidence. . . . If you believe Willis was the person that did make use of these colors, and that he was assisting in pulling down the meetinghouse in Hatton-garden, then you are to find him guilty. If you think he was not the person, you will acquit him.

Then the Jury withdrew, and the court adjourned till five o'clock, when the Jury brought in their verdict.

*Cl. of Arr.*—Francis Willis, hold up thy hand. Look upon the prisoner. How say you? Is he guilty of the high treason whereof he stands indicted, or not guilty?  
*Foreman.*—Not guilty.

*Cl. of Arr.*—Did he fly for it?—*Foreman.*—Not that we know of.

**321. LOUCKS v. PADEN.** (1895. APPELLATE COURT OF ILLINOIS. 63 Ill. App. 545.) . . .

This was a bill in chancery filed by appellant, in which she alleged that she and one Margaret A. Tinnin, from about the year 1886 to January, 1892, were partners, engaged in selling notions and small articles in the city of St. Louis, Mo.; that they were both deaf mutes; that they accumulated a partnership fund which they kept in money, at their room at 300 South Broadway, St. Louis, in a trunk belonging to said Margaret A. Tinnin, because her trunk was stronger and more secure in its fastenings than the trunk of appellant, that the money in said trunk was the joint earnings of appellant and said Tinnin. That in February, 1892, said Margaret A. Tinnin, who had for two years previous been in poor health, was taken seriously ill and was removed by

her friends to Litchfield, Illinois; that appellant also went to Litchfield to assist in the care of said Tinnin; that the said trunk of Margaret A. Tinnin containing the partnership moneys therein was taken to Litchfield, and that said joint earnings and partnership money amounted to \$1400, being the accumulation of six years' partnership business; that appellant and said Tinnin frequently conversed about said money in the sign language; that the money was to be equally divided; that appellant would have to receive \$700. That said Margaret A. Tinnin died intestate March 7, 1892, leaving certain heirs named in the bill; that Robert N. Paden was, on March 9, 1892, appointed administrator of her estate by the County Court of Montgomery County, Illinois; that

he took possession of said trunk including the said \$1400; that appellant applied to said administrator for her one half of said money, but he refused to give it to her, claiming that the money was the exclusive property of said Tinnin, and will distribute same to the legal heirs of said Tinnin. Payer of bill is to have said money decreed to be partnership property, and said administrator be ordered to deliver one half thereof to the complainant. The defendants answered denying the alleged partnership and claiming all the money belonged to Margaret Tinnin. The cause was referred to the master, to take and report the proof, and was submitted to the court upon the testimony taken before and reported by the master, and upon the deposition of witnesses taken in St. Louis. The Court found the complainant had not supported her case by the proof, and dismissed the bill, from which decision she appealed to this Court.

*W. A. Howett and Amos C. Miller*, attorneys for appellant.

*R. McWilliams and James M. Truitt*, attorneys for appellees.

OPINION, PER CURIAM. — Only questions of facts arise herein. They are stated by counsel for appellee to be — First. — Were the complainant and said Maggie Tinnin partners? Second. — If they were partners, is the money in dispute partnership funds? . . .

Patrick Coughlin testified substantially as follows: "I am forty-five years old; live at 1248 Carr Street, St. Louis; got acquainted with Maggie Tinnin and Mary Loucks about eleven years ago at 1236 N. Broadway, wholesale supply house; they came to my house to buy laces, with a note from the house of Rice, Stix & Co., telling me what they wanted; they both came together. Maggie's health was delicate from the first day I saw her. They were both deaf mutes. I communicated with them in writing; Mary Loucks would buy

the goods and Maggie would pay the bill; Maggie would sit in the coolest place we could get, and the goods would be brought to her and she and Mary would examine them and when satisfied they would go into the pile of things they wanted to buy. Maggie told me they were partners. Many a day Maggie would come to the house alone to buy goods, and when I asked her where her partner was, she would tell me in such and such a place; then she used to come and buy goods and would ship them to Mary in different parts of Missouri, and she would remain here. I would get letters from them ordering so much goods, and the goods were always shipped to Mary Loucks. The letters were always written and signed by Mary Loucks; the returns were sent by Mary Loucks. All that Maggie Tinnin told me was they were partners. About eight years ago the express drove to the door with a trunk with Mary Loucks' name on it; after a while Maggie and Mary came in; they said they were going to buy a nice bill of goods; they went off together, and when they came back Maggie was fainty; Maggie told me that she had lost \$800 and could not buy any goods; I told Maggie, "You can have all the goods you want." They bought \$50 or \$60 worth of goods. I asked both in writing who I should charge them to and they both said charge the goods to both of them; they sent me the money from some place in Illinois; this was eight years ago; they continued to buy goods of me until about three years ago; they would buy \$35 and \$40 worth of laces every week. Every time Maggie came in I would say, "Where is your partner?" she would write down where she was then. It was Maggie who told me she lost the \$800. It was out in the paper for a week and a reward offered; she said she carried it in her bosom. When I asked who the goods should

be charged to, Maggie said they were equal partners. Maggie was the general manager in buying and Mary in selling.

Andrew Eichoff, who was in the employ of the Standard Hosiery Mills in St. Louis, in 1884, and until and including the year 1889, testified the appellant and the deceased bought articles such as hosiery, linen, towels, notions, etc., from the establishment with which he was connected, almost every week during the five years he was there. They came to the store together; Miss Loucks did the buying; Mrs. Tinnin "looked on"; Miss Loucks made the payments and on some occasions the goods were sent to No. 300 Broadway, where the women had a room rented in which they lived together.

They leased the room of Mrs. Frederick Woydt. She testified that the "deaf mute women" were engaged in selling stamping goods, hosiery, etc., and that she was frequently in their room and learned the sign language; that Maggie Tinnin (appellee's intestate) was often ill and always in delicate health and was confined to the room nearly all the time, but that Mary Loucks went out to sell goods every day "rain or shine"; that the witness was frequently in the room when Mary Loucks returned in the evening, and saw Mary give Maggie the pocketbook and the money she had taken in, and that Maggie told her they were partners. . . .

The other question — whether the money found in the trunk was the property of the firm? The position of appellee upon this question is, the money received from the sale of goods was divided at the close of each day, or from time to time, and the money found in the trunk was the individual property of the owner of the trunk. There was proof tending to show the partners divided sums received from daily sale, and perhaps tending to show each had separate parcels of money;

but the evidence was conclusive that all the money, whether belonging to them jointly or to each separately, was kept in the same trunk. Each had a trunk, but it was their custom to keep all the money in Mrs. Tinnin's trunk, as they did many of the articles on hand for sale. . . . Mrs. Starr, a cousin of Mrs. Maggie Tinnin, testified that Maggie came to her house from St. Louis and remained there until she died; that both the trunks were there and that Mary Loucks had the keys to both trunks all the time and that Maggie left the keys with Mary when she left St. Louis. . . .

The appellant after the death of Mrs. Tinnin produced the keys to the trunks and at the request of the administrator opened both trunks. Money in bank bills to the amount of \$1550 was found in Mrs. Tinnin's trunk, and also in the same trunk were found hose, corsets, stamping goods, patterns, and notions confessedly of the stock in trade of the firm. Upon the statement of the administrator that she should lose none of her rights thereby, and he would see she got whatever interest she was entitled to, the appellant allowed him to take the money. The conclusion sought to be drawn from the appearance of the bank bills and the fact they adhered together, that they had been in the package for a much longer period of time than as stated by the appellant, was, we think, entirely overcome by the testimony of the cashier of the bank, whose experience in handling money and keeping it in packages peculiarly qualified him to throw light upon the subject.

Counsel for appellee urge the appellant made many contradictory statements as to the amount she was entitled to have out of the money in the trunk, and attach much importance to such contradictions as tending strongly to show she had no real interest whatever

in the money. These contradictions are, as we think, apparent only, at least are explainable upon theories entirely consistent with the honesty and justice of her claim to one half of the money as partner of the deceased. Her claim to all the money was based, in part, upon the alleged expressed intention of Mrs. Tinnin that she should have all of it in case of her (Mrs. Tinnin's) death, and in part because she insisted she had earned Mrs. Tinnin's half of the money by working for her and attending upon and caring for her when she was sick. These supposed contradictions are based largely upon questions asked and answered in a conversation carried on by means of signs between appellant and Miss Jennie Paden. As to this conversation Miss Paden testified, "some of the questions were asked a number of times before the appellant could understand their meaning"; that she (the witness) "thought she interpreted the answers correctly, but there might have been misunderstandings"; she understood "the appellant claimed all the money because Mrs. Tinnin wanted her to have it all; also claimed it as a partner; claimed all as a gift; then all because she had earned Mrs. Tinnin's half by working for and boarding her," etc., etc. The appellant testified Mrs. Tinnin wanted her to have all the money

except \$100, which was to be given to Miss Jennie Paden. In stating her supposed interest in the money under these various claims of right therein the appellant, of course, claimed different amounts, but we find nothing in any of her claims inconsistent with the justice of her demand for one half the money in her right as partner.

The case was presented to the learned chancellor who presided in the Circuit Court upon depositions and written testimony — we have before us the same testimony, and our facilities for determining as to the credibility of the witnesses and as to their truthfulness are not less or inferior to those enjoyed by the trial judge. After a thorough investigation and careful consideration thereof we are constrained to declare the preponderance thereof manifestly supported the position that the money in question was the property of the appellant and the deceased in equal parts. For this reason the decree is reversed and the cause remanded with directions to the Circuit Court to enter an order and decree requiring the administrator to deliver to the appellant one half of the money found in the trunk of deceased, viz. the sum of \$775, and to pay the costs in due course of administration.

Reversed and remanded with directions.

322. G. F. ARNOLD. *Psychology applied to Legal Evidence*. (1906. p. 401.) . . . "A person," says a legal author, "may equally persistently adhere to falsehood once uttered, if there be a motive for it." A person may no doubt adhere to a falsehood; but it is not equally easy to repeat a true story and a made-up one, and the longer and more detailed it is, the harder it becomes. This follows from the nature of memory itself; events that have really happened will always be recalled in the same chronological order, because that is the order in which we originally attended to them, and cross-questioning is not so likely to confuse that order. With a story learnt off by heart it may easily happen that the same question put in different forms and in different contexts will not receive the same answer, for it is not based on any firm association of ideas, as in the case of ordinary memory. Real events are also better recollected because we localize

them in time and space and so give them Definiteness, assigning them a particular place in our past experience. It would seem that conditions favorable to memory, such as interest, attention, impressiveness of the original experience, its intensity and distinctness, duration in the happening, etc., are less likely to be present in the mere learning of a tale than in the occurrence of facts, and hence retention and revival will become more difficult. The statement then that a "person may equally persistently adhere to a falsehood once uttered, if there be a motive for it, if by "equally" is meant "equally successfully," is open to criticism on the basis of memory. It has always seemed to us that for this reason a statement does gain value by repetition, if the second statement is substantially in accord with the original, and especially if it has stood the test of cross-examination. For a good cross-examination will by suggesting other mental associations be likely to break down the association of ideas in the mind of the witness unless that association has some basis in reality; if it fails to do that, there is reason to think the story has a foundation of fact.

To apply this view to what has become an axiom with the lawyers, viz. that "the statement of an accomplice does not at all improve in value by repetition" we are inclined to dispute this if any attention is to be paid — as we think it should be — to consistency. . . . Whether the previous statement of the accomplice is a *sufficient* corroboration of his evidence at the trial or not, is a question of fact to be decided in each case, and we have little doubt that in some cases it may be so. But however this may be, it is a different matter from the question whether the statement gains *at all* in value from repetition. It gains to just the same extent as that of the evidence of a non-accomplice witness gains, neither more nor less, because consistency is the test here and not the moral character of the witness: and to say that it does not improve in value because it "is still only the statement of an accomplice" is simply to fail to grasp the principle on which the idea of corroboration in § 157 of the Indian Evidence Act is founded. It is just one of those silly dicta that will not bear examination; but because it has never been examined but has been repeated with parrot-like fidelity by legal writers, it has come to be regarded as an axiom instead of being rejected as fallacious.

323. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> The significance of the present sort of impeaching evidence is in general the same as that of the Contradiction, namely, to show the witness to be in general *capable of making errors* in his testimony (*post*, No. 355); upon perceiving that the witness has made an erroneous statement upon one point, we are ready to infer that he is capable of making an error upon other points. But the method of showing this is here slightly different; for, instead of invoking the assertions of other witnesses to prove his specific error, we resort simply to the witness's own prior statements, in which he has given a contrary version. We place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors. Two important features of this method of proof are to be noticed.

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. II, § 1017.)]

(1) The result is the same indefinite one reached by the other method (*post*, No. 355), *i.e.* some *undefined capacity to err*; it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality. No specific defect is indicated; but each and all are hinted at. It has been often said that a Self-contradiction shows "a defect either in the memory or in the honesty" of the witness:

SHAW, C. J., in *Com. v. Starkweather* (1852, 10 Cush. 60): "It is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief."

COLE, J., in *Knox v. Johnson* (1870, 26 Wis. 43): "This circumstance is well calculated to throw suspicion on her accuracy and credibility. It shows that her memory is exceedingly unreliable and treacherous in reference to the times of payment of moneys by her, or that she does not realize the importance of adhering to actual facts when making statements under oath."

This may be roughly true in the majority of instances; but there is no such invariable, certain indication; the scope is much broader and more intangible. There has also sometimes been an inclination on the part of the bar to argue as if every Self-contradiction involved a lie, and illustrated the maxim, *Falsus in uno, falsus in omnibus*; but this also is without foundation; the discrediting effect of a Self-contradiction is not dependent on whether or not the jury believe it to involve a conscious lie.

(2) The process of using a Self-contradiction to show error is in one respect weaker, in another respect stronger, than the process of using Contradiction by other witnesses. It is *weaker*, in that the proof of the specific error can never be as *positive* as is possible by the other mode. For example, if five credible witnesses testify that the assailant had a scar upon his face, contradicting the first witness, a belief in his present error is more readily reached than if a single former contradictory statement of his own is brought forward; in the latter case we are by no means compelled to believe that his statement on the stand is erroneous. On the other hand, in the present mode, the process of discrediting is in its chief aim incomparably *stronger*, because it *always* shows that the witness has made *some sort of a mistake* at some time, and thus demonstrates a capacity to make errors. In other words, both of his statements cannot be correct; one of the two must be incorrect; therefore, he shows a capacity to err. It is the repugnancy of the two that is fatal.

Thus, the process of discrediting by prior Self-contradiction is on the whole the more effective. The capacity to err invariably appears, from the very fact of Self-contradiction; while in the other process it does not appear unless we believe the opposing witnesses' assertions. Logically, therefore, the present process is more direct and effective, because self-operative. Practically, however, it may fall to the same level as the other, if the utterance of the self-contradiction is denied by the witness and is obliged to be evidenced by calling other witnesses; for then it requires (as in the other process) that we first believe the other witnesses. Yet, even then, in compensation, it may acquire a double force, for if we believe the other witnesses, the first witness has twice erred and perhaps twice falsified, — once, in his self-contradiction, and once again in denying that he uttered it.

**Topic 4. Contradictory Testimony by Witnesses called on the Same Side****324. THE HISTORY OF SUSANNA. (Apocrypha.)**

[Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim. They tempted her, but she resisted. Then they plotted, and charged her with adultery; and she was brought before the assembly.] And the elders said: "As we walked in the garden [of Joacim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify." Then the assembly believed them, as those that were the elders and judges of the people. . . . But [Daniel] standing in the midst of them, said: . . . "Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a

daughter of Israel?" . . . Then Daniel said unto them, "Put these two aside, one far from another, and I will examine them." So when they were put asunder one from another, he called one of them, and said unto him: "Now, then, if thou hast seen her, tell me, under what tree sawest thou them companying together?" who answered, "Under a mastick tree." And Daniel said, "Very well; thou hast lied against thine own head." . . . So he put him aside, and commanded to bring the other, and said unto him, . . . "Now therefore tell me, under what tree didst thou take them companying together?" who answered, "Under an holm tree." Then said Daniel unto him, Well; thou hast also lied against thine own head." . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people.

**325. KERNE'S TRIAL. (1679. HOWELL'S *State Trials*. VII, 707, 709.) . . .**

[Charge of being a priest. Two women, Edwards and Jones, were offered to testify to hearing him say mass.] *Defendant*: "I desire to ask her what discourse she had with Mary Jones, the other witness, for she has been instructing her what to say, and that they may be examined asunder;" which was granted. *L. C. J. Scroggs*: "Did she [Jones] tell you what she could say?" *Edwards*: "She did." *L. C. J.*: "What?" *Edwards*: "She went once to hearken, and she heard Mr. Kerne say something in Latin, which she said was mass." *L. C. J.*: "Call the other woman; you shall now see how these women agree." *Clerk*: "Call Mary

Jones." *L. C. J.*: "Let the other woman [Edwards] go out. . . . What did you tell her you could say?" *Jones*: "I told her . . . he said somewhat aloud that I did not understand." *L. C. J.*: "Did you not tell Margaret Edwards that you heard him say mass?" *Jones*: "No, my lord." *L. C. J.*: "Call Margaret Edwards again. Margaret Edwards, did Mary Jones tell you that she heard Mr. Kerne say mass?" *Edwards*: "Yes, my lord." *Jones*: "No, I am sure I did not, for I never heard the word before, nor do not know what it means." *L. C. J.*: "So they contradict one another in that."



**326. THE ATTESTING WITNESSES' CASE.** (JOHN C. REED. *Conduct of Lawsuits*, 2d ed., 1912, § 118.)

. . . The first instance was on a caveat to a will propounded for probate, the issue being whether the witnesses signed in the presence of the testator. There was no doubt that he and all of the witnesses were present when the execution commenced, but the caveators contended that he left the room before the witnesses signed. The recollection of the subscribing witnesses was not clear, and the court held that by reason of this testimony there was a prima facie presumption of due execution. To rebut this presumption, the caveators read the testimony of two women which had been taken by commission. These two were in the room during the execution of the paper, and both of them testified positively that the testator went out in company with themselves before the subscribing witnesses had signed.

This testimony seemed to overwhelm the propounders. But when it was criticized, it was shown that in every other respect save that they carried the testator off before the subscription by the witnesses, these two were in irreconcilable conflict with each other. One said that the testator accompanied her and her companion to the room, while the other said that the testator was

already in the room when they came and she did not know whence he came. They disagreed as to the order of leaving. One said that the testator went out with the two and at her side, the other said that he came behind them. According to one of them, the two went out into the hall and passed up to the door of the sitting-room, where they stopped; the other carried the whole party at once into the sitting-room. Again, each one of them was at variance in other particulars with the weight of the evidence; in many instances the variations being trivial, to be sure, but yet of great importance for testing the accuracy of their memories. The paper, at the time of its execution, was primarily intended as a settlement, and it was not known by the subscribing witnesses nor the women to be also a will, and none of them pretended to have closely observed the details of its execution. Many years had elapsed since the occurrence under investigation. One of the women was interested with the caveators and the other strongly biased in their favor. The jury could not trust their memories in the solitary particular where they agreed, and they found a verdict setting up the will.

**327. FRANK ROBINSON'S CASE.** (T. DUNPHY and T. J. CUMMINS. *Remarkable Trials of all Countries*. 1873. pp. 146, 156, 163.)

[On April 9, Saturday, 1836, in New York City, Helen Jewett, an inmate of a house of ill-fame, was murdered at night in her room, probably with an axe. In the back yard next morning were found an axe and a cloak. The cloak had a cord or string to tie it, and was said to be the accused's; the axe was said to be tied to the same string.]

*Richard Eldridge*, examined by *Mr. Phenix*. — "I am a watchman. On Sunday morning the 10th of April,

. . . in a yard next to Mrs. Townsend's, belonging to a lot on Hudson street, I found a hatchet and a cloak. . . . I went towards the south-west corner of the yard, and there I perceived, about six inches at the other side of the railing, the hatchet which has been produced. The fence between Mrs. Townsend's yard and the yard belonging to the house in Hudson street is about nine feet high, and in some places twelve feet. The cloak was about fifteen

feet from the fence of Mrs. Townsend's yard in the yard belonging to the lot in Hudson street. . . . When I first discovered the cloak I did not see that it had any string attached to it. . . . The axe and cloak were both deposited in a back room on the first floor of the house immediately under the room in which the body was lying. . . . I did not, until they were pointed out to me at the coroner's inquest, observe either the string or the hatchet or the string upon the cloak." . . .

*William Schureman*, who, being sworn, was examined by Mr. *Phenix*, and deposed as follows: "I am the coroner for the City and County of New York. . . . I was at the house when a cloak was found in one of the yards in the rear. That cloak was handed to me in the yard of the house. . . . The string now attached to the cloak was attached to it when it was found, and from certain circumstances and conversation which then took place between me and some of the persons in the house, I was induced to notice it particularly. I saw the string attached to the cloak before it was taken into Mrs. Townsend's house, and shortly after I received it from the watchman. . . . There was a hatchet also found in the rear of the house. . . . When the hatchet was handed to me, I looked at it, but did not discover anything at that time very particular upon it. It was wet as if with dew; at that time I did not perceive a string upon the hatchet — I mean when it was handed to me in the yard. I did not observe the string upon the hatchet until it was brought to me a second time before the jury. I think it was handed to me by Mr. Brink and he called my attention to it; then myself in company with some of the jurors compared the string upon the coat and the string upon the hatchet, and they were similar in all respects; the string appeared to be new, and to have

been recently cut off. . . . I did not notice any blood on the hatchet, but it had a reddish appearance the same as it has now. I gave particular direction, when I handed the hatchet and cloak to a person to keep until I impaneled a jury, to be sure to keep safe. I gave this injunction more particularly in relation to the string that was upon the cloak, as I understood from some of the persons in the house that a person had been there who wore a cloak. I did not then notice or know anything about the string upon the hatchet, and my directions therefore had not such particular reference to it." . . .

*By the Judge.* — "The string might have possibly been on the hatchet. My attention was drawn to the string on the cloak, before I saw the hatchet, and it is now, on reflection, my impression that if the string had been on the hatchet when it was found I should have noticed it in connection with the circumstance. . . . It is possible that some of the persons to whom I gave the cloak, having the string then attached to it, might have tied the hatchet to the string, and subsequently broken it off." . . .

*George W. Noble*, examined for the prosecution by Mr. *Morris*. — "I am an assistant captain of the watch. . . . When I got into the yard both the cloak and hatchet were found. I saw the hatchet and examined it myself. I examined it before it was taken into the house. I saw the string upon the cloak before it was taken into the house. . . . I saw the string on the hatchet as it is now upon it, in the yard, before it was taken into the house, and directly after it was found. I did not compare the string upon the hatchet and the string upon the cloak, but Mr. Brink, the officer, did in my presence. He examined and compared them, and he concluded as I did that they were both alike." . . .

*Denis Brink*, police officer, examined by Mr. *Phenix* for the pros-

ecution.—“I was at the house of Mrs. Townsend, in Thomas street, on the morning of the tenth of April. . . . I was there when the cloak and hatchet were found. . . . I had both the cloak and hatchet in my hand before they were taken into the house. . . . The string that now appears upon this cloak was in the yard before it was taken into the house. It was fastened to the end of the cloak. I had the hatchet in my hand before it went into the house. I saw a string upon the handle of the hatchet. I compared the string on the handle of the hatchet with the string that was fastened to the cord of the cloak. . . . I saw the

string on both the coat and the hatchet not more than two minutes after they were found. . . . There was not a particle of difference between the strings on the hatchet and cloak when I first saw them in the yard.” . . .

Mr. *Schureman*, recalled for the defense, and examined by Mr. *Maxwell*. —“I did not see or hear of any comparison of the string on the cloak with the string on the hatchet by Mr. Brink or Mr. Noble. . . . I have expressed it as a somewhat singular circumstance, that neither Brink nor Noble mentioned to me in especial manner about their comparing the strings on the hatchet and the cloak.”

328. LAURENCE BRADDON'S TRIAL. [Printed *post*, as No. 391.]

329. LORD CHANCELLOR MACCLESFIELD'S TRIAL. (1725. HOWELL's *State Trials*. XVI, 843, 1118.)

[Sir Thomas Parker, after being Chief Justice, was made Chancellor. He was impeached on the charge of having taken money for the appointment of masters in chancery and other offices. One of the issues in the particular charge here involved was whether the money was merely a present offered and accepted, or a price exacted by way of sale and extortion.] . . .

Mr. *Thomas Bennet* sworn.

Serg. *Pengelly*. — My lords, Mr. Bennet was the person who was possessed of the office of the Clerk of the Custodies, at the time of the resignation of it for the benefit of Mr. Hamersley, who has now a patent. . . . We beg leave to ask Mr. Bennet, what application he made for liberty to resign this office, and for Mr. Hamersley to be admitted?

*Thomas Bennet*. — My lords, as soon as I was admitted a Master of the Court of Chancery, which was on the 3rd of June, 1723, I thought it inconsistent to hold this office of Clerk of the Custodies, which I had before; and therefore I intended to

surrender it to some person that was proper; and after I had found Mr. Hamersley, and made an agreement with him, I applied to Mr. Cottingham, then secretary to my Lord Chancellor. I told him I was possessed of an office in the gift of the crown, and was willing to surrender, and was going to apply to a secretary of state, to get the king's leave to surrender, for the benefit of Mr. Hamersley. I told him that the office being in the Court of Chancery, the Secretary of State would naturally ask my Lord Chancellor, whether the person I proposed was well affected to the government and qualified for the place; and therefore, for that reason, I thought it my duty to acquaint my Lord Chancellor with my intention, and who the person was I intended to succeed me. I desired Mr. Cottingham to acquaint my Lord Chancellor that Mr. Hamersley was the person. Mr. Cottingham replied, he would acquaint my Lord Chancellor, and I should have an answer as soon as possible. He appointed me to meet him the next day, when

he told me he had acquainted my Lord Chancellor who the person was, and that my Lord Chancellor said he had not any knowledge of him. I told Mr. Cottingham he might have acquainted his lordship that he [Mr. Cottingham] knew him, for he lived the next door to him. He is a gentleman at the bar well known; and I do assure you he is in the interest of the government. Says Mr. Cottingham, my Lord Chancellor don't know him, nor do I. I was surprised at that. But however, said he, Mr. Bennet, there is a present expected by my Lord Chancellor, and if I made that present, the thing might be made easy, and my Lord Chancellor would do what I desired; that is, to acquaint the Secretary of State, that Mr. Hamersley was a person well affected to the government; and that I desired he might succeed me in my place. Mr. Cottingham said, there must be a present. On this, I told Mr. Cottingham, that it was not usual to give any present upon this occasion; that, in my own case, when I came in, I gave none to my lord Cowper; and my brother told me that he gave none; and that at his coming in, he asked lord Cowper if anything was due to him, and my lord Cowper denied that anything was due, and absolutely refused anything. Besides, said I, it is very hard for my Lord Chancellor to ask or accept anything from me, because I so lately paid him so great a sum as 1,500 guineas for my Master's place; but if he will have it, I will give him 100 guineas. He said he would acquaint my Lord Chancellor with it; and the next day, or the day after, he told me that my Lord Chancellor would accept of that; but it was a very small present, and it was a favor my lord accepted it; and my lord would send over to Hanover for the king's warrant, and I need have no further trouble besides passing the patent.

Serg. *Pengelly*.—My lords, I de-

sire he may be asked, whether he paid the 100 guineas to Mr. Cottingham, and in what manner?

*Thos. Bennet*.—I did pay it; I think it was in a Bank bill of £105.

Serg. *Pengelly*.—Do you remember at what time?—It was long before the resignation. . . .

Serg. *Pengelly*.—We have done with Mr. Bennet.

Serg. *Probyn*.—If the gentlemen have done with him, we beg that he may be asked a few questions on behalf of my lord Macclesfield. What was it you desired Mr. Cottingham to say in your favor to my lord Macclesfield?—I desired Mr. Cottingham to acquaint my Lord Chancellor, that I intended to apply myself to the Secretary of State for leave to surrender the place of Clerk of the Custodies, and to beg the favor, that if the Secretary of State should inquire of him after the abilities and circumstances of Mr. Hamersley, he might assure the Secretary of State, that he was a man qualified for the place, and well affected to the government.

Serg. *Probyn*.—Was that all?—I think that was all.

Serg. *Probyn*.—Was that all that Mr. Cottingham told you he had asked?—I don't remember anything more, but only Mr. Cottingham returned for answer, my lord did not know Mr. Hamersley, and I must make a present, and then what I desired would be complied with.

Serg. *Probyn*.—I think you say you had some treaty with Mr. Hamersley about the surrender of your office?—Yes.

Serg. *Probyn*.—Had you come to any agreement with him for the office, if you could procure a surrender and admittance?—Yes. . . .

Mr. *Robins*.—My lords, I desire he may be asked, whether Mr. Cottingham told him that the lord Macclesfield insisted upon any particular sum?—Mr. Cottingham told me, that my lord insisted upon one hundred guineas; and I argued the unreasonableness and hardship of it.

*Com. Serg.*—My lords, I desire Mr. Bennet may acquaint your lordships, whether ever he made any application to the noble lord for permission to resign?—I never spoke to my lord myself.

*Serg. Pengelly.*—If the gentlemen have done with him, we beg leave to explain this matter, and to ask him upon what account it was that Mr. Cottingham, from my lord Macclesfield, said a present was expected?—I cannot say what was Mr. Cottingham's reason; but he said My Lord Chancellor did not know Mr. Hamersley; and then he went on and said, a present was expected. I apprehended Mr. Cottingham took it, that I could not do it without my Lord Chancellor's consent. . . .

*Serg. Pengelly.*—My lords, if they have done with this witness, we beg leave to call Mr. Cottingham, who was an agent, and paid over this money to my lord Macclesfield.

*Mr. Peter Cottingham* sworn.

*Serg. Pengelly.*—My lords, we only call Mr. Cottingham, to acquaint your lordships when he paid over these 100 guineas to my lord Macclesfield. — *Cottingham.* — In July, I think it was.

*Serg. Pengelly.*—How long after you received it from Mr. Thomas Bennet? — *Cottingham.* — I believe I paid it over that day, or the day after. . . .

*Com. Serg.*—If the gentlemen of the House of Commons have done with him, I beg that he would give your lordships an account what discourse he had with Mr. Bennet?

*L. C. J. King.*—You hear the question.

*Cottingham.*—Mr. Thomas Bennet told me he had agreed with Mr. Hamersley for the place of Clerk of the Custodies; and that he did not think it convenient to keep two such considerable places, which depended upon his own life only; that is, the Master's place, which he had before purchased, and this. He told me he had disposed of this place to Mr.

Hamersley, in order to reimburse himself part of the money he had paid to Mr. Hiccocks, for his Master's place that he had purchased of him, and for that reason he did not care to keep both.

*Com. Serg.* Did he tell you how much he had disposed of it for? — No, he did not.

*Com. Serg.*—My lords, I desire Mr. Cottingham may be asked, what it was Mr. Bennet desired him to request of my lord Macclesfield? —To the best of my remembrance, he said, he hoped that his lordship would accept of 100 guineas, because he had received from him so lately a present for his Master's place, and he desired his lordship to forward his petition to his majesty.

*Dr. Sayer.*—Was this on the first application?—Yes; he never made but one application to me.

*Dr. Sayer.*—It is of consequence; and therefore I desire it may be asked, whether, at the first time he applied, he made this offer of 100 guineas?—He did, and I paid it over to my lord Macclesfield.

*Dr. Sayer.*—I desire Mr. Cottingham may be asked whether he knew Mr. Hamersley before this time?—I knew him very well, he was my next door neighbor both in town and country.

*Dr. Sayer.*—Did you tell Mr. Bennet you did not know him? No, I never told him so, it was impossible I should; he was my next door neighbor both in Bell-yard, and at Hampstead.

*Dr. Sayer.*—What character had Mr. Hamersley?—A very good one.

*E. of Macclesfield.*—When you first spoke to me of this matter, what did you tell me?—I told your lordship, Mr. Hamersley was my next door neighbor both in town and country; and that he was a gentleman of as unquestionable a character as any at the bar; and your lordship was pleased to depend upon me for his character. . . .

*Serg. Pengelly.*—If they have

done, we beg leave to ask Mr. Cottingham, since he informed my lord of the circumstances of Mr. Hamersley, whether he acquainted my lord of Mr. Hamersley, before or after the time he paid the 100 guineas? — I acquainted his lordship before.

Serg. *Pengelly*. — I beg leave to ask another question: If this gentleman can inform your lordships upon what account it was he received the 100 guineas from Mr. Bennet? — I received the 100 guineas upon account of his surrender of his office.

Serg. *Pengelly*. — We beg leave to ask another question: whether before he agreed with Mr. Bennet, he had informed my lord Macclesfield of any proposal, or what was to be expected? — No, I don't remember I did. All that passed on that occasion was, Mr. Bennet said he was willing to give 100 guineas, and he hoped his lordship would not insist upon more.

Serg. *Pengelly*. — I beg he may be asked another question; whether when he came back from my lord Macclesfield to Mr. Bennet, with the account of the acceptance of the 100 guineas, he did not tell Mr. Bennet, he ought to take it as a favor that his lordship accepted so little? — I can't remember, but I think I did not.

Serg. *Pengelly*. — Can you say you did, or you did not? — To the best of my remembrance, I did not.

Serg. *Pengelly*. — We desire he may inform your lordships what answer he brought to Mr. Bennet from my lord Macclesfield? — The answer my lord Macclesfield ordered me to give Mr. Bennet, was, that he agreed to accept of the 100 guineas according to his proposal.

Serg. *Pengelly*. — Whether was this offer of the 100 guineas the first time, or after Mr. Cottingham had spoken to my lord Macclesfield about it? — Mr. Bennet proposed to me to give the 100 guineas before I spoke to my lord about it.

Serg. *Pengelly*. — Whether it was the first time he offered the 100

guineas, or some time after? — He offered the 100 guineas the first time.

Serg. *Pengelly*. — Whether Mr. Cottingham did not say the first time, that something was expected? — I believe he did say the great seal would expect something.

Mr. *Lutwyche*. — Mr. Cottingham says, he believes he did say something was expected. Then I desire to refresh his memory, and that he would acquaint your lordships whether that was mentioned before the 100 guineas were offered? — No, not as I remember.

Mr. *Lutwyche*. — What did you say on that occasion? I said on that occasion, as he offered 100 guineas, I told him my lord was willing to accept of it.

Mr. *Lutwyche*. — I am speaking of the first discourse he had with him, I think he does recollect that he said my lord expected something on the account of this office. — The first discourse when that was mentioned, I told him my lord expected something to be paid by way of compliment.

Mr. *Lutwyche*. — Was that the first discourse? — The first that I remember.

Mr. *Lutwyche*. — I beg another question. If Mr. Cottingham told Mr. Bennet that my lord expected something by way of compliment, how came Mr. Cottingham to know that? — Mr. Bennet asked me if I believed his lordship would not expect a compliment. — I told him I believed his lordship would; and then he said he would give 100 guineas.

Mr. *Lutwyche*. — Had you any discourse with my lord Macclesfield before? — No, none at all. I told him it was usual to make a present; and then he told me he was willing to give 100 guineas.

Mr. *Plummer*. — I know Mr. Cottingham is a very honest gentleman. I desire to ask him, if Mr. Bennet did not then tell him, that when his brother was admitted, my lord Cow-

per would take nothing?—He did not, upon the oath I have taken; this is the first word I heard of it; I did not know whether his brother paid anything or nothing.

*Serg. Pengelly.*—There is some little variation, though not material, between Mr. Bennet and Mr. Cottingham; we beg that Mr. Bennet may come to the bar again.

*E. of Macclesfield.*—My lords, I don't oppose Mr. Bennet's coming to the bar again; but I think it is very extraordinary for persons to produce witnesses to confront their own witnesses.

*Mr. Lutwyche.*—We do it to confirm the testimony of our witness.

*Serg. Pengelly.*—In an affair of this nature it is impossible to produce direct evidence, without producing the agent employed. Mr. Cottingham was the agent made use of by the Chancellor, and we beg leave to ask of Mr. Bennet, what answer Mr. Cottingham brought, or said he brought, from my Lord Chancellor relating to this affair.

*Thos. Bennet.*—When Mr. Cottingham went from me to my Lord Chancellor, there was not a word of money mentioned the first time. I would not so much as put it into his head; and he returned to me the next day and told me my Lord Chancellor insisted upon a present. Then I said it was very hard, and I would give my lord 100 guineas if it must be so.

*Serg. Pengelly.*—Was it not at the second meeting that he insisted on a present to my lord? *Thos. Bennet.*—At the second meeting. At the first time he did not, because there was no mention made of money.

*Cottingham.*—All that Mr. Bennet said to me on that occasion was, that in regard a compliment of 1500 guineas had been so lately given to his lordship, he hoped his lordship would take no more of him than 100 guineas.

*E. of Macclesfield.*—These gentlemen are pleased to differ in their evidence. I would ask Mr. Bennet

a second time whether Mr. Cottingham told him that he did not know Mr. Hamersley?—*Thos. Bennet.*—I am sure Mr. Cottingham told me that my Lord Chancellor did not know him, and I think he told me that he did not know him. That made me say, Why, Sir, that is strange you should not know him, when he lives the next door to you!

*E. of Macclesfield.*—Before he said, Mr. Cottingham said he did not know Mr. Hamersley. I think he told your lordship so, that he did not know him. *Thos. Bennet.*—It is impossible to swear to a conversation at so great a distance.

*E. of Macclesfield.*—You are not positive? *Thos. Bennet.*—I am not positive.

*E. of Macclesfield.*—Then, if he is not positive whether Mr. Cottingham told him so; I desire he may be asked whether he is positive that he answered Mr. Cottingham, Why, Sir, that is very strange that you should not know him, when he lives the next door to you? *Thos. Bennet.*—I am as positive of the one as of the other. This conversation passed between us, as near as I can remember.

*Cottingham.*—It is very strange I should say so of my very next-door neighbor, and a gentleman at the bar. *Thos. Bennet.*—Therefore I wondered at it.

*Cottingham.*—It is very strange, sure, Mr. Bennet, that I should not know him. He is a gentleman at the bar; I see him every day at Westminster hall. *Thos. Bennet.*—That was the wonder I made of it I might mistake you; I am sure you said my lord did not know him, and I believe you said you did not know him. Mr. Cottingham is very deaf, and he might mistake me. . . .

*Com. Serg. (Mr. Lingard).*—My lords, the gentlemen that have gone before me upon this occasion have so fully opened the nature of the noble Earl's defense in general, that I shall not presume to take up any more of your lordships' time, by

following them in that method; but shall confine myself to the Fifth, Sixth, Seventh, Eighth, and Ninth articles. . . . My lords, we must beg leave to submit it to your lordships' consideration, what credit is to be given to Mr. Bennet's evidence, so far as it does go, for this purpose. The gentlemen of the House of Commons have thought fit to call Mr. Cottingham, as a witness to this Article; who owns that in his first discourse with Mr. Bennet upon this occasion, he told him he believed a present would be expected to the great seal, and that Mr. Bennet freely offered 100 guineas, before Mr. Cottingham spoke to the Earl about that affair. He expressly contradicts Mr. Bennet in what he said of Mr. Cottingham's insisting upon 100 guineas, and Mr. Bennet's agreement to give that sum at the second meeting, Mr. Cottingham swearing, that the offer of 100 guineas was voluntary on Mr. Bennet's part; and that it was at their first meeting. There are several other contradictions in their evidence; but I shall only

take notice of that, where Mr. Bennet pretends that Mr. Cottingham asserted he did not know Mr. Hamersley, his next-door neighbor. This Mr. Cottingham denies, and Mr. Bennet is forced in some measure to retract what he had so positively sworn; and comes down to a belief only that Mr. Cottingham said so, but will not be positive. It is something surprising, that after they have done Mr. Cottingham the honor to call him as a witness, and give him a credit by so doing, hints should be flung out, that Mr. Cottingham knows nobody, except where there is gold in the case; that gold is a great clearer of the eyesight, and the like insinuations, to the lessening his character. But why then did they call him as a witness? Surely, my lords, if he is a person not to be believed, it was not altogether so proper to produce him as a witness before this august assembly. . . . We hope your lordships will then find no difficulty in determining whether Mr. Bennet or Mr. Cottingham deserves most to be credited.

**330. JOHN BEGGS' TRIAL.** (1803. *HOWELL'S State Trials*. Vol. XXVIII, p. 852.) . . .

Mr. *Attorney-General*.—My Lord, and Gentleman of the Jury: We shall shortly submit to your consideration such evidence, as we trust will be sufficient to satisfy your minds, that a rebellious and traitorous insurrection existed in this city of Dublin upon the 23d day of July last, and then it will be your duty, gentlemen, to attend with every possible degree of diligence to the evidence which will be adduced to show, how far the prisoner was connected with that insurrection. . . . The prisoner at the bar, standing sentinel at Bonham-street, was discovered at no great distance from the frame of timber which you will hear described. . . . A soldier of the ninth regiment, who first perceived the prisoner, said, "There

is a man with a pike," and upon hearing the exclamation, the prisoner fled into a timber yard; he was pursued and arrested, in a situation in which he endeavored to conceal himself. If these facts shall be clearly established by evidence, there can be no doubt that the prisoner was armed with a pike for the purpose of aiding those who were engaged in the conspiracy. If he took up the pike with that intention, he is guilty of the crime charged against him. . . .

*Wheeler Coultman*, Esq., sworn.  
Examined by Mr. *Townsend*.

Do you remember the night of the 23d of July last?—I do.

Had you any party with you that night?—I had about twenty-eight men.



To what place did you proceed?—To the left of Bonham-street, where a box of ball cartridge had been found. I saw eight pikes there.

... Look at the prisoner at the bar; did you see him?—I did.

Where and when?—I saw him in a timber yard in Bonham-street. . . .

Had he any arms?—Not that I saw. It was a quarter past twelve at the time; a private of the ninth mounted upon the wall, and said, "Here is a rebel with a pike." I handed him a pistol, and desired him to jump down, and not let the man hurt him, but to open the gate; I then got into the yard, and saw the prisoner dragged from under some fresh timber, the roots of trees I believe; there was little more than his legs seen, and by them he was dragged out; I seized and tied him, and gave him to a party of the thirty-eighth regiment. . . .

Was any person with him?—No; and I saw but one pike there, within a yard of where the prisoner was lying.

How far was this yard from the beam of timber which you said was across Bonham-street?—About twenty yards, not reckoning the space over the wall.

Was it easy to get over the wall?—It was; for there was a quantity of pipe timber raised against the wall upon which we climbed. . . .

*Wheeler Coultman, Esq.,* cross-examined by *Mr. MacNally.* . . .

*Court.*—Did the prisoner say anything by way of excuse?—I asked him, "what brought him there?" he said, "he ran away to avoid the pikemen."

He told you he ran away from a number of pikemen?—He did.

From all you saw, from the instruments of destruction across the street, and the depot of arms, do you not believe there was a great number of pikemen there?—I do believe it, because Colonel Browne had been killed there that evening. . . .

*Sergeant Thomas Rice* sworn. Examined by *Mr. Mayne.*

Were you with lieutenant Coultman upon the 23d of July last?—I was under his command.

Were you in Bonham-street?—I was.

Was any prisoner taken there?—There was one taken out of a timber yard.

Who was that person?—The prisoner at the bar; I know him very well.

What did you first see of him?—I found him under some timber.

Was he concealed?—He was; I could only see his legs and feet. . . .

Was any weapon found there?—I believe there was, but I cannot say positively; when taken out from under the timber he had nothing in his hand. . . .

*John Gallagher* sworn. Examined by *Mr. Solicitor-General.*

Do you remember the night of the 23d of July?—I do very well.

Do you know the prisoner?—He is there (pointing to him).

Did you see him upon that night?—I did.

Where did you first see him?—I first saw him running up Bonham-street. . . .

How did he get off?—He mounted on large beams of timber which were next the yard gate.

And what did he do then?—He jumped over the wall.

Had he any arms at that time?—He was armed with a pike.

Did you pursue him?—Over the wall straight; and when I was upon the wall, some of the party desired me not to go down; I said I would go; if I was killed, it would be the first time; I called out to my officer, and said there was the man there; he immediately dropped his pike, and he sunk under some timber. I jumped down with my bayonet, and threw the pike under the wall, lest some mischief might be done, and I called for a hatchet which the party had, and I broke open the gate. The sergeant came, and I said, the man sunk there, and I desired the sergeant to take him out.

Was there any other person there ?  
— No, there was not. . . .

*John Gallagher* cross-examined by  
*Mr. MacNally*.

. . . What arms had you ?— I had no musket, but I had this bayonet. . . .

You took this man with your bayonet ?— No, I desired the sergeant to take him. . . .

You said you threw the pike over the wall ?— I did, certainly.

Then there was no pike in the yard ?— There was no pike when I threw it from the yard ; he dropped it in the yard, when I called out, "he was there" ; he sunk under the timber, and I let the officer in.

You threw the pike into the street ?— I did, and afterwards opened the gate.

When you went in, you did not know but there might be more men than one, and therefore you threw the pike over the wall ?— For fear of mischief I did ; for fear there might be more there to sacrifice me while I was opening the gate. . . .

Why did you not fire at the rebel as you supposed the prisoner to be, when you saw him in the yard ?— Because I had no pistol ; my officer gave me one afterwards.

*Court*.— Be accurate as to the time when you threw the pike over the wall ; did you throw the identical pike which you saw the man drop ?— The very pike.

Before you opened the gate ?— Yes.

Was there any other there ?— Not that I saw. . . .

Was any of the party with you in the yard at the time you threw the pike over the wall ?— No one but myself. . . .

(The witness was desired to withdraw, and *Lieut. Coultman* was called again and examined by the *Court*.)

You have been present when the last man was examined ?— I was, my lord.

In your direct examination you said you found a pike, and but one

within the yard, when the prisoner was dragged from under the timber ?— I have.

You heard the last witness say, the pike was let fall by the prisoner, and thrown over the wall by him, the witness, before he opened the gate ; of course it must of necessity follow, that it was not the pike which you got in the yard ?— I could not answer for that ; I say I got a pike in the yard near where the man lay.

Do you recollect a pike being thrown over the wall ?— I do not ; there was a gentleman with me who may recollect better.

When the prisoner was taken, what conversation passed respecting the pike ?— I asked him what brought him there ? He said he ran away from a number of pikemen. I asked him why he was out so late ? He said he had been at a tailor's.

Did you say anything about the pike ?— I asked him about his pike ; he said he knew nothing of it.

*Jury*.— You said you gave the soldier a pistol ?— I say so still ; I gave him a pistol when I mounted the wall. . . .

*Jury*.— What did the soldier say when he got upon the timber ?— He said, "here is a man with a pike in his hand."

Was it then, or after his going over, that you gave him the pistol ?— He was upon the timber, looking over the wall, and I drew my pistol from my belt and gave it to him ; for we desired him not to go over the wall without it.

*John Gallagher* called again. Examined by *Mr. Attorney-General*.

Did you get any weapon from your officer upon the night of the 23d of July ?— I did—a pistol when I was mounting the stores.

Did he give you a pistol when you were mounting the wall of the yard, where the prisoner was ?— No, but in Marshal lane, after we went from the timber yard.

*Court*.— What did you say when you looked into the yard where the prisoner was ?— I said, "here is a

rebel with a pike in his hand"; and he then dropped the pike and sunk under the timber. . . .

*Defense*

Mr. *MacNally*.—My Lords and Gentlemen of the Jury: . . . What will be the question for your determination, when you have weighed all the evidence? It is this, whether the prisoner has to your full satisfaction, and beyond all rational doubt, been guilty of any one of those overt acts? Now what is his defense? It is too short to bear the appearance of a statement; it is confined to a single point. . . . He is a journeyman carpenter; and it is a truth that he was at work on the 23d of July; it is true that he was in his working dress, had his apron on, and was with his master from the commencement of the day, down to that terrific hour, when the inhabitants of this city were roused from their peaceful firesides and domestic comforts, by the drums beating to arms. On the firing being heard, he departed from his employer's house, and went to a house in Dirty lane, where he lodged, deviating a little way indeed to call at a tailor's for a pair of breeches. It was Saturday night, he wanted his new clothing for Sunday morning. This is a material part of the case. . . . He states to me, gentlemen of the jury, that on his way to his lodgings, it being then dark, he met in the neighborhood of the depot an armed body of men, from whom he fled in terror, supposing them to be rebels. The house where his tailor resided, and from whence he came, is exactly opposite to the wall where it is alleged he was first discovered, that is, according to the vague and equivocal evidence of the soldier. . . . If you believe he spoke truth, when he alleged to the officer, that he fled from a party whom he supposed to be rebels, you will then acquit him, from a conviction that he is innocent. . . .

*Margaret Carr* sworn. Examined by Mr. *MacNally*.

Where do you live?—In Bonham-street.

Do you follow any business?—My husband is a poor man, a carpenter, and works at a bench in the street. . . .

Can you remember whether you saw the prisoner on the night of the 23d of July?—I did indeed.

Where did you see him?—In my place.

At what hour did he leave your place?—In or about ten o'clock.

Do you know what brought him there?—He had left a pair of small clothes with the young man the week before, and he came about them.

Was the tailor at home that time?—He was not.

Did he return while the prisoner waited there?—No.

And upon that he went away?—He did. . . .

Mr. *Ball*. My Lords and Gentlemen of the Jury: . . . What is the evidence tending to support the accusation against the prisoner? Is there any other circumstance of guilt, except the evidence of the soldier, who swears that he saw a pike in the prisoner's hand, and upon that single fact, which is the whole strength of the prosecution, is to be found, in my opinion, the most deplorable weakness: if he had not the pike, there is no more reason to impute guilt to him, than to any one of you, or to any man in the court. Who is it tells you the prisoner had a pike? He is a man who has either told you a deceit, or intentional falsehood, or who has so confused and so uncertain a knowledge of the facts, that he is unable to give an accurate statement of them. . . . But attend him farther, examine his evidence, step by step, and see whether you can give him credence in any part of his story. Now, gentlemen, see what his evidence is; he says that there were large pieces of timber lying against the wall in Bonham-street, and that he saw the prisoner running over it, and that he, the witness, went after him; upon his evidence,

taken altogether, the guilt or innocence of the prisoner rests; and I will shortly analyze that evidence. He saw the prisoner run over the wall with a pike in his hand; he runs upon the wall after him; what is his account then of the transaction? I entreat you to attend minutely to his expressions. Does he say, "the fellow I saw with the pike is here still?" which is the very form of words he would have used, if the fact be true. No, but he cried out, "here is a rebel, and he has a pike in his hand." These are the words he would have used if he had unexpectedly seen a man for the first time, not if he had again seen one whom he knew to be there, and whom he had seen immediately before. They are words of discovery, not of ascertainment; the witness then says he drew his bayonet in order to defend himself, and you will remember, gentlemen, that armed with that bayonet he went and took the prisoner lurking under the timber, that the pike was within a yard of him, and so cautious was the witness that, though the man sunk as was described, under the root of the tree, and there was no danger from him, and although the witness had no arms but the bayonet to defend himself against the others, he took up that pike, and to be more upon his guard, threw it over the wall, lest he should be assailed by other rebels, while he was opening the gate as he was desired by his officer. Observe, gentlemen, how circumstantially he tells his story — he states to you his fears, the nature of them, and the means he took to avert the danger. If he has stated those circumstances falsely, he has done it through design; it is impossible he could invent them through forgetfulness. A man may through weakness of memory forget what he has known, but cannot from the same cause remember what he never knew.

I will undertake to show you, that he has invented all those facts

which he has detailed with such precision. First, the story the soldier tells is in itself improbable; for, gentlemen, according to my reasoning, if one person whom I was pursuing should throw away his pike, I would rather use it, as putting myself upon a level with any other person who might attack me, than throw it over the wall. But the fact is not corroborated by any other evidence, which, if it were true, that the pike had been tossed over the wall, might easily have been done, for all the party waiting at the outside must have seen it. Was there any other pike there? "No," says the soldier. "What became of it?" — "I threw it over the wall before lieutenant Coultman came in." What is lieutenant Coultman's evidence? That he found a pike in the yard; he said he did not find it with the prisoner, nor near him, so it could not be the pike of the prisoner. The only witness that attests the fact of the pike being in the prisoner's hands shows it was not the prisoner's pike that lieutenant Coultman saw, because the prisoner's pike was thrown over the wall, and therefore if a pike was found afterwards in the yard, as lieutenant Coultman says, it was not brought in by the prisoner; if not, who brought it there? It is utterly inconsistent with the prisoner's case, that he could prove it, but beyond all manner of contradiction the one found by lieutenant Coultman was not the pike of the prisoner. . . .

Upon the whole, which of the witnesses will you believe — lieutenant Coultman or the soldier? Will you be asked to say, It is of very little consequence and makes no difference whether there was one pike or two pikes, that the prisoner had a pike and that is sufficient? No, gentlemen, this cannot be expected from you: if you cannot speak with certainty, you cannot convict: the criminality of the prisoner rests upon the identity of the pike; which then will you believe? Can you say

that the pike which he had was the one which was found by lieutenant Coultman? No; for that was not near him, nor is it pretended that the prisoner knew anything of that pike; besides, the soldier denies and falsifies that account by saying, he threw the pike which the prisoner had into the street. The evidence at best is calculated to puzzle and perplex you, and if you give implicit credit to such contradictory, vague, and uncertain accounts, unless you cut the gordian knot, you cannot satisfy your minds. But, gentlemen, you will not do that violence, when a plain and obvious rule of common sense will gently untie and unravel the difficulty — namely, that a witness contradicted by others equally entitled to credit, must not be believed; — that no man's life should fall beneath such evidence; — that it is better one hundred guilty persons should escape, than one innocent person suffer.

I have, however, gentlemen, farther observations to make upon the evidence of the soldier, as contrasted with that of the officer, which will, in my opinion, strongly corroborate (if they have any weight at all), those which I have already made. There is one other important circumstance which I think it necessary to observe upon — it is an unconnected, single, detached fact — nothing more is necessary than barely to state it — speaking trumpet tongued that the evidence of the soldier ought not to be believed; he either forgets the transaction *in toto*, or he forgets most important facts, and those facts of a nature to make a strong and lasting impression upon his mind — because clearly and immediately connected with his own personal safety — because, being connected with his own self-defense — the strongest passion of nature — their impression must be indelible. He admits that there were fears for his safety — but he forgets that it was the officer who first suggested these fears. He

admits that he was armed for his defense, but he forgets the nature of these arms. The officer tells you, he armed the soldier with a pistol — the soldier tells you that he armed himself with his drawn bayonet only. The soldier tells you he threw away the pike, lest some unseen rebel might seize it, because he had no arms that could resist a pike. But, gentlemen, he had arms that might have defended him against a pike — he had a pistol — and that fact he denies. I do not wish to cast the stigma of intentional falsehood on any witness brought forward by the government of the country. That he has sworn falsely cannot be denied; can this falsehood be accounted for in any way favorable to the witness? . . .

I sincerely hope that those falsehoods and contradictions have arisen from the confusion of the man, his inaccuracy of recollection and judgment; but are you, gentlemen, to hang a wretched prisoner, because a man tells a story comprising a number of facts of which his recollection, his judgment, and his observation as to the persons, time, and circumstances of the transaction have been confused, indistinct, inconsistent, and contradicted? Is there not in all this something upon which you should long and long hesitate, before you would consign an individual to death? . . .

#### Reply

Mr. *Solicitor-General*. — My Lords, and Gentlemen of the Jury: It falls to my lot to conclude this trial, by a few observations upon the evidence; and I should not pay that respect to Mr. Ball which he is entitled to, unless I assigned the reason of my troubling you. . . . When the party arrived at the corner of Bonham-street, Gallagher swears he saw a man running, and that he leaped over the wall. That must have been the case; because he would not have noticed the wall unless he saw something that way;

neither would he have been induced to quit his party, unless something was presented to his view which required investigation. This demonstrates that he could not be mistaken in that respect; when he got upon the timber, he exclaims, "Here is a man with a pike." Mr. Ball relies upon it, that the soldier's testimony is to be considered solely by itself. But you will observe, that the other witnesses confirm him; they agree that he did exclaim, "There was a man with a pike!" What object could the soldier have had in stating a falsehood at that time? It was a sudden exclamation, when there was no time to deliberate upon plan or contrivance, without any motive of falsehood; it was in the moment of danger, when nothing but truth was likely to escape his lips. There was no other person found in the yard, save the prisoner; and that he was the man who jumped over the wall upon the approach of the military, there can be no doubt upon any reasonable mind.

Then the whole difficulty which has been attempted to be raised is the transaction immediately following—in the account of which, there, in truth, is no contradiction; but even if there were, it is of no consequence in the case. The finding of the pike, one way or the other, is perfectly immaterial to the point in issue, namely, the identity of the man; and this enables me to apply a rule which was stated by Mr. Ball himself, upon a former case, that trifling inconsistencies do not defeat the testimony, of witnesses, but rather serve to corroborate them, because they show that the witnesses do not come with prepared stories, but declare the truth, and slight trifling deviations appear, according as the mind or recollection of each particular witness was affected. But I do not rest upon that: I shall show, that there was no contradiction whatever.

Two points of contradiction have

been relied upon. The soldier says, he did not get a pistol when going over the wall; the officer says he did. But it appears upon another occasion, in the course of the same night, the soldier acknowledges he got a pistol, and that was, when he entered the depot; for it appears, that being a courageous man, he was foremost in every danger, and the transaction of the pistol having taken place might be mistaken by the officer, and not by the soldier, because he was the actor in the business. The pistol was not necessary in the deal yard, because the prisoner threw away his pike and hid himself before Gallagher jumped down. But let which of the witnesses be mistaken, or whether there be a mistake or not, it is not material, because the main question is, as to the identity of the man. The next contradiction relied upon is, the account respecting the pike. One of the witnesses states, that it was thrown over the wall; the other states, he found a pike in the yard: now, gentlemen, consider their situation. The soldier was within the yard, looking with attention towards the prisoner and the pike, while those without were collected at the gate, waiting for admission—so that the pike might have been thrown over the wall without the officer perceiving it, and it might have been found there by the officer when he was giving the prisoner up to another party. Now, what could induce the witness to tell a falsehood in this respect? If the pike were found in the yard by the officer, it might have been brought in by some of his party and dropped, when they were dragging the prisoner from under the timber. . . . It is not an important point upon which this variation appears, but this fact is certain, that a pike was there, and there is no way of accounting for it but by the prisoner having had it. That fact is confirmed by the testimony of lieutenant Coulterman; he says, the soldier called

out, "Here is a man *with a pike*." Can you believe, in saying that, he concerted a falsehood before so many who could detect him in a moment, when there was no opportunity for concert or design?

And therefore, gentlemen, I submit, that there is no important contradiction whatever, and that the material fact is strongly confirmed. . . . There is no dispute as to his identity or his jumping over the wall — the finding of the pike is not contradicted — and the only question is, what was his intent in having it, and what could have induced him to fly from his majesty's troops. The prisoner found it necessary to account for this conduct, and the evidence produced confirms the case of the prosecution, and leaves no reasonable doubt of his guilt. . . .

#### *Summing Up*

LORD NORBURY. — Gentlemen of the Jury: . . . No doubt remains of that which is the primary consideration, namely, that there did exist a rebellious insurrection, and a levying of war in the city of Dublin, at the period in question. . . . The existence of the treason and conspiracy being thus established, the principal question is, whether the prisoner was concerned in it; because you must be satisfied, before you find him guilty, that he did take some active part in forwarding that conspiracy. In order to bring the guilt home to him, lieutenant Coultman describes his going after twelve o'clock of the night in which the disastrous events are sworn to have happened. . . . One private in military uniform appears to have been somewhat advanced more than the rest, that was Gallagher, and there seems to be no doubt that he made use of the expressions which called upon the attention of the rest of the party; he exclaimed that "there was a rebel with a pike;" that was when he approached the timber yard in which the prisoner was afterwards

found. Some timber was also piled against the wall, by which the soldier climbed and got access without opening the gate; when Gallagher had ascended this timber, and looked over the wall, he exclaimed, "here's the rebel, he is throwing away his pike and hiding himself." . . . When the gate was opened, the party entered, and saw the prisoner concealed, all but his legs, by which he was dragged from under the timber. There was no person with him at the time, and here you will have much to investigate. Lieutenant Coultman says, he got a pike within a yard where the prisoner lay, and Gallagher says, that he threw the pike which the prisoner had over the wall. . . .

Gentlemen, you are to judge whether the person whom Gallagher first saw, was the same person whom he saw afterwards in the timber yard: the pursuit was made by the witness over the timber to the wall, and in consequence of that pursuit some person was seen. The witness called out, that he saw a man with a pike — that he was letting it fall, was diving under the timber; whether the witness could be so inspired as to pursue without seeing a party fly, you are to judge; the pursuit and the finding of a man seemed to be connected with the preceding circumstance of seeing a man run: the officer followed, and the fact of finding the prisoner is incontrovertible. Gallagher says, he threw the pike over the wall; in that he disagrees with lieutenant Coultman; whether that circumstance did not draw the officer's attention, if it happened, or whether it escaped his observation, will be for you to consider, because in all cases of this kind, it is natural to catch at every circumstance where there is even an apparent contradiction. But I am bound to tell you — what may perhaps occur to you yourselves — that it is extremely possible, that a witness intending

to tell the whole truth upon the subject matter, concerning which several witnesses have been examined, may differ in collateral points, which are not essential, and do not bear upon the main subject of inquiry. But still, if the witnesses do differ, it is a matter which ought to be taken into consideration. . . . There is a variance, marking the fallibility and a defect of memory in one witness or the other, and if such incorrectness appears, even in collateral points, as would induce you to doubt that part which is essential, undoubtedly it will weigh much in the conclusion that you shall form. But if it arise from equivocation in either witness, it bears close affinity to deliberate falsehood, and it ought to go strongly against the credit of the witness. You will consider, however, whether this difference between the witnesses arose from a different view of the transaction, in a matter that seemed

not essential to the case of the prisoner, and by no means illustrative of innocence or guilt, and whether from a frail recollection by one witness, and a clear recollection in the other; or whether there was intentional falsehood in either. There are various gradations in accuracy of account and consistency of detail, from whence you are to draw the inference as to the intention of the witnesses and the degree of credit their evidence should have.

It is for you to judge upon all the circumstances of the case; but the most important fact for you to determine is, whether the prisoner was armed with a pike, in furtherance of the treason charged upon him. . . .

The jury retired, and after deliberating for twenty-five minutes, returned a verdict of guilty; at the same time recommending him to mercy, on account of the character given of him by his employer.

331. RICHARD HARRIS. *Hints on Advocacy*. (Amer. ed. 1892. p. 55.) A witness whose evidence is untrue must lie with wonderful skill if he go through even his examination-in-chief without betraying himself. He is, I think, the easiest of all to dispose of, and once discovered to the jury in his true character will do more harm to a cause than half a dozen truthful witnesses will undo. The greatest instances in modern times of this class of witness were the notorious Tichborne claimant and his supporter Luie. It was wonderful how Orton told the story of the wreck, of his having been rescued and conveyed to Australia, of his life in the bush, of his return and his recognition by persons who had known the real heir to the baronetcy. There was, doubtless, falsehood stamped unmistakably upon the whole story, but what gave it the appearance of truth which it presented to some minds was, not the probability of any part of it, but the improbability that so ignorant a man could so skillfully have constructed so wonderful a story; that it should not have broken down by its own inherent weakness even while being narrated in chief to the jury. We know as a fact that it did not, and it therefore follows that a tissue of lies may support itself before a tribunal constituted for the purpose of eliciting the truth. Even after he had been discovered and exposed as an impostor, there were thousands who believed his story, and believe it to this day. A lying witness, therefore, is not always to be disposed of by a flourish of the hand. In most cases, if you have had any experience, you will be able to refute his statements by his own lips.

The witness comes up with a well-concocted story, and tells it glibly enough. Now you are well aware that events in this world take place in



connection with or in relation to other events. An isolated event is impossible. The story he tells is made up of facts which, if true, fit in with a great many other facts, and could not have happened without causing other facts or influencing them. If his story be untrue, the matters he speaks of will not fit in with surrounding circumstances in all their details, however skillful the arrangement may be. The multitude of surrounding circumstances will *all* fit in with a true story, because that is part and parcel of those circumstances carved out from them, no matter how extraordinary it may seem; just as the oddest shaped stone you could cut from the quarry would fit in again to the place whence it was taken. It is therefore to the rock, of which it once formed a part, that you must go to see if the block presented be genuine or false. You must, in other words, go to the surrounding circumstances. The witness, however clever he may be, cannot prepare himself for questions which he has no conception will be put to him, and if you test his imaginary events by comparing them with real events, you will find the real and the false could not exist in their entirety, there must be a displacement of facts which have actually occurred, which is impossible.

Will a lying story fit in? It is certain it will not; but it may not be possible to obtain an accurate view of the surrounding circumstances—that is the principal difficulty. But you may almost always get at some of them, and these, however few, will answer your purpose. Did the Claimant go to Wapping? Did he know the houses of the neighborhood, and the names and trades of the respective owners? If he did, who was the Claimant? Orton telling the story of himself would tell a true story, and all the surrounding circumstances would fit in and form with it a complete whole. But when he says, I am Tichborne, he places there a man who from his position in life and mode of bringing up could not possibly have been acquainted with the minute details concerning the families of Wapping and its neighborhood. Transpose the men, and you then have one whose antecedents just qualified him for possessing that knowledge which he displayed of the minute particulars of past events and persons, and which no one in any other situation of life could possess.

In cross-examining such a witness, or a witness who lies, you must therefore apply the test of surrounding circumstances, and compare his testimony with that of other witnesses. The latter will be the severest and the surest test if you apply it to the smaller details. It need hardly be said, that the greater the number of witnesses to prove a concocted story the greater the certainty of exposure by a skillful cross-examiner. The main facts of a story may be so contrived as to be spoken to by all the witnesses; but they cannot agree upon details which never occurred to them, or concoct answers to questions which they have no conception of.

It was the great complaint of Brougham in Queen Caroline's trial, that the story was so well concocted that two witnesses were never called upon one important fact. This, of course, was contrived so that there should be no possibility of contradiction. It is not difficult, if there are several witnesses telling an untrue story, to break them down in cross-examination; and one of the best instances I have met with is that narrated in the story of Susannah and the elders. This example of cross-examination further shows how necessary it is that the other witnesses should "be out of court" while one is under examination.

It is when you have to deal with an untruthful witness who speaks only to one set of facts, and stands alone with regard to that evidence, that your skill is put to the test. How are you to shake his testimony?

You must proceed to test him by surrounding circumstances, leading the witness on and on, until, encouraged by his apparent success, he will soon tell more than he can reconcile, either with fact or with the imagination of the jury. At a trial at Warwick some years ago a remarkably well-planned *alibi* was set up. The charge against the prisoner was burglary. An Irish witness was called for the defense, and stated that at the time the burglary was committed the prisoner was with him and four or five other persons some miles from the scene of the crime. The time, of course, was a material element in the case, and the witness was asked how he fixed the *exact* time. He said there was a clock in the room where he and the prisoner were, and that he looked at it when they went in and when they left. He was then told to look at the clock in court and say what time it was. The witness stared vacantly for a considerable time, and then said it was "such a rum 'un he couldn't tell." "Can't you tell a clock?" "Shure, sor, I can't tell that 'un!" What was still more strange, the same question was put to every witness, and there was only one out of some six persons who could tell what o'clock it was. And yet they all swore to the exact time deposed to by the first witness, and repeated the answer as to how they knew it. Of course the *alibi* totally broke down, and the prisoner was convicted.

I come now to a subject which has always been considered, in criminal cases especially, one of the most difficult tasks that presents itself to the cross-examiner. It is that which is known under the title of a *false alibi*; that is, where an *alibi* is set up, and every fact is true except the *date*. It has been said that you cannot break down an *alibi* of this kind. That, I think, is an erroneous idea: and although it is a difficult task, I believe, in the majority of cases, it can be accomplished. A *false alibi* may be described in this way: A has committed a burglary, say, between the hours of eleven and twelve on a particular night. B, C and D are resolved to secure his acquittal, and undertake to prove that, at the time mentioned, the prisoner was in their company ten miles away from the scene of the crime. If this be proved, and the witnesses withstand the cross-examination, they will succeed.

They know that they will be cross-examined apart as to the main events of their meeting as well as the minor circumstances — the time they started, the road they took, where they stopped, what refreshments they had, how they were employed, and even the relative position each individual occupied with regard to his companions. If the meeting were altogether imaginary, nothing would be more easy than to demolish the whole story. But if A, B, C and D went on some other day for the purpose of subsequently describing their proceedings, each would be able to stand against the most subtle cross-examination that could be administered, as to the circumstances of their meeting. All would be true, and the more they were cross-examined the more clearly the truth would appear. The only thing they would have to make up their minds upon and remember would be that it occurred upon the night of the burglary. This was doubtless an ingenious device, and must have succeeded for a considerable time. It must have been exposed, however, on the first occasion, when it was discovered that the events were

all true, and yet the prisoner was guilty. It could be capable of one explanation only. Now comes the question, "How is such an *alibi* to be broken down?" The time-worn questions, such as, "Where were you the day before? The day after?" and so on, are obviously too weak as well as too clumsy to succeed. It cannot be doubted that there must be a way to break down such an *alibi*, but up to the present time no one seems to have formed any scientific mode of proceeding, although the best cross-examiners have furnished portions of a system which I have endeavored to piece together.

In the first place it must be ascertained whether the *alibi* be true or false (a very different thing from *proving* it to be one or the other), and this will be easily accomplished by a skillful advocate in three or four questions, for as spurious metal answers to the test, so a fictitious story will discover its nature to a good cross-examiner. Having satisfied yourself on this point, the next question and the only one will be how to break down the witnesses as to *date*? As all the incidents deposed to actually occurred, cross-examination as to them will be not only a waste of time, but will tend, as before observed, to prove their truth. You must, consequently, proceed to the incidents which are *outside* the witness' story.

If I take an absolutely obvious example by way of illustration, it will probably be more useful than any attempt to define a theory by reasoning. I will suppose, then, the burglary to have been committed on the Thursday immediately preceding Good Friday, in a country village, and that the meeting for the purpose of concocting the *alibi* took place on Good Friday. The witnesses will have come prepared to speak of the incidents of that meeting. They will surmise that, in all probability, they will be asked, because it is a common and, as it seems to me, a clumsy question, "Where were you the day before?" and, "When were you with the prisoner before that?" "These questions and many others of a similar kind are as familiar to the class of persons now referred to as they are to the counsel asking them. "I knowed what he was going to arx," says one — "allays axes where you was the day afore." They are obvious, every-day, stereotyped questions, and the witnesses come prepared to answer them accordingly.

But suppose you take him entirely out of the circumstances, and ask something which he does *not* anticipate. In the first place, he will be afraid to answer, for fear you are laying a trap, and the more the question is unconnected with the circumstances of the case, the greater will be his alarm. Follow that up by another and another alike incomprehensible to his baffled mind, and then ask him where he was *in the morning*. That is quite far enough from the time he has deposed to to set him wondering what it has to do with eleven o'clock at night. As he cannot guess your meaning he will be puzzled what answer to return, and as he will be afraid, on the spur of the moment, to attempt to invent a story, and may not be ingenious enough to do so, he will probably tell the truth. Having got thus far, you start with a *fact*. By the same process you may get another and another fact. He will be drawn on to give you facts, because he does not know what answers his companions may give. He will feel sure that you will put the same questions to them. Presently, you may get from him, if a little caution and skill be used, what people he met, and where and at what time — what they did and where they went. He has not come, by any means, prepared

to set up a dozen *alibis* at once — some for himself and some for his friends — so he must necessarily become confused, and as he will tell the truth and lie at the same time, you will find him pretty much at your mercy. It may be that he saw several people on that morning, and he may place so many of them together, by a little gentle humoring, that you may, at least, safely put the question, “Were not the people coming out of church?” Outwitted, the rogue will smile and say no, *it was Thursday!* but the effect of this, if done with tact, will utterly destroy the whole story. The jury will readily accept the suggestion which, indeed, you may be able to prove by independent testimony — that *the day he is speaking of must, from the incidents you have drawn from him, have been Good Friday, and not the preceding Thursday.* ; But you will not rest there: at present you have only gone a little portion of the way. The next witness will fall into the same blunder, and may add another minute fact to the particles of evidence. Suppose Thursday was a fine and Friday a wet day. Here is a field for the exercise of ingenuity which counsel should hail with delight; and he ought not to sit down till he has proved from the witness that the day he and his companions were together was a *wet day*. . . . You would not be weak enough to let him suspect that you were cross-examining for a rainy day, otherwise you would fail; it is only by keeping him in the dark that you can succeed. His mind will be working intensely the whole time you are questioning him, and as his great object will be to find out what you are aiming at, yours must be to conceal it. As a policeman once said of an eminent friend of mine on the Midland circuit, “He’s a good cross-examiner, sir, he never lets you know what he’s driving at.”

If you succeed in getting from these two witnesses an incident, however small, that even *tends* to show that the meeting took place on Friday you will have almost demolished the *alibi*. But C comes into the box, and may by a stretch of memory recollect for whom he worked at the time and what particular work he was engaged upon: and it might possibly have happened that some portion of the machinery broke on that particular morning. Nothing outside the case is too trivial if it throw but the faintest gleam upon it. If he answers flippantly he will be caught in two or three questions without much difficulty. If he answers overcautiously he will betray himself by his demeanor, and you may follow him up and give him line like a pike that has taken the bait. But if no work was done and no machinery broken, you will still be able to find out his *habits*, his *mode of living*, and his surroundings, and it will be strange if from all these you do not lay hold of some event which will be shown by its connection with some other event to have happened on the latter and not the former of the days in question. *The smallest incident may be linked to a greater, which may be either patent of itself or notorious as to the day of the week on which it took place.* Other witnesses may be dealt with in like manner, *none of them being cross-examined to the same facts unless for the purpose of contradiction*, but all of them questioned as to incidents which, small though they be, will in their united strength destroy the *alibi* altogether.

On the other hand, an honest case is sometimes spoiled by just such discrepancies, which give the impression that the witnesses are wrong on some of the more vital facts. It is extremely important that you should not try to prove too much, or you may in consequence prove too little. “Overlay-

ing the case," as it is called, is a dangerous proceeding. It is like taking a feather-bed, bolster, and two pillows to smother a mouse with, when the feather-bed would be amply sufficient if well applied. A number of witnesses cannot agree on all points; I do not mean in words, because that would at once damn their evidence, but I mean as to facts themselves; and if you call a number of witnesses, the chances are that you will call a number of contradictions, and the moment you get one witness to contradict another upon any point how little material soever, if it be material, the jury, as a rule, will determine that portion of the evidence in favor of the accused, unless other circumstances lead them to a different conclusion. You will have given him already the benefit of one doubt.

... I may here mention (with all reverence) one great prosecuting institution which is very apt to overlay its infants, and that is THE CROWN. I remember one very important case in which the Crown was cruelly hoodwinked, and I have always had a feeling of deep sympathy with the Crown ever since. It was a case of murder. A very bad case. Horribly brutal. The public was shocked and intensely interested throughout the length and breadth of the land. It was a murder that ranks among the great murders of the world. In consequence whereof there was more bungling among the police, and more conflict among police authorities than usual. . . . The "proofs" came thick and fast you may be sure; almost everybody had a "proof." The whole country seemed to have been called from its avocations to see the murder done. The prisoner was seen here and seen there; he was buying in this shop and visiting in that; he was singing in one place and dancing in another; courting in one lonely spot and murdering in another. There never were so many "clews" to a single crime. At last the perpetrator of one horrible murder, at all events, to the satisfaction of one section of the police, would be brought to justice. It would make up for many undiscovered and thrilling crimes. Let no one henceforth say the police cannot "find out anything." Into the office where they take the evidence, or "proofs," there stepped witness after witness — scores of witnesses. Evidence was taken down, sifted, weighed, measured, as it might have been by the yard; and there stepped in among the crowd one or two of the simplest-looking, "innocentest" looking young men that could be found in all London, and an innocent looking woman or two, if I remember rightly. Now, the Crown being incapable of doing any wrong, is equally incapable of thinking any evil; so it thought no evil of these interesting witnesses, who gave their story with solemn faces, and went away with proper subpoenas in their pockets, proper Crown Office subpoenas.

The trial came on, as, after so much elaborate preparation, it was only proper that it should; and the evidence looked uncommonly black against the unhappy prisoner. An anxious and highly sensational public watched for justice to be avenged. But it was curious that amid the Crown witnesses, interspersed, were witnesses who made some matters deposed to impossible, who undid fastenings and knocked the heads off several of the Government rivets; in fact, who seemed altogether to upset the elaborately constructed evidence of the prosecution. Crown became confused, looked at the notes taken down at the institution, compared them with the evidence in court to-day, questioned the witnesses — no use, there were contradictions, irreconcilable disagreements, all in favor of the prisoner. Dates were wrong;

prisoner was in two or three places at once. And so it went on, until the judge summed up. The judge did not reconcile the discrepancies — could not, in fact; jury never attempted to. So the man was acquitted. Evidence not sufficient because too much.

332. JAMES RAM. *On Facts as Subjects of Inquiry by a Jury*. (3d Amer. ed. 1873. p. 193.) A question of credit often arises on different, or contradictory, evidence given by two witnesses. When two persons have been present when a fact took place, when something was heard or seen, and each gives an account of the fact, their stories sometimes quite, or at least very nearly, agree. But at other times it is found that the account which one gives of the fact, or if not of the fact itself, the main fact, yet of some accompanying circumstance, differs much from the account given by the other. A discrepancy of this kind necessarily raises a question of credit; and this whether the witnesses are honest or dishonest.

Assuming that each of the two is an honest witness, the disagreement in their accounts is to be sought for in each one's perception of the thing seen or heard, the impression it made on him, and his remembrance of it. From inattention, interruption, a less acute sense of hearing or sight, distance from the sound or object heard or seen, or from some other cause, one may not have had the same perception or impression which the other had of the particular thing; or the memory of the one may be better than that of the other.

It may happen that when one person does one thing, and another another, each may think and say he did that which the other did. Here each is mistaken, but his mistake need not at all affect his credit. On the same trial of Frost, part of the evidence for the Crown was that a large and armed mob had assembled in front of an inn, in which soldiers were placed, the soldiers being in a room looking toward the front, and having in it one projecting window, namely, a bow with three windows, one of which, that nearest to the passage or entrance to the inn, being, to a person in the room, and looking toward the projecting window, on the left of the middle of the three windows. The lower half of the shutters of each of the three windows was closed; and it becoming necessary, for the purpose of firing on the mob, to open the shutters, they were opened by Phillips and Gray, witnesses on the trial. On the fact that the shutters were opened, Phillips and Gray agreed in their evidence; but they differed in their evidence of the person who opened the shutters of the left-hand window and those of the middle window. Phillips said that he opened the shutters of the window on the left, and that Gray opened the shutters of the middle window. On the contrary, Gray said that he opened the shutters of the window on the left, and that Phillips opened the shutters of the middle window. Lord Chief Justice Tindal told the jury the point was perfectly immaterial, unless the variance and discrepancy between the witnesses was of such a nature as to impair their confidence in the one or the other.<sup>1</sup>

Also, when a thing is done by one person, and the like may be done by another, and each of two persons thinks and says he did a something, which may correspond either with the thing first mentioned, or with that like it, it will not follow that the two persons mean the same thing; and there may consequently be no contradiction between them, and their credit may be in

<sup>1</sup> Frost's Trial (taken by Gurney), pp. 238, 248, 249, 707.

no wise affected by what they say. On the same trial of Frost, the two witnesses, Phillips and Gray, agreed so far that the soldiers were ordered to load; and Phillips said he ordered them, and Gray said he did. "It is possible," said the Lord Chief Justice Tindal, "that both might have done it, and that Gray did not hear the order given by Phillips. It is very immaterial to the main question, because such discrepancies as this may exist very well between witnesses, without at all breaking in upon the weight due to the testimony of each."<sup>1</sup>

"I know not," says Paley, "a more rash or unphilosophical conduct of the understanding, than to reject the substance of a story, by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations present themselves; not seldom also absolute and final contradictions; yet neither one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudian's order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both contemporary writers. No reader is led by this inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind. In the account of the Marquis of Argyle's death, in the reign of Charles the Second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day; on the contrary, Burnet, Woodrow, Heath, Echard, concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever skeptic enough to raise from hence a question, whether the Marquis of Argyle was executed or not?"<sup>2</sup>

333. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>3</sup> *Sequestration of Witnesses*. The probative service rendered by this expedient is somewhat different according as the witnesses separated are called for opposing parties or for the same parties.

(1) If the hearing of an *opposing witness* were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is here purely preventive; *i.e.* it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony.

(2) But the separation of *witnesses on the same side* may do something

<sup>1</sup> Frost's Trial (taken by Gurney), pp. 237, 248, 251, 707.

<sup>2</sup> Paley's *Evidences of Christianity*, part iii, chap. i.

<sup>3</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. III, § 1838.)]

more than this. It is equally preventive, in that it deprives the later witness of the opportunity of shaping his testimony to correspond with that of the earlier one. But it is, additionally, detective in its effects; *i.e.* it exposes their difference of statement on points on which, had they truly spoken, they must have made identical statements. This variance of statements is the significant achievement of the witnesses' separation, and seems to rest for its probative cogency on two salient circumstances, namely, (a) that the witnesses speak upon the same side, and (b) that the subject of their statements is the details of a single occurrence. (a) The first circumstance serves to remove uncertainty, by fixing unmistakably upon one party's case the whole burden of error. Where two persons, claiming to have been present on the same occasion with equal opportunities of observation, are called upon opposite sides and contradict each other, the contradiction does not of itself establish anything; it may indicate that one of the two is falsifying, but it does not indicate one rather than the other as the falsifier; it is still open to either side to claim its witness as the truthful one, so that neither side is clearly fixed with the error of falsity. But where both speak for the same party, contradicting each other, it is manifest without anything further that the error is upon that particular side; the result is achieved by mere comparison of statements, without the necessity of first granting credit to an opposing witness and without any of the troublesome uncertainty which arises from being forced to weigh their respective credits. (b) The second circumstance, mentioned above, emphasizes the probability of a downright manufacture of testimony. The truth of the main fact is put forward by the party as confirmatively established by the harmony of their joint testimony; and, where two persons come purporting to have observed the same event in the same way, the details of that fact, necessarily and equally open to their observation at the same time, ought to produce the same harmony of impression, and therefore of testimony. If, then, that harmony disappears upon further questioning as to these details, one of two inferences follows: Either (b) there is an honest mistake, in observation or in memory on the part of one; but the former is less likely to the extent that the one fact was necessarily connected in observation with the other, and the latter is almost impossible where (as is usual) the statements are positive, and therefore mere failure of memory does not serve to explain; moreover, even an honest mistake as to details shows the probability of a mistake on the main fact. Or, (bb) there is a collusive arrangement, or a deliberate intention by one, to testify falsely; for if, on connected matters of detail, which by the operation of the senses ought equally to have produced identical impressions and therefore identical statements, there is no harmony, then the apparent harmony of statement on the principal fact can be explained only as artificial (*i.e.*) as the result of an individual plan or a combination to manufacture false testimony. This not only discredits one or both of the witnesses in all their testimony, but also throws suspicion on the entire mass of evidence of that party, if this fabrication by the witnesses may seem to have been known to him. More concisely and less accurately: If matters A, B, C, and D must have happened together, then a disagreement as to the tenor of matters B, C, and D, by witnesses called on the same side to prove A, indicates probable perjury by one or more as to A. and possible subornation of perjury by the party.



The weight of this exposure of contrary statements is of course diminished according to the degree of possibility of honest mistake, which in turn depends upon the necessariness of connection between the facts testified to and upon the extent to which one or more of the witnesses venture positive statements as to details. Moreover, the expedient is not invariably successful even where perjury does exist, because either a concerted working out of false details, or a cautious failure of memory, beyond the circle of the main fact, may sometimes baffle all efforts at detection. But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism; for, while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it.

**Topic 5. Contradictory Testimony by Witnesses on Opposing Sides;  
and Collateral Error in General**

**335. ROBERT HAWKINS' TRIAL.** (G. L. CRAIK. *English Causes Célèbres*. 1844. p. 147.)

[The accused, a clergyman, was charged at Aylesbury, in 1668, with robbing one Larimore at his house on a certain day. Further facts are given in No. 207, *ante*. Larimore himself was the only witness to the alleged robbery; he described it as taking place on the afternoon of Friday, September 18, when he came home alone to his house, and found the accused there.] For the defense was called. . . .

Mr. *Wilcox*. — If it may please your Honor, my Lord, upon Friday the 18th of September, 1668, I was at Larimore's house in Chilton, from noon until it was near night, with Larimore, a driving of some bargain about tiles and other things; and, my Lord, Mr. Hawkins was not at Larimore's house all that afternoon, nor did I hear anything at all then that Larimore was robbed, which, my Lord, I must needs have done if he had been robbed that afternoon I was there.

L. C. B. *Hale*. — At what time came you to Larimore's house, Mr. Wilcox? Take heed what you say.

Mr. *Wilcox*. — Before noon, my Lord.

L. C. B. — Mr. Wilcox, how long did you stay there? Mr. *Wilcox*. — Until it was near night, my Lord.

L. C. B. — Was Larimore with you all that time? Mr. *Wilcox*. — Yes, my Lord, for we were about to bargain for some tiles and other things.

L. C. B. — Are you sure that it was on the 18th of September that you were at Larimore's house?

Mr. *Wilcox*. — I am sure, my Lord, that it was upon the 18th of September that I was there, and the day before Mr. Hawkins's house was broke open.

L. C. B. — What day of the week was it upon? Mr. *Wilcox*. — It was upon a Friday, my Lord, and Mr. Hawkins' house was broke open on the next day, it being Saturday.

Lar. — It was upon Thursday, my Lord, that Mr. Wilcox was at my house, it was not upon that day that my house was robbed, but the day before. Sir *Ralph Verney*. — No, no, Larimore, it could not be on

the Thursday that Mr. Wilcox and you were together at your house, for that was the 17th day of September, and that was the day you were busied in fetching your warrant from Sir Richard Pigott.

*L. C. B.* — It is well observed, sir, and so he was, and therefore it could not be on the Thursday that Mr. Wilcox was with him at his house.

*Sir Richard Pigott.* — I am sure, my Lord, that Larimore and that fellow, the constable, were both at my house upon the 17th of September, as my warrant testifieth.

*L. C. B.* — Larimore, do not you

remember that he was at your house on Friday, the 18th of September, 1668?

*Larimore.* — No, my Lord, sure it was not upon that day that I was robbed.

*L. C. B. Hale.* — Larimore, no, in my conscience thou sayest well, for it seems you were not robbed upon the same day that you have sworn you saw the prisoner at the bar commit this robbery.

*Hawk.* — My Lord, nor upon any other day (as I do verily believe).

And here many of the people cried out, that they believed as much.

336. **SMYTH v. SMYTH.** (W. O. WOODALL. *Reports of Celebrated Trials.* 1873. Vol. I, p. 130.)

[The plaintiff claimed to be Richard Hugh Smyth, son of Sir Hugh Smyth, and Jane Vandenberg, a relative of Mrs. Jane Bernard, formerly Jane Gookin. The plaintiff's mother's marriage to Sir Hugh would have made him the heir to vast estates. He claimed to have been born in 1798, and to have been placed by his father in another family, to keep secret his relation to the father's family. He lived a long time abroad. On his return in 1826, he learned of his parentage. He produced two deeds of testament, signed and sealed by Sir Hugh Smyth, purporting to acknowledge in explicit detail all the facts of his mother's marriage and his own birth. The deeds bore date January 27, 1822, and September 10, 1823. They had not come into his possession, however, till 1852 or 1853.

The trial in ejectment for the estates came on in August, 1853. The last witness was the claimant himself, who thus continued.] . . . "I was going away from my father's house, and he called me back, took me upstairs to his bedroom, opened his bureau and gave me the Bible and the jewelry. The large picture said to be that of my father hung in the

room below. He also asked me to pledge my word to him that I would follow his directions. I assured him I would. He then gave into my hands a bundle of papers, sealed up with directions to take them to Mr. Phelps, an eminent solicitor, at Warminster. I then left him, and never saw him more. I brought the Bible and jewelry away without opening them. That is the Bible [produced], and this the jewelry."

Much interest was caused by the production of the jewelry. The Claimant brought out a new-looking morocco case containing a miniature portrait supposed by him to be his mother's, four gold rings, and two brooches. One ring was marked with the initials "J. B.," suggested to be those of Jane Bernard, and one of the brooches with the words "Jane Gookin" at length. . . .

[He testified:] "I first saw the large parchment [the deed of 1823] some time in March last. It came to me by railway from London. There was a letter inclosed with it. The letter is dated March the 7th, but I think I did not receive the parcel until the 17th. I first heard of the small parchment of 1822 when my

attorney spoke of it to me. I first saw this parchment (the small one) to-day. I do not know where it came from. . . . I did not order any seals of Moring, seal engraver of Holborn, in December, 1852. It was in March, 1853. . . . The second seal was taken from the document of 1823, the only one I had. . . . I got the seal, I think, the 7th of June. I had correspondence with Mr. Bennett, of Ballinadee . . . stating that he had the certificates of his mother's marriage and wanted specimens of Mr. Lovett's writing. . . ."

[This letter to Mr. Bennett, being produced, was found to bear the date 13th March, 1853. Upon the envelope was a seal with the motto "Qui capit capitor," which was the same as the seal he said he did not have till 7th June.] In explanation of this witness said: "It must be a mistake of the engraver; he should make out his bill better and not lead me astray with wrong dates. I could not have had the seal long before I wrote to the Rev. Mr. Bennett. After I received the deed on the 17th March, I sent the impression to Mr. Moring. He was not long executing it. . . ."

Sir F. Thesiger then asked how it was that he sealed a letter, dated the 13th March, with a seal made from a document which he did not see until the 17th. The plaintiff in explanation said Sir Frederick had explained it—he must have received the seal *before* the 13th. Sir F. Thesiger then asked how he could account for receiving the seal before he received the document; and the plaintiff replied that he could not tell—he could not explain, and asked to be allowed to retire.

Sir Frederick. — "That cannot be. My lord [addressing the court], I have just had a telegraphic message from London of the greatest importance." Sir Frederick then read from the message to the wit-

ness — "Did you on the 19th of January last apply to a person at 361, Oxford Street, to engrave the ring with the Bandon crest, and the brooch with the words Jane Gookin?"  
Witness. — "I did, sir."

The excitement in court at this unexpected avowal was intense. Sir Frederick himself sat down, and was so much affected as to be quite unable to proceed or even to repeat the question. Mr. Bovill was also deeply moved. Mr. Alexander then repeated to the court, at the request of the judge, the question asked of the witness, Sir Frederick being quite unable to do so. The ring and brooch were then produced, and admitted by the plaintiff to be the ones referred to. Hitherto he had faced all the previous questions; but at this stage of the case he appeared cowed and crestfallen. . . . His lordship thereupon appealed to Mr. Bovill whether he meant to go on. . . . Application was then made to the court by Sir F. Thesiger that the plaintiff should not be permitted to go at large, and he was accordingly taken into custody on a charge of perjury. The jury then returned a verdict for the defendant, and the extraordinary case came to an end. . . .

All trinkets, deeds, etc., were then impounded; and in the course of the day the plaintiff was taken before a magistrate and committed for trial on a charge of forgery. . . .

Mr. Alexander, on the part of the prosecution, stated the circumstances under which the previous action had been brought and its termination in the committal of the plaintiff to take his trial for perjury and forgery; and the shorthand notes of the plaintiff's examination in chief and cross-examination having been read,

Mr. Moring, a seal engraver of Holborn, was called. He deposed that in December, 1852 (only a few months before the trial), he had been employed by the prisoner to engrave a crest, garter, and motto

on a seal, from a pattern which the prisoner furnished him with. The proper motto was "Qui capit capitur," but the "u" being blotted, an error was made in the engraving, and the motto was made to read "Qui capit capitor." He also made a second seal at the request of the prisoner, with the arms of the Smyths of Ashton Court, in which the same error arose. The seal on the document purporting to be the will of Sir Hugh Smyth was made with this second seal, as also the seal on the letter from Sir Hugh to his pretended wife. He further proved that there had been an alteration in the mode of engraving seals within the last four or five years, and the seals on the will had been engraved in the new manner. The prisoner had subsequently called upon him and desired he would not give any information about the seals. Another witness, a seal engraver, corroborated the evidence as to the seal on the will having been made with the seal engraved by Mr. Moring, and also as to the new mode of engraving.

Mr. *Robert Cox*, a jeweler, of No. 351, Oxford Street, London, through whose instrumentality the plaintiff had been so effectually confounded on the third day of the trial, proved

that on the 5th January, 1853, the prisoner came to his shop and said he was trustee of some children, and had the care of some jewels which he had lost; but the jewels had been asked for, and he was desirous of buying some others in their place. As the children had never seen the originals the prisoner said the new ones would do just as well. He also asked for a miniature or miniature frame, which he said he should wish to pass off as that of the mother of the children. He selected two brooches and a wedding and a mourning ring. The engraving on the mourning ring, "Mary, wife of Sir Hugh Smyth, m. 1796, d. 1797," was done by order of the prisoner. On one of the brooches the name "Jane Gookin" was engraved, also by his order, and on the signet ring the Bandon crest. The witness deposed that it was by casually reading a report of the proceedings of the first day's trial in the "Times" newspaper that he had been led to communicate with the defense at the last trial. . . .

The jury after a few minutes' deliberation returned a verdict of guilty both of forgery and of the uttering, and the prisoner then received the well-merited sentence of twenty years' transportation.

**337. LAURENCE BRADDON'S TRIAL.** [Printed *post*, as No. 391.]

**338. THE GENERAL RUCKER.** [Printed *ante*, as No. 171.]

**339. CAL ARMSTRONG'S CASE.** (ISAAC N. ARNOLD. *Life of Abraham Lincoln*. 1885. p. 87.)

One of the great triumphs of Lincoln at the bar was won in the trial of William D. ("Cal") Armstrong, indicted with one Norris, for murder. The crime had been committed in Mason County, near a camp meeting. Norris was convicted and sent to the State prison. Armstrong took a change of venue to Cass County, on the ground that the prejudices of the people in Mason

County were so strong against him that he could not have a fair trial. He was the son of Jack Armstrong, who had been so kind to Lincoln in early life. Jack was dead; but Hannah, who, when Lincoln was roughing it at New Salem, had been so motherly, thought that Lincoln only could save Bill from disgrace and death; he could do anything. She went to Springfield, and begged

him to come and save her son. He at once relieved her by promising to do all he could.

The trial came on at Beardstown, in the spring of 1858. The evidence against Bill was very strong. Indeed, the case for the defense looked hopeless. Several witnesses swore positively to his guilt. The strongest evidence was that of a man who swore that at eleven o'clock at night he saw Armstrong strike the deceased on the head. That the moon was shining brightly and was nearly full, and that its position in the sky was just about that of the sun at ten o'clock in the morning, and that by it he saw Armstrong give the mortal blow. This was fatal, unless the effect could be broken by contradiction or impeachment. Lincoln quietly looked up an almanac, and found that at the time this, the principal witness, declared the moon

to have been shining with full light, there was no moon at all. There were some contradictory statements made by other witnesses, but on the whole the case seemed almost hopeless. Mr. Lincoln made the closing argument. "At first," says Mr. Walker, one of the counsel associated with him, "he spoke slowly and carefully, reviewed the testimony, and pointed out its contradictions, discrepancies, and impossibilities. When he had thus prepared the way, he called for the almanac, and showed that, at the hour at which the principal witness swore he had seen, by the light of the full moon, the mortal blow given, there was no moon at all."

This was the climax of the argument, and of course utterly disposed of the principal witness. But it was Lincoln's eloquence which saved Bill Armstrong.

**340. NETHERCLIFT'S CASE.**  
*and the Criminal.* 1911. p. 89.)

. . . Netherclift's dogmatic manner rendered him peculiarly liable to fall into traps like this, and many were the occasions on which he was found tripping. Readers of Lord Brampton's book will recall another amusing instance in which the expert was "put in a hole" by his opponent, who tells the story in these words: "When I rose to examine I handed to the expert six slips of paper, each of which was written in a different kind of writing. Netherclift took out his large pair of spectacles, magnifiers, which he always carried. Then he began to polish them with a great deal of care, say-

(C. AINSWORTH MITCHELL. *Science*

ing, as he performed that operation, 'I see, Mr. Hawkins, what you are going to try to do — you want to put me in a hole.' 'I do, Mr. Netherclift, and if you are ready for the hole, tell me — were those six pieces of paper written by one hand about the same time?' He examined them carefully, and after a considerable time, answered, 'No; they were written at different times, and by different hands.' 'By different persons, do you say?' 'Yes, certainly.' 'Now, Mr. Netherclift, you *are* in the hole! I wrote them myself this morning at this desk.'"

**341. PITTSBURG, C. C. & ST. LOUIS R. CO. v. STORY.**  
(1896. ILLINOIS APPELLATE COURT. 63 Ill. App. 241.)

Trespass on the case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. James GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Remittitur ordered, etc. Opinion filed March 31, 1896. . . .

Mr. Justice SHEPARD delivered the opinion of the Court.

The appellee was a passenger, bound from Chicago to New York, on one of the appellant's passenger trains. Near a station named Tuscarawas, Ohio, the train in

which appellee was so traveling collided with a west-bound mail train on the same road, and the claimed injuries suffered by appellee were thereby incurred. The trial in the Superior Court resulted in a verdict for \$12,000, from which appellee remitted the sum of \$3000, and thereupon a judgment for \$9000 in favor of appellee was entered, and this appeal is from such judgment. The appellee was about forty-six years of age, and resided on a farm in Wisconsin with her two sons and a daughter. She had lived there twenty-six years, and performed all the usual household duties, and was in good health before the accident. She testified that previous to the collision she averaged from 135 to 140 pounds in weight, and that at the time of the trial (four years after) her weight was 170 pounds. In the collision the baggage-master was killed and another employee severely hurt, but no passenger except appellee was injured. The collision occurred about eleven o'clock in the forenoon of May 7, 1891. The locomotive and the express and baggage cars were disabled, but the passenger coach in which appellee traveled was, at least, left fit for present use; and about the middle of the afternoon it was attached to another train, and appellee continued onward in her journey to New York, where she arrived about eleven o'clock the following day, and on the day after that proceeded on to her ultimate destination in Connecticut.

The only evidence the record furnishes of what her condition was after the accident, and prior to her reaching Connecticut, is found in the testimony of the appellee. After she had been in Connecticut a "few days," according to her testimony, and some time in "the latter part of May, 1891," according to his testimony, a physician was for the first time called to treat her. That physician visited her twelve or

fourteen times between his first call and June 17th following, and on the faith of her representations of pain and disability suffered by her, and of certain external bruises, contusions and discolorations seen by him on her person, he prescribed for her during that period. Appellee remained visiting at her niece's house in Connecticut some six months, and until in November, 1891, when she returned to Chicago, visiting on the way her sister in Linesville, Pennsylvania, and a cousin in Pierrepont, Ohio. She remained in Chicago for a while and then went to Wisconsin for a short time, after which she returned to Chicago, and through the intervention of a friend was accepted at St. Luke's hospital as a patient, and remained there three weeks, in February, 1892. It was while in St. Luke's hospital that she for the first time had medical treatment after that referred to in Connecticut.

There were not many objective symptoms (to use the language of the doctor) of physical injury to her visible at the time she entered St. Luke's hospital, nor do we understand from the evidence that any such have become apparent since that time. The evidence from that time on, and there is a great deal of it, with reference to her injuries, deals wholly with subjective symptoms, and for its weight rests upon her own statements and actions; and there is in some of the medical testimony, in her own testimony, and in the clinical report or record of her case, made when she was an inmate of St. Luke's hospital, considerable evidence of a lack of genuineness in her case — probably not of actual simulation of an injury not received, or of actual malinger, as recorded against the record of her case in St. Luke's hospital, but of an exaggeration of the injury, owing to a highly wrought up condition of the nervous system, produced primarily by the injury and intensified by brooding over it. The only pecuni-

any loss suffered by the appellee, that is shown by the evidence, is her disability to pursue her usual avocations as before, and her expenses in endeavoring to be cured.

As to what such expenses were, appellee was asked by her counsel if she could state to the jury, or approximate, the amount of money she had expended for such purpose, and she replied that she could not, but added, "I should say in the neighborhood of \$3000;" and upon being asked if she were able to give the items, answered: "I am not; no, sir." Her treatment in St. Luke's hospital was free, and that received by her in the sanitarium at Joliet, for the two days that she remained there, was in return for services rendered by her. And the physician who attended her in Connecticut testified that \$15 would cover his entire bill for services to her. Drawing all reasonable inferences from all the other evidence concerning what may have caused expense to her, it seems as if her estimate of \$3000 was needlessly extravagant, if not recklessly so. . . .

Looking only at the record, the appellee does not inspire us with much confidence in her statement of facts concerning which other proof is preserved, and hence we cannot avoid a distrust as to those facts of which her testimony furnishes the only evidence. That circumstances "should admonish us to look with suspicion upon whatever else he (she) may choose to swear to," as was said by Mr. Justice Caton in a case (*Fryrear v. Lawrence*, 5 Gil. 325, p. 329) where one swore to hearsay matters as being within his own knowledge. See also *Earle v. Earle*, 60 Ill. App. 360, p. 367. Appellee testified among other things concerning the results of the collision to the car that she was in, as follows: "The stove was overturned, the lamps were shattered and broken, the oil falling all over the passengers; the window glass was shattered and the car took fire, and the rear

end of the car seemed to be thrown up a great distance." We have not exhausted the record with reference to each of the details she so testified to; but it was clearly established by other evidence that the stove was not overturned, that the car did not take fire, that the windows, with perhaps one exception, were not broken, and that if any lamp was broken, no one complained of oil falling upon them. This testimony of the appellee was probably not at all material to her right of recovery, but it shows her unreliability and tendency to exaggeration. If she is so prone to magnify immaterial matters, what confidence can we place upon her testimony as to material facts? Moreover, her testimony heretofore referred to, regarding the expense she had incurred in her endeavors to become cured, is so utterly and recklessly exaggerated beyond any facts shown, and is so entirely improbable, considering her apparent means, as to cast further suspicion upon all her statements.

Considering, therefore, appellee's own testimony in connection with the uncertainty of much of the medical evidence and the records of St. Luke's hospital, wherein the diagnosis of her case is set down as "Malingery," we feel that there has not been that certainty obtained regarding the extent of her injuries as warrants us in sustaining a judgment which of itself amounts to a small fortune, and is far in excess of what we think the record shows would constitute full compensation. . . .

It seems, however, from a careful consideration of the whole record, that the appellee should have recovered a reasonable judgment, and if appellee shall elect within ten days to enter in this court a remittitur of six thousand dollars from the judgment of the Superior Court, the judgment will be affirmed for the amount so remitted down to; otherwise the judgment will be reversed and the cause remanded.

**342. JOHN HAWKINS' CASE.** (S. M. PHILLIPPS. *Famous Cases of Circumstantial Evidence.* No. XXII.)

John Hawkins and George Simpson were indicted for robbing the mail, about 2 A.M. on the 16th of April, 1722. Hawkins, in his defense, set up an alibi, to prove which, he called one William Fuller, who deposed, that Hawkins came to his house on Sunday, the 15th of April, and lay there that night, and did not go out until the next morning. Being asked by the court, "By what token do you remember that it was the 15th of April?" he replied, "By a very good token, for he owed me a sum of money for horse hire, and on Tuesday, the 10th of April, he called upon me and paid me in full, and I gave him a receipt; and I very well remember, that he lay at my house the Sunday night following." The receipt was now produced. "April the 10th, 1722. Received of Mr. John Hawkins, the sum of one pound ten shillings, in full of all accounts, per me, William Fuller." Upon inspecting the receipt, the court asked Fuller who wrote it. He replied, "Hawkins wrote the body of it, and I signed it."

*Court.* — "Did you see him write it?" *Fuller.* — "Yes."

*Court.* — "And how long was it after he wrote it, before you signed?"

*Fuller.* — "I signed it immediately, without going from the table."

*Court.* — "How many standishes [inkwells] do you keep in the house?"

*Fuller.* — "Standishes?"

*Court.* — "Aye, standishes; it is a plain question." *Fuller.* — "My Lord, but one; and that is enough for the little handwriting we have to do."

*Court.* — "Then you signed the receipt with the same ink that Hawkins wrote the body of it with?"

*Fuller.* — "For certain."

*Court.* — "Officer, hand the receipt to the jury. Gentlemen, you will see that the body of the note is written with one kind of ink, and the name at the bottom with another very different; and yet this witness has sworn, that they were both written with the same ink, and one immediately after the other. You will judge what credit is to be given to his evidence!"

Thus, the authenticity of the receipt, and the credit of the witness, were overthrown.

**343. THE BOND PAYMENT CASE.** (JOHN C. REED. *Conduct of Lawsuits.* 2d ed. 1912, § 434.)

. . . There are still others, who belong to a much less numerous class, where perjury is palpably detected. And as the lawyer should be ready to deal with such reckless swearers, we will give instances where some were brought to grief. The first is told by Judge Sharswood. "He (a gentleman of the bar of Philadelphia) allowed nothing that occurred in a cause to disturb or surprise him. On an occasion, in one of the neighboring counties the circuit of which it was his custom to ride, he was trying a cause on a bond, when a witness for the defendant was introduced, who testified that the defendant had taken the amount of

the bond, which was quite a large sum, from his residence to that of the obligee, a distance of several miles, and paid him in silver in his presence. The evidence was totally unexpected. His clients were orphan children; all their fortune was staked on this case. The witness had not yet committed himself as to how the money was carried. Without any discomposure, without lifting his eyes or pen from paper, he made on the margin of his notes of trial a calculation of what that amount in silver would weigh, and when it came his turn to cross-examine, calmly proceeded to make the witness repeat his testimony



step by step, — when, where, how, and how far the money was carried, — and then asked him if he knew how much that sum of money weighed, and upon naming the

amount so confounded the witness, party, and counsel engaged for the defendant that the defense was at once abandoned and a verdict for the plaintiff rendered on the spot."

**344. THE FARM BURGLARY CASE.** (A. C. PLOWDEN. *Grain or Chaff; The Autobiography of a Police Magistrate*. 1903. p. 102.) . . .

The prisoner was a young woman employed as a servant on a farm in an out-of-the-way part of the country. The charge against her was the ordinary one of stealing money. The facts were as follows. One night the farmer was roused from his sleep by the prisoner's knocking at his door and telling him there were burglars in the house. Seizing his gun, the farmer, in company with the prisoner, cautiously descended the stairs and made his way to the sitting room. It was evident that some one had been there, for the furniture had been shifted about, and a purse and one or two other trifles were missing from the mantelpiece. The farmer rushed to the front door, and hearing, as he thought, the sound of retreating footsteps down the gravel path, fired his gun in the direction without effect. The burglars had effected their escape. The next day the police were duly informed of the occurrence, and thanks to the very clear description the prisoner was able to give — one of the burglars she had particularly noticed as having a golden mustache and patent leather boots — placards were posted at the different Police Stations, and a general hue and cry took place over the length and breadth of the country.

Days and weeks passed without any trace of the burglars, but the police, though baffled, had not been listless. The golden mustache and the patent leather boots were a clew indeed, but not in the direction they had been seeking. They began to suspect their clever little informant, and when it was discovered that she had been spending money be-

yond the amount of her wages in the nearest town within a few days of the burglary, out of the very purse which was missing, the police felt certain that they had got the real criminal, and she was duly arrested and committed to the Quarter Sessions. I was instructed for the defense. It transpired that the prisoner was much given to reading penny dreadfuls, and that for weeks before the burglary, she had discussed the possibility of such a thing happening with a fellow servant who shared her room. There was also of course the damaging fact that she was in possession of the missing purse and had been spending money freely. In fact there was little or no moral doubt that she was guilty.

On the other hand there was a good deal to be said for the defense. If the prisoner was guilty, she was evidently a very clever actress, for beyond all question she had made the whole countryside believe in the genuineness of her story; and there was of course the admission of the farmer that he had heard the footsteps of the retreating burglars and fired a shot at them. I made the very most of this, and though the farmer tried to get out of it by saying that he must have imagined the footsteps, as no doubt he had, I succeeded in convincing the jury, at the end of a hard-fought case, that it would be dangerous to convict, and my client was acquitted. I have only given an imperfect outline of the case. The extraordinary feature of it was the amazing imagination of an uneducated servant girl, and the skillful way in which she built up the details of a story which deceived her master, hood-

winked the police, and created a general feeling of uneasiness throughout the country. If she had but left out of her description the mustache and patent leather boots,

probably suspicion would never have been excited against her, and the burglary would have taken its place in the list of crimes beyond the ingenuity of the police to discover.

#### 345. DR. RANNEY'S CASE.

*Cross-examination.* 1908. p. 66.)

... During the lifetime of Dr. J. W. Ranney, there were few physicians in this country who were so frequently seen on the witness stand, especially in damage suits. So expert a witness had he become that Chief Justice Van Brunt many years ago is said to have remarked, "Any lawyer who attempts to cross-examine Dr. Ranney is a fool." A case occurred a few years before Dr. Ranney died, however, where a failure to cross-examine would have been tantamount to a confession of judgment, and the trial lawyer having the case in charge, though fully aware of the dangers, was left no alternative, and as so often happens where "fools rush in," made one of those lucky "bull's eyes" that is perhaps worth recording.

It was a damage case brought against the city by a lady who, on her way from church one spring morning, had tripped over an obscure encumbrance in the street, and had, in consequence, been practically bedridden for the three years leading up to the trial. She was brought into the court room in a chair and was placed in front of the jury, a pallid, pitiable object, surrounded by her women friends, who acted upon this occasion as nurses, constantly bathing her hands and face with ill-smelling ointments, and administering restoratives, with marked effect upon the jury. Her counsel, Ex-chief Justice Noah Davis, claimed that her spine had been permanently injured, and asked the jury for \$50,000 damages. It appeared that Dr. Ranney had been in constant attendance upon the patient ever since the day of her

(FRANCIS L. WELLMAN. *The Art of*

accident. He testified that he had visited her some three hundred times, and had examined her minutely at least two hundred times, in order to make up his mind as to the absolutely correct diagnosis of her case, which he was now thoroughly satisfied was one of genuine disease of the spinal marrow itself. Judge Davis asked him a few preliminary questions, and then gave the doctor his head and let him "turn to the jury and tell them all about it." Dr. Ranney spoke uninterruptedly for nearly three quarters of an hour. He described in detail the sufferings of his patient since she had been under his care; his efforts to relieve her pain; the hopeless nature of her malady. He then proceeded in a most impressive way to picture to the jury the gradual and relentless progress of the disease as it assumed the form of creeping paralysis, involving the destruction of one organ after another until death became a blessed relief. At the close of this recital, without a question more, Judge Davis said in a calm but triumphant tone, "Do you wish to cross-examine?"

Now the point in dispute — there was no defense on the merits — was the nature of the plaintiff's malady. The city's medical witnesses were unanimous that the lady had not, and could not have, contracted spinal disease from the slight injury she had received. They styled her complaint as "hysterical," existing in the patient's mind alone, and not indicating nor involving a single diseased organ; but the jury evidently all believed Dr. Ranney, and were anxious to render a verdict on his testimony. . . . The cross-

examiner first directed his questions toward developing before the jury the fact that the witness had been the medical expert for the New York, New Haven, and Hartford R. R. thirty-five years, for the New York Central R. R. forty years, for the New York and Harlem River R. R. twenty years, and so on; until the doctor was forced to admit that he was so much in court as a witness in defense of these various railroads, and was so occupied with their affairs that he had but comparatively little time to devote to his reading and practice.

*Counsel* (perfectly quietly). — "Are you able to give us, doctor, the name of any medical authority that agrees with you when you say that the particular group of symptoms existing in this case points to one disease and one only?"

*Doctor*. — "Oh, yes, Dr. Ericson agrees with me."

*Counsel*. — "Who is Dr. Ericson, if you please?"

*Doctor* (with a patronizing smile). — "Well, Mr. —, Ericson was probably one of the most famous surgeons that England has ever produced." (There was a titter in the audience at the expense of counsel.)

*Counsel*. — "What book has he written?"

*Doctor* (still smiling). — "He has written a book called *Ericson on the Spine*, which is altogether the best known work on the subject." (The titter among the audience grew louder.)

*Counsel*. — "When was this book published?"

*Doctor*. — "About ten years ago."

*Counsel*. — "Well, how is it that a man whose time is so much occupied as you have told yours is, has leisure enough to look up medical authorities to see if they agree with him?"

*Doctor* (fairly beaming on counsel). — "Well, Mr. —, to tell you the truth, I have often heard of

you, and I half suspected you would ask me some such foolish question; so this morning after my breakfast, and before starting for court, I took down from my library my copy of Ericson's book, and found that he agreed entirely with my own diagnosis in this case." (Loud laughter at expense of counsel, in which the jury joined.)

*Counsel* (reaching under the counsel table and taking up his own copy of *Ericson on the Spine*, and walking deliberately up to the witness). — "Won't you be good enough to point out to me where Ericson adopts your view of this case?"

*Doctor* (embarrassed). — "Oh, I can't do it now; it is a very thick book."

*Counsel* (still holding out the book to the witness). — "But you forget, doctor, that thinking I might ask you some such foolish question, you examined your volume of *Ericson* this very morning after breakfast and before coming to court."

*Doctor* (becoming more embarrassed and still refusing to take the book). — "I have not time to do it now."

*Counsel*. — "Time! why there is all the time in the world." (Counsel and witness eye each other closely.)

*Counsel* (sitting down, still eyeing witness). — "I am sure the court will allow me to suspend my examination until you shall have had time to turn to the place you read this morning in that book, and can re-read it now aloud to the jury."

*Doctor* (no answer).

The court room was in deathly silence for fully three minutes. The witness *wouldn't* say anything, counsel for plaintiff *didn't dare* to say anything, and counsel for the city *didn't want* to say anything; he saw that he had caught the witness in a manifest falsehood, and that the doctor's whole testimony was discredited with the jury unless he could open to the paragraph referred to, — which counsel well knew

did not exist in the whole work of Ericson.

At the expiration of a few minutes, Mr. Justice Barrett, who was presiding at the trial, turned quietly to the witness and asked him if he desired to answer the question, and upon his replying that he did not intend to answer it any further

than he had already done, he was excused from the witness stand amid almost breathless silence in the court room. . . .

After ten days' trial the jury were unable to forget the collapse of the plaintiff's principal witness, and failed to agree upon a verdict.

**346. PARNELL COMMISSION'S PROCEEDINGS.** (1888. 48th day, "Times" Rep., pt. 13, p. 102.)

[In support of the charge, against Mr. Parnell and others, of using the Land League to commit crime and intimidation, the speeches to the public and the doings at the League meetings were often proved by Government constables, spies, or other prejudiced persons, and the reports were apt to be partial and misleading; every such witness was accordingly tested with reference to the correctness of his report; this testing turned out for one of them as follows:]

A. "Some months before Lyden's murder I was at a meeting at Mrs. Walsh's house. There were several persons assembled there. Varilly took the chair."

Q. "Was anything proposed or said about any person's cattle?"

A. "Yes. . . . A resolution was come to about the killing of these cattle. Some of those present left the room for the purpose of killing them." . . .

On cross-examination: Q. "My learned friend has put several rather big words to you about some gentle-

man taking the chair. Was there a chair to take at Walsh's?" A. "I cannot understand you."

Q. "Well; but you know you said that Mr. Varilly took the chair?" A. "He did."

Q. "What do you mean?" A. "He was the chairman."

Q. "What did he do?" A. "To attend the meetings."

Q. "What did he do?" A. "He told them that there should be cattle drowned."

Q. "You have been asked by my learned friend whether a resolution was passed. What is a resolution?"

A. "I could not tell you."

Q. "You have told us there was a resolution. Do you know what that meant?" A. "No."

Q. "Was there a secretary?" A. "Yes."

Q. "What is it?" A. "Not to tell anybody."

Q. "Were you secretary?" A. "I was not."

Q. "Was there a secretary?"

A. "I do not know whether there was or not."

**347. MOBILE & O. R. CO. v. STEAMER NEW SOUTH.** (*circa* 1875. U. S. District Court, Southern District of Illinois, *ex rel.* Prof. Barry Gilbert, of Iowa State University.)

An action was brought by one steamboat company on the lower Mississippi against another for injuries sustained in the sinking of one of its vessels in a collision caused by the careless backing out of the Cairo harbor of a boat of the defendant company. Because of the harbor

and pilot regulations, it was essential to the plaintiff's case to show that the collision had taken place in the middle of the river, and not two thirds of the way across, as the defendant contended. Several colored deck hands of the defendant had sworn that the collision took place

two thirds of the way across. One in particular was vehement in his declarations that he *knew* it was two thirds across, as he had noticed it definitely at the time. The counsel for the plaintiff, Mr. *W. B. Gilbert*, on the cross-examination, took a sheet of paper, folded it once at the center, and said: "Now, that's half, isn't it?" "Yes, suh." Folding it over in halves again, he said, "Now, that's a third, isn't it?" "Yes, suh!" (promptly). Then

opening out the sheet, thus creased, into four divisions, the lawyer said, pointing to the first, "John, here's one third?" "Yes, suh." To the second, "Here's two thirds." "Yes, suh." To the third, "That's three thirds." "Yes, suh." "John, we've got four thirds. What are we going to do?" "Dunno, suh; throw away the fourth one, I reckon. But I know, suh, that the two boats struck *right there at the end of the second third!*"

348. LADY IVY'S TRIAL. (1684. HOWELL'S *State Trials*. X, 555, 569.)

[This suit of ejectment involved the defendant Lady Ivy's title to a large estate containing numerous small parcels of land. She proved her title to some of them by a chain of old deeds discovered (as alleged) by one Knowles, a neighbor, while searching some musty deed boxes in his own garret. The particular parcel of land here under inquiry depended on the title of a prior grantee, one Stepkins, and the deed that would give Stepkins title would be from one Marcellus Hall as grantor to intervening parties. This old deed having been produced, Knowles was now called for the defendant to testify to the circumstances of his discovery of it. It should be remembered, in following Knowles's story, that by his own account he knew nothing, when searching, about Hall's connection with the title; he was searching only for some Stepkins deed.]

*Att.-Gen.* — Mr. Knowles, do you know anything of that deed? When did you first see it? Mr. *Williams*. — And where had you it?

*Knowles*. — My lord, I had it in a garret, in a kind of a nook, about six foot long, and three foot and a half wide, in my own house, in the garret among other writings.

*L. C. J. JEFFREYS*. — How came you to have them? *Knowles*. — As I was executor to Winterburn.

Mr. *Powis*. — Pray, Mr. Knowles,

will you tell upon what occasion you looked there and found them? *Serg. Pemberton*. — Ay, pray give an account of the whole. *Knowles*. — My lord, upon the 2d of August, 1682, was the first time I ever saw my Lady Ivy to my knowledge; and she was informed by one Mr. Vicarer, that I had several writings of Winterburn's: I told her I had so, and my lady desired me to search among them, if there were any writings that concerned Stepkins's estate; I told her it would take up a month's time to look them all over, for there was a great quantity of them. She said, I would do her a great kindness, if I would look; I promised her I would: and upon the 4th of September, I think, I found the deed. . . .

*L. C. J.* — Read it; read the demise. . . . But, Mr. Knowles, let me ask you a question or two: as I understood, you said my Lady Ivy desired you to look among Winterburn's writings, for deeds that concerned Stepkins's estate? *Knowles*. — Yes, my lord.

Where was that? — That was at her house.

And when did you find this deed? — I found the deed in September, before anybody came to look with me, or was in the place with me.

Was there anybody with you, when you found the deed? — No.

Then you found it yourself? — Yes.

Did you read it? — I did the outside; what was I concerned further?

Nay, do not be angry; when thou art most calm, thou speakest so fast a man can scarce understand thee; answer my question fairly: you say you read it, what part was it you read? — The backside, the outside. . . .

*L. C. J.* — . . . When first saw you that deed? — In September, 1682.

How do you know that? — I put my hand to it.

Did you read the inside of that deed? — No, I did not.

*L. C. J.* — Look you, then, we ask you how you came to know it was a deed belonging to Stepkins? — I read the backside, and put my hand to it.

*L. C. J.* — How came you to put your hand to this deed as belonging to Stepkins, when you never looked into the deed [as you have already sworn]? — When I found this deed to have written upon it "Marcellus Hall," I did believe it was something that concerned the Stepkins.

*L. C. J.* — Let us see the deed now. You say that was the reason, upon your oath? — Yes, it was.

*L. C. J.* — Give Mr. Sutton [the defendant's attorney] his oath. Look upon the outside of that deed, and tell us whose handwriting that is. *Sutton.* — All but the word "Lect." is my handwriting.

*L. C. J.* — Then how couldst thou [Knowles] know this to belong to the Stepkins by the words "Marcellus Hall" when you first discovered this deed in September, 1682, and you found it by yourself and put your hand to it, and yet that "Marcellus Hall" be written by Mr. Sutton, which must be after that time?

*Sol.-Gen.* (for defendant). — Here are multitudes of deeds, and a man looks on the inside of some and the outside of others; is it possible for a man to speak positively as to all the particular deeds, without being liable to mistake?

*L. C. J.* — Mr. Solicitor, you say well. If he *had* said, "I looked upon the outside of some and the inside of others, and wherever I saw *either* on the outside *or* in the inside the name of Stepkins or Marcellus Hall, I laid them by and thought they might concern my Lady Ivy," that had been something. But when he comes to be asked about this particular deed, and he upon his oath shall declare that to be the reason why he thought it belonged to Stepkins [namely] because of the name of "Marcellus Hall" on the outside, and never read any part of the inside, when Sutton swears "Marcellus Hall" was [later] written by him, what would you have a man say?

*Sol.-Gen.* — My lord, I have but this to say; if there were never a deed delivered by Knowles to my Lady Ivy, or Sutton, where Marcellus Hall's name was written on the backside of it, but by Mr. Sutton; I confess it were a strong objection. But where there are other deeds, and a great many, a man may easily be mistaken. It is impossible for any man, in a multitude of deeds that he finds among a great parcel, and delivers many of them out, to take it upon his memory particularly, which he looked on the inside of and which he looked on the backside or outside of.

*L. C. J.* — Did he not give it as a particular reason of his knowledge that they belonged to my Lady Ivy? . . . And you shall never argue me into a belief, that it is impossible for a man to give a true reason, if he have one, for his remembrance of a thing.

*Sol.-Gen.* — I beg your pardon, my lord; as I apprehend him, he swore he looked into the inside of some, and the outside of others, and there were a great many of them.

*L. C. J.* — And I beg your pardon, Mr. Solicitor, I know what he swore as well as anybody else: if indeed he had sworn cautiously, and with care, it might have been taken for a slip, or a mistake.

*Att.-Gen.* — My lord, we must leave it upon its own weight. But we are not come to our title yet: I have the deed in my hand, which is a very old one, and therefore needs not such exact proof. He is mistaken, we do own it; and I must appeal to the court, whether a man may not be mistaken in a great multitude of deeds.

*L. C. J.* — Well, now, after all this is done, let him give an account how he came to know this to belong to Stepkins, or my Lady Ivy, if he can. I speak it not to prejudice your cause, but only to have the truth come out. But for the witness that swears, it may affect him I assure you. Give him the deed, and let him look upon it. Look upon the inside, and look upon the outside too. *Knowles.* — I believe, my lord, upon better consideration, I have read this deed before now.

*L. C. L.* — Very well; and yet you swore the contrary just now. *Knowles.* — I was in a maze, my lord.

*L. C. J.* — I am sure thou sworest wildly.

*Sol.-Gen.* — Pray what deed did you take it to be at first? *Knowles.* — The lease of 128 years.

*L. C. J.* — Prithee read it now to us. *Knowles* (reads). — "This indenture made the 22d day of December."

*L. C. J.* — Between whom? *Knowles* (reads). — "Between Marcellus Hall of Radcliff, miller, of the one part, and John Carter, oar-maker, of the other part, witnesseth, that the said Marcellus Hall hath demised, granted, and to farm letten to the said John Carter, all that wharf lying in Radcliff, where late a mill stood, and called Radcliff Mill."

*L. C. J.* — Can you say you ever read so much before? *Knowles.* — I believe I did.

*L. C. J.* — When was it? *Knowles.* — In September, 1682.

*L. C. J.* — Then you read it before you showed it to my Lady Ivy? *Knowles.* — Yes, my lord.

*L. C. J.* — And you found what the contents were by reading? *Knowles.* — Yes, my lord.

*L. C. J.* — Did you read it through? *Knowles.* — No, I did not, I believe.

*L. C. J.* — How far do you think you read? *Knowles.* — As far as I have read now.

*L. C. J.* — Did you find anything there of the name of Stepkins? *Knowles.* — No, not in that I did not.

*L. C. J.* — I would desire to know of you, who it was that came to my Lady Ivy, to inform her you had such and such writings? *Knowles.* — . . . The first time that I saw her was the 2d of August, as near as I can remember, and then I told her, I was executor to Winterburn, and had a great many writings. Said she, do you know the hand of Stepkins? if you do, and can find any writings that relate to Stepkins, you will do me a great kindness.

*L. C. J.* — Did she name anybody else to you? *Knowles.* — She named one Lun, and one Barker, and one Holder, and several others; I do not remember all.

*L. C. J.* — Was there any mention made of one Collet? *Knowles.* — No.

*L. C. J.* — Was there of one Donne? *Knowles.* — Of one Lun there was.

*L. C. J.* — Of one Fecknam? *Knowles.* — No.

*L. C. J.* — Of one May? *Knowles.* — No.

*L. C. J.* — One Joan Hall? *Knowles.* — No.

*L. C. J.* — Was there any mention made of any Hall? *Knowles.* — Yes, there was.

*L. C. J.* — What Hall did she speak of? *Knowles.* — I am not certain whether any Hall was named or no.

*Att.-Gen.* — He says, he is sure there was of Stepkins, and several others, but not of any Hall.

*L. C. J.* — He does so, Mr. Attorney. But now I would ask him this question; if there were no mention of any Hall, how came

you to find out that this deed from Marcellus Hall to Carter should affect Stepkins, or any Lady Ivy? *Knowles*.—My lord, I will give you an account of that.

*L. C. J.*—Ay, do if you can. *Knowles*.—This was at the first time that I saw my Lady Ivy, that this discourse was between us; upon another discourse, at another time, Hall was mentioned to me. . . .

*L. C. J.*—Who was it first spoke to you to inquire about the Halls? *Knowles*.—My Lady Ivy spoke to me about Hall when I gave her account of some deeds I had found. . . .

*L. C. J.*—The first time, did you give my Lady Ivy an account that you had found anything? *Knowles*.—Yes, I gave her an account of the lease of 128 years. . . .

*L. C. J.*—Did you find that lease, or this deed first? *Knowles*.—The lease.

*L. C. J.*—When did you first

find this deed? *Knowles*.—The 4th of September I found the lease, and within fourteen or fifteen days after I found the rest. . . .

*L. C. J.*—What day was it my Lady Ivy first spoke to you to look after the Halls? *Knowles*.—Within a week after I first saw her.

*L. C. J.*—Was it before you found the lease you speak of? *Knowles*.—Yes, it was before.

*L. C. J.*—How comes it to pass then, that you did not find this deed at the first looking, which was the 4th of September, when you found that lease, you say?

*Att.-Gen.*—We must lay aside the testimony of this man.

*L. C. J.*—Ay, so you had need.

[The defendant was afterwards indicted for forging these deeds; and it was amply proved that she and Knowles had manufactured and aged a large quantity of such documents.]

### 349. THE POPIISH PLOT. (1678–79. HOWELL'S *State Trials*, ubi *infra*.)

[Charles II had been restored to the throne in 1660. But the political antagonism between Protestants and Romanists continued. Extremists in each party hated and feared the other. Charles II was nominally a Church of England Protestant; but his brother and to-be successor, James II, then duke of York, was an avowed Romanist. Fanaticism and popular excitement would believe anything against the opponents. In 1678 the so-called Popish Plot was discovered, — a plot by certain Jesuit priests and others to assassinate the king, massacre the Protestants, and burn London. The principal accused were Whitebread, Ireland, Harcourt, Langhorn, Wake-man, Grove, and Gavan. All were tried in 1678–1679, found guilty, and executed. The two principal witnesses against them were Titus Oates and William Bedlow, who became informers and recounted the various plans of the conspiracy,

which they had originally entered, or pretended to enter. In Oates's testimony, a principal fact was the alleged meetings of the conspirators at London, in August, 1678. The accused denied these meetings; Ireland, in particular, asserted that he was not in London during that month. Testimony as to that fact in the trials of Ireland and Whitebread here follows.]

(α) *Ireland's Trial* (1678. HOWELL'S *State Trials*, VII, 110). . . .

*Fenwick*.—Where was this meeting, and when? *Bedlow*.—Last August, at Harcourt's chamber.

Who were present there? *Bedlow*.—Be pleased to give me leave to go on; I will tell you by and by: Then I understood, as I said, that the plan was to kill the king, but that Pickering and Grove failing of it, they had hired four ruffians that were to go to Windsor, and do it there. . . . About the latter end



of August, or the beginning of September (but I believe it was the latter end of August), I came to Harcourt's chamber, and there was Ireland and Pritchard, and Pickering, and Grove.

*L. C. J.* — What part of August was it? — The latter end.

Do you say it positively, that it was the latter end of August? — My lord, it was in August; I do not swear positively to a day.

But you say it was in August? *Ireland.* — And that we were there present? *Bedlow.* — You were there, and Grove, and Pickering.

*Ireland.* — Did you see me before? *Bedlow.* — You were present there, and Grove, and Pickering, and Pritchard, and Fogarthy, and Harcourt, and I.

*L. C. J.* — What did you talk of there? *Bedlow.* — That the ruffians missing of killing the king at Windsor, Pickering and Grove should go on, and that Conyers should be joined with them; and that was to assassinate the king in his morning walks at Newmarket. . . .

*L. C. J.* — Now, gentlemen, you shall have liberty to make your full defense.

*Defense.*

*Ireland.* — First, I shall endeavor to prove there are not two witnesses against me: for that which he says, of my being at Harcourt's chamber in August, is false; for I will prove I was all August long out of town, for I was then in Staffordshire.

*L. C. J.* — Call your witnesses. . . .

*Recorder.* — To save him that labor, the king's evidence will prove, that he was in town at that time.

*Serg. Baldwin.* — Swear Saran Paine. Which was done.

*Serg. Baldwin.* — My lord, this person was Mr. Grove's maid.

*L. C. J.* — I believe you know your maid, Mr. Grove, don't you? Look upon her, she was your servant. *Grove.* — Yes, my lord, she was so, she is not so now.

*L. C. J.* — Do you know Mr.

Ireland? *Sarah Paine.* — Yes, my lord.

Do you know whether Mr. Ireland was in town in August last, or no? *Sarah Paine.* — I saw him at his own house about a week before I went with my lord Arlington to Windsor.

*L. C. J.* — When was that? *Sarah Paine.* — That was about a week after the king was gone thither.

*L. C. J.* — Sir Thos. Doleman, what day was it the king was gone thither? *Sir T. Doleman.* — About the 13th of August.

*L. C. J.* — Thirteen and seven is twenty; then you went to Windsor about the 20th, it seems, and you say that eight days before you saw Mr. Ireland at his own house? *S. Paine.* — Yes, my lord, about eight or nine days before that; I did see him at the door of his own house, which was a scrivener's in Fetter-Lane. He was going into his own lodging.

*L. C. J.* — How long had you known him before that time? *S. Paine.* — My lord, I knew him, for he came often to our house, when I lived at Mr. Grove's; he was the man that broke open the packet of letters that my master carried about afterwards, and he sealed all the packets that went beyond the seas. And he opened them still when the answers returned back again.

*Ireland.* — Now must all the people of my lodging come and witness that I was out of my lodging all August.

*L. C. J.* — Call them. *Ireland.* — There is one, Anne Ireland.

*L. C. J.* — Crier, call her.

*Crier.* — Anne Ireland: Here she is.

*L. C. J.* — Come, mistress, what can you say concerning your brother's being out of town in August? *A. Ireland.* — My lord, on Saturday the 3d of August he set out to go into Staffordshire.

*L. C. J.* — How long did he con-

tinue there? *A. Ireland.* — Till it was a fortnight before Michaelmas.

*L. C. J.* — How can you remember that it was just the 3d of August?

*A. Ireland.* — I remember it by a very good circumstance, because on the Wednesday before, my brother and my mother, and I were invited out to dinner; we stayed there all night, and all Thursday night, and Friday night my brother came home, and on Saturday he set out for Staffordshire.

*L. C. J.* — Where was it, maid, that you saw him? *S. Paine.* — I saw him going in at the door of their own house.

*L. C. J.* — When was that? *S. Paine.* — About a week before I went with my lord chamberlain to Windsor, which was a week after the king went thither.

*L. C. J.* — That must be about the 12th or 13th. Are you sure you saw him? *S. Paine.* — Yes, my lord, I am sure I saw him.

*L. C. J.* — Do you know this maid, Mr. Ireland? *Ireland.* — I do not know her, my lord.

*L. C. J.* — She knows you by a very good token. You used to break open the letters at her master's house, and to seal them.

*S. Paine.* — He knows me very well, for I have carried several letters to him, that came from the carrier as well as those that came from beyond sea.

*L. C. J.* — They will deny anything in the world.

*Ireland.* — I profess, I do not know her. Twenty people may come to me, and yet I not know them; and she, having been Mr. Grove's servant, may have brought me letters, and yet I do not remember her. But, my lord, here is my mother, Eleanor Ireland, that can testify the same.

*L. C. J.* — Call her then.

*Crier.* — Eleanor Ireland. *E. Ireland.* — Here.

*L. C. J.* — Can you tell me when

your son went out of town? — He went out of town the 3d of August, towards Staffordshire.

*Ireland.* — My lord, there is Mr. Charles Gifford will prove that I was a week after the beginning of September and the latter end of August in Staffordshire.

*L. C. J.* — That will not do: for she says that she saw you in London about the 10th or 12th of August; and she makes it out by a circumstance, which is better evidence than if she had come and sworn the precise day wherein she saw him; for I should not have been satisfied unless she had given me a good account why she did know it to be such a day. She does it by circumstances by which we must calculate that she saw you about the 12th or 13th day. . . . You say you went out of town the 3d of August; who can swear you did not come back again? *Ireland.* — All the house can testify I did not come to my lodging. *E. Ireland.* — He went out of town the 3d of August, and did not return till a fortnight before Michaelmas. . . . *Oates.* — My lord, . . . when we pretended to go into the country, we have gone and taken a chamber in the city, and have had frequent cabals at our chambers there. Mr. Ireland writ a letter as dated from St. Omers, when I took my leave of him at his own chamber, which was betwixt the 12th and 24th in London. He was there; and afterwards when I went to Fenwick's chamber he came thither; a fortnight or ten days at least, I am sure it was in August.

*L. C. J.* — Here are three witnesses upon oath about this one thing. . . . *Oates.* — Whereas he says, that the beginning of September he was in Staffordshire, he was in town the 1st of September, or 2d<sup>1</sup> for then I had of him twenty shillings.

*Ireland.* — This is a most false

<sup>1</sup> This is the statement on which one of Oates' subsequent indictments for perjury was based.

lie; for I was then in Staffordshire. And the witnesses contradict themselves; for the one saith, he took his leave of me, as going to St. Omers the 12th; the other saith, it was the latter end of August I was at Harcourt's chamber.

*L. C. J.* — He does not say you went, but you pretended to go.

*A. Ireland.* — Here is one Harrison, that was a coachman that went with them.

*L. C. J.* — Well, what say you, friend? Do you know Mr. Ireland? *Harrison.* — I never saw the man before that time in my life, but I met with him at St. Albans.

*L. C. J.* — When? *Harrison.* — The 5th of August. There I met with him, and was in a journey with him to the 16th.

*L. C. J.* — What day of the week was it? *Harrison.* — Of a Monday.

*L. C. J.* — Did he come from London on that day? *Harrison.* — I cannot tell that. But there I met him.

*L. C. J.* — What time? *Harrison.* — In the evening.

*L. C. J.* — Whereabouts in St. Albans? *Harrison.* — At the Bull-inn where we lodged.

*L. C. J.* — Mr. Ireland, you say you went on Saturday out of town, did you stay at St. Albans till Monday? *Ireland.* — No, I went to Standon that day, and lay there on Saturday and Sunday night; on Monday I went to St. Albans.

*L. C. J.* — What, from thence? *Ireland.* — Yes, my lord.

*L. C. J.* — Why did you go thither? Was that in your way? *Ireland.* — I went thither for the company of Sir John Southcot and his lady.

*L. C. J.* — How did you know that they went thither? *Ireland.* — I understood they were to meet my lord Ashton and lady there.

*L. C. J.* — What, on Monday night? *Ireland.* — Yes, my lord.

*Harrison.* — From whence I went with him to Tixwel, to my lord Ashton's house, there we were all with him.

*L. C. J.* — Were you my lord Ashton's coachman? *Harrison.* — No, my lord, I was servant to Sir John Southcot.

*L. C. J.* — How came you to go with them? *Harrison.* — Because my lord Ashton is my lady Southcot's brother.

*L. C. J.* — How long was you in his company? *Harrison.* — From the 5th of August to the 16th, and then I was with him at West-Chester.

*Mr. Just. Atkins.* — You have not yet talked of being at West-Chester all this while. *Ireland.* — My lord, I must talk of my journey by degrees.

*L. C. J.* — Before you said you were all August in Staffordshire; come, you must find out some evasion for that. *Ireland.* — In Staffordshire, and thereabouts.

*L. C. J.* — You witness, who do you live with? *Harrison.* — With Sir John Southcot.

*L. C. J.* — Who brought you hither? *Harrison.* — I came only by a messenger last night. . . .

*L. C. J.* — Fellow, what town was that in Staffordshire? tell me quickly. *Harrison.* — It was Tixwel, by my lord Ashton's; there we made a stay for three or four days, then we went to Nantwich, and so to West-Chester.

*L. C. J.* — Were not you at Wolverhampton with him? *Harrison.* — No, my lord, I was not there, left him at West-Chester. *Ireland.* — My lord, I was at Wolverhampton with Mr. Charles Gifford, and here he is to attest it.

*L. C. J.* — Well, sir, what say you? *Gifford.* — My lord, I saw him there a day or two after St. Bartholomew's day, there he continued till the 9th of September; the 7th of September I saw him there, and I can bring twenty, and twenty more, that saw him there. Then, as he said, he was to go towards London, I came again thither on the 9th, and there I found him. And this is all I have to say.

*Oates.* — My lord, I do know that day in September I speak of by a particular circumstance.

*Ireland.* — My lord; there is one William Bowdrel, that will testify the same, if I might send for him.

*L. C. J.* — Why haven't you him here? *Ireland.* — She hath done what she can to bring as many as she could. . . . We could have had them, if we had time. . . .

*L. C. J.* — Well, if you have any more to say, say it. *Ireland.* — My lord, I have produced witnesses that prove what I have said.

*L. C. J.* — I will tell you what you have proved, you have produced your sister and your mother and the servant of Southcot; they say you went out the third of August, and he gives an account you came to St. Albans on the 5th, and then there is another gentleman, Mr. Gifford, who says he saw you at Wolverhampton till about a week in September. Mr. Oates hath gainsaid him in that, so you have one witness against Mr. Oates for that circumstance. It cannot be true what Mr. Oates says, if you were there all that time, and it cannot be true what Mr. Gifford says, if you were in London then. And against your two witnesses, and the coachman, there are three witnesses, that swear the contrary, Mr. Oates, Mr. Bedlow, and the maid; so that if she and the other two be to be believed, here are three upon oath against your three upon bare affirmation. . . .

Then the Lord Chief Justice directed the jury thus:

*L. C. J.* — Gentlemen, you of the jury. . . . It may seem hard, perhaps, to convict men upon the testimony of their fellow-offenders, and if it had been possible to have brought other witnesses, it had been well: but, in things of this nature, you cannot expect that the witnesses should be absolutely spotless. . . . Ireland objects, that Bedlow charges him in August, when he was out of town all that time, and that there-

fore the testimony of one of the witnesses cannot be true. And, to prove this, he calls his mother, his sister, and Sir John Southcot's man, and Mr. Gifford. His mother and sister say expressly, that he went out of town the third of August, and the servant says, that he saw him at St. Albans the 5th of August, and continued in his company to the 16th (so that as to that, there is a testimony both against Mr. Bedlow and against Mr. Oates); and Mr. Gifford comes and says, he saw him at the latter end of August and beginning of September at Wolverhampton; whereas Mr. Oates hath sworn, he saw him the 12th of August, and the 1st or 2d of September, and tells it by a particular circumstance. Wherein, I must tell you, it is impossible that both sides should be true. But if it should be a mistake only in point of time, it destroys not the evidence, unless you think it necessary to the substance of the thing. If you charge one in the month of August to have done such a fact, if he deny that he was in that place at that time, and proves it by witnesses, it may go to invalidate the credibility of a man's testimony, but it does not invalidate the truth of the thing itself, which may be true in substance, though the circumstance of time differ. And the question is, whether the thing be true? Against this, the counsel of the king have three that swear it positively and expressly, that Ireland was here. Here is a young maid that knew him very well, and was acquainted with him, and with his breaking up of letters; and she is one that was Grove's servant: She comes and tells you directly, that about that time, which, by computation, was about the twelfth of August, she saw him go into his own house; which cannot be true, if that be true which is said on the other side; and she does swear it upon better circumstances than if she had barely pitched upon a day; for she must

have satisfied me well, for what reason she could remember the day so positively, ere I should have believed her: But she does it, remembering her going to my lord Arlington's service, which was a week after the king went to Windsor; which is sworn to be about the 13th of August, and a week before her going it was that she saw Ireland at his own door. What arts they have of evading this, I know not. . . . But the fact against them is here expressly sworn by two witnesses; if you have any reason to disbelieve them, I must leave that to you.

(b) **Whitebread's Trial** (1679. HOWELL'S *State Trials*, VII, 327).

*Oates*.—Now, my lord, we are arrived to our business in August; about the 12th of August, as near as I remember, but it was between the 8th and the 12th, therein I am positive, Ireland, who is executed, took his leave of us,<sup>1</sup> as if we were to go to St. Omers.

*L. C. J.*—Where did he take his leave? *Oates*.—At his chamber in Russel street. Ireland went out of town, and Fenwick, by that means, was to be treasurer and procurator to the society altogether. . . .

*L. C. J.*—I am mistaken, if you have not testified that Ireland was in town in August and September with Harcourt. *Oates*.—Ireland took his leave of London betwixt the 8th and the 12th of August, as to go to St. Omers.

*L. C. J.*—Here is the matter; they must have right, though there be never so much time lost, and patience spent. Say they, we must prove and contradict men by such matters as we can; people may swear downright things, and it is impossible to contradict them; but we will call witnesses to prove those particulars that can be proved: say where Mr. Ireland was in August. *Oates*.—He took his

leave of us in town in August, and that was between the 8th and 12th at Harcourt's chamber. . . .

*L. C. J.*—Look you now, mind what he says, Ireland and Fenwick were together in August, between the 8th and the 12th. . . .

[*Defense*. After calling some of the former witnesses to prove Ireland's departure from London on Aug. 3,]

*Lady Southcot* stood up.

*L. C. J.*—How long were you in Mr. Ireland's company?—From the 5th of August to the 16th.

*L. C. J.*—What, every day?—Yes, every day. . . .

Then Sir *John Southcot* was called, and appeared.

*L. C. J.*—Did you know Mr. Ireland?—Yes, I did know him by face.

Where did you see him?—I saw him the 5th of August, at St. Albans.

And did he travel along with you?—Yes, he did travel along with us the 6th, 7th, 8th, and 9th.

How many days did he travel along with you?—He traveled along with us four days together, I am sure.

*L. C. J.*—What, from the 5th to the 9th?—Yes, sir.

Is this all that you can say?—Yes, my lord. . . .

Then Mr. *Edward Southcot* stood up.

*L. C. J.*—Were you here when Ireland was tried?—No.

Did you see Mr. Ireland in August last?—The 3d of August he came down to my lord Ashton's at Stanmore, they said so; but I cannot swear he came that night; but I saw him very early the next morning; the 5th we went to St. Albans, and we kept on till we came to Tixall; and I was in his company from the 4th to the 16th.

*L. C. J.*—Why, you hear what he says, he was in company with him every day from the 4th to the 16th. . . .

<sup>1</sup>This was the perjury assigned in the second count of the indictment upon which *Oates* was convicted, May 9th, 1685.

Sir *Cr. Levinz* [for the prosecution]. — Gentlemen of the jury, you have heard the prisoners, and they have had a great deal of time to make their defense. . . . By chance we have a witness still to give you satisfaction, that Mr. Ireland was in London at that time that Mr. Oates did swear him to be. We will begin with that witness about Ireland. And then we will call our witnesses to prove that Mr. Oates was in England, and did come over when he said he did. Call Sarah Paine. (Who was sworn.)

Sir *Cr. Levinz*. — What time did you see Mr. Ireland in London? did you see him in August last? *S. Paine*. — I saw him about seven or eight days before I came to my Lord Chamberlain, and that was about a week before the king went to Windsor.

*L. C. J.* — Where did you see him? — At his own door in Russel street.

*L. C. J.* — Did you speak to him? — No, I know him very well, and saw him as I came by. . . .

Sir *Cr. Levinz*. — How long did you look upon him? Did you see him go in? Did you see his face or his back? — I saw his face, and made him a curtsy.

*L. C. J.* — This she said to Ireland's face.

Justice *Dolben*. — Your evidence is, that Mr. Ireland went out of town the 5th of August, and she says she saw him about that time, which must be the 12th or 14th of August.

*Gavan*. — How does she prove it? She does not say she spoke with him.

Justice *Dolben*. — She swears it.

Sir *Cr. Levinz*. — Now we must prove what time the king went to Windsor.

*L. C. J.* — Sir Thomas Doleman, what time in August did the king go to Windsor last summer? — Sir *Thos. Doleman*. — I believe (I cannot charge my memory so well) it was the 13th; it was about the 12th or 13th. . . .

*L. C. J.* — And when do you say you saw Ireland? *S. Paine*. — I saw him seven or eight days before I went to my Lord Chamberlain's, which was before my lord went to Windsor, and that was a week after the king went thither.

Sir *Cr. Levinz*. — Now I will tell you what she says; she says she saw Ireland a week before she went to my Lord Chamberlain's, and she saw him go into Grove's house, where he did usually go for letters; she says she saw his face, and made him a curtsy; and that this was a week before she went to my Lord Chamberlain's, and that was a week after the king went to Windsor. Now the time that Mr. Oates pitches upon is between the 8th and 12th of August, which by computation is the time she speaks of.

*Gavan*. — And our witnesses go from the 3d of August to the 14th of September.

(c) *Oates's Trial* (1685. How-ELL'S *State Trials*, X, 1239).

[After the panic of the Popish Plot had subsided, suspicion began to arise that it had been a false alarm, and that Oates and Bedlow had composed a story to take advantage of the state of popular excitement. Upon this reaction, Oates was put on trial for perjury.] . . .

*Att.-Gen.* — May it please your lordship, and you gentlemen of the jury; Mr. Oates stands indicted for having perjured himself; the instances, gentlemen, that we charge him with, are these: first, what he swore at the trial of Ireland; and we say, that at that trial he did swear Ireland was in town the 1st or 2d of September, 1678. The second instance is, what he swore at the trial of the Five Jesuits; and there we say, he did swear, that Ireland was in town between the 8th and 12th of August, and that he took his leave of him here in town at his chamber in Russel street; and we do charge him by this indictment, that he has forsworn himself in both

instances; and that Ireland, gentlemen, was neither in town between the 8th and 12th of August, nor the first or second of September. And we shall make it out very evidently: for, gentlemen, as to the proof in this case, our case stands thus: we say, that the 3d of August, 1678, Ireland went into Hertfordshire, to a house of my lord Ashton's, and from thence went into Staffordshire. . . . and did not return till after the 9th of September. And for this, we call Ann Ireland (who was sworn).

*Sol.-Gen.* — Mrs. Ireland, pray where did you take your leave of your brother, Mr. Ireland, who was executed in summer, 1678, and when? *Mrs. A. Ireland.* — I took my leave of him the beginning of August.

*Sol.-Gen.* — What day in August, do you remember? *A. Ireland.* — The 3d of August.

*Sol.-Gen.* — Where was it? *A. Ireland.* — In my own lodging.

*L. C. J.* — Where was your lodging? *A. Ireland.* — In Russelstreet, Covent garden.

*L. C. J.* — Now tell us again the time when it was? *A. Ireland.* — It was on Saturday morning, as I remember, the 3d of August, the Saturday after St. Ignatius's day.

*L. C. J.* — How come you to remember so particularly, that it was then? *A. Ireland.* — Because upon St. Ignatius's day, we were invited to Mr. Gifford's, at Hammer-smith; my brother, my mother, and I were invited to stay all night: but my brother refused to stay, because —

*L. C. J.* — Which brother? What was his name? *A. Ireland.* — William Ireland.

*L. C. J.* — Did they stay there? *A. Ireland.* — No, my lord, my brother came home on foot, but we stayed all night.

*Att.-Gen.* — Here is an almanac of that year; and the 3d of August was on Saturday. *A. Ireland.* — He said he could not stay, because

he was to go into the country upon Saturday. I asked him, "Why he would set out on Saturday?" And says he, "I'll go to Standen, there I shall meet with my lord Ashton, and his family; and have an opportunity to go with him into Staffordshire." . . .

*Att.-Gen.* — What day of the week was St. Ignatius's day? *A. Ireland.* — St. Ignatius's day was on Wednesday.

*L. C. J.* — What day of the month is St. Ignatius's day? *A. Ireland.* — It is either the last day of July, or the 1st of August. . . .

*Att.-Gen.* — Mrs. Ireland, when did you see him again? *A. Ireland.* — Just a fortnight before Michaelmas, and not before. . . .

*Att.-Gen.* — Pray swear Mrs. Duddle, and Mrs. Quino. (Which was done.)

*Sol.-Gen.* — Come, Mrs. Duddle, do you remember when Mr. Ireland went out of town in the year 1678? *Mrs. Duddle.* — To the best of my remembrance it was the 3d of August.

*Sol.-Gen.* — Why do you think it was the 3d of August? *Duddle.* — He went for a recreation out of town three days before, which was upon an holiday, St. Ignatius's day; and he went out of town one night then, and he came and stayed but two nights after; and went out of town upon the Saturday.

*L. C. J.* — Did he stay out of town one night? *Duddle.* — Yes, he stayed out of town all night.

*L. C. J.* — Are you sure he stayed there all night? *Duddle.* — I am sure he stayed but one night.

*L. C. J.* — But what say you to that, Mr. Attorney? this witness contradicts the other?

*Just. Withins.* — Ay, plainly. *Duddle.* — Mrs. Ireland, and Mrs. Anne Ireland, and he went out upon a recreation out of town, it being a holiday; and I remember well, that was of a Wednesday; and that Saturday he went away, and never

came again till a fortnight before Michaelmas.

*L. C. J.* — But mind my question, woman. *Duddle.* — Yes, my lord.

*L. C. J.* — Did he come home that night he went on the recreation? *Duddle.* — I do not know.

*L. C. J.* — But just now, you swore he stayed out all night. *Duddle.* — No, my lord.

*L. C. J.* — Yes, but you did though; prithee mind what thou art about. *Duddle.* — I do not say he, but I am sure his sister and the company stayed out that night. I remember very well, he went the third day after, which was Saturday. And Mr. Jennison came to ask him for three weeks after; and there was a person of quality with him in the coach, I think it was Sir Miles Wharton. And he asking for him, they gave him an account, that they had not heard from him since he went; which was then three weeks after he was gone. And I remember well, he did not come to town again till a fortnight before Michaelmas.

*L. C. J.* — How can you tell that?

*Duddle.* — My lord, I can tell it very well; for I was almost every night in the room where he used to lie; and there lay a gentlewoman there that I knew.

*L. C. J.* — What was her name?

*Duddle.* — Mrs. Eagleston.

*L. C. J.* — How came she to lie there? *Duddle.* — Her maid fell sick, and she changed her own chamber, and lay there all the time he was out of town.

*Oates.* — My lord, is this good evidence?

*L. C. J.* — Ay, why not? *Oates.* — My lord, I think she contradicts the other witness; for she says he lay out two nights.

*L. C. J.* — No, there you are mistaken too. But I tell you what I did observe before. Mrs. Anne Ireland swore, that they did stay all night; but Mr. Ireland refused to stay there, but would go home, because he was to go his journey on

Saturday. Then this woman comes, and she said at first, that he went out of town on the Wednesday, and stayed out all night, and lay at home but two nights, and then went away. But now, when I put her in mind to take care what she said, she swears, she is sure the sister lay out, but she is not sure of Ireland's lying out; but she is positive he went away on Saturday, the 3d of August, and returned not till a fortnight before Michaelmas.

*Oates.* — My lord, I humbly conceive, she having once sworn false —

*L. C. J.* — Ay, but she immediately recollected herself. . . .

*Att.-Gen.* — Now swear my lord Ashton. (Which was done.) We will bring Ireland now upon the 3d of August at night, to my lord Ashton's house, at Standen.

*Sol.-Gen.* — Pray will your lordship give my lord and the jury an account, when Mr. Ireland came to your house, and how far he traveled with you afterward? *Lord Ashton.* — My lord, being in town, I was spoke to, and desired that Mr. Ireland might have the opportunity of going in my company down into Staffordshire; which I consented to. I went out of town, as I remember, the latter end of July, 1678, and this same Mr. Ireland came to me at my house in Hertfordshire, at Standen, upon the 3d of August, at night.

*L. C. J.* — What day of the week was that, my lord? *Lord Ashton.* — As I remember, it was Saturday, and in the evening.

*L. C. J.* — How long did he stay with your lordship? *Lord Ashton.* — My lord, I stayed till Monday at Standen; and upon Monday he went into my company to St. Albans, which was the 5th of August.

*Att.-Gen.* — Whither then did you go, my lord? *Lord Ashton.* — There I met with my brother and sister Southcot.

*L. C. J.* — Sir John Southcot you mean, my lord? *Lord Ashton.* — Yes, my lord. And thence, in four days we went to my house at Tixhall.



*L. C. J.* — Did Mr. Ireland travel with you all the way? *Lord Ashton.* — I cannot charge my memory, my lord, that he did, so as particularly to swear it; but there he came into my company sometimes at Tixhall; but I cannot tell the particular days; nor could I speak positively to those things that I have spoke to now, but that I find in my Notebook, that at that time he did come to my house at Standen, and did go with me to St. Albans.

*Att.-Gen.* — Pray, my lord, did he go that journey to Tixhall along with you? *Lord Ashton.* — I cannot say positively that, Mr. Attorney, but I have a general notion that he did. . . .

*Att.-Gen.* — Swear Sir Edward Southcot. (Which was done.) . . .

*Att.-Gen.* — We desire Sir Edward Southcot would give an account, whether he met Mr. Ireland at my lord Ashton's? And when? *Sir Edward Southcot.* — I was with my lord Ashton in his company.

*L. C. J.* — When was that, Sir? *Sir E. Southcot.* — The 4th of August I saw Mr. Ireland at my lord Ashton's. . . .

*L. C. J.* — Pray, Sir, go on with your evidence. *Sir E. Southcot.* — Upon Monday we began our journey to Tixhall, and went that night to St. Albans, where we met my father and mother, and thence we continued on our journey the next day.

*L. C. J.* — Was he with you there that day you went to St. Albans? *Sir E. Southcot.* — He was with us, I remember very particularly. It was hot weather, and my lord Ashton invited him into the coach; for before he was riding by the coach side, and there I remember a particular discourse that he and my lord Ashton had; from thence we went on to Northampton, and came there Tuesday night. . . .

Where did you lie there? *Sir E. Southcot.* — We lay at the sign of the George; it was Sir William

Farmer's house, but made use of for an inn, because the town was burnt down.

*L. C. J.* — Was Mr. Ireland with you all that day? *Sir E. Southcot.* — He rode with us all the day.

*L. C. J.* — And you took notice of it, because of his horse, you say? *Sir E. Southcot.* — Yes, he had a very pretty horse, my lord; and my brother bought the horse of him after we came back again.

*L. C. J.* — Whither went ye the next day? *Sir E. Southcot.* — The next night we lay at the Bull in Coventry, and from thence on Thursday, we arrived at my lord Ashton's at Tixhall. . . .

*Att.-Gen.* — So then, my lord, we are gotten to Tuesday, the 13th of August, which is past the time of the perjury that is laid second on the Indictment; but in point of time, is the first that happened, for he swore that Ireland took his leave of him, and others here in town, between the 8th and 12th of August.

*Sol.-Gen.* — Where did you go on Tuesday, Sir? *Sir E. Southcot.* — Towards Wales. . . .

*L. C. J.* — Where were you the next night? *Sir E. Southcot.* — The next day we reached to St. Winifred's Well.

*L. C. J.* — Where did you lie there? *Sir E. Southcot.* — At the Star, which is the great inn there.

*L. C. J.* — It is so.

*Att.-Gen.* — Was Mr. Ireland there with you? *Sir E. Southcot.* — Yes, he was.

*Att.-Gen.* — Whither did ye go then? *Sir E. Southcot.* — We stayed not but one day at Holy-well; for we arrived there pretty late at night, and all the morning we spent there, and went away in the afternoon, and came that evening to Chester, and lay there only one night, and came the next day to Tixhall again.

*Att.-Gen.* — Which was Friday, the 16th of August. . . .

*Att.-Gen.* — Swear Mr. George Hobson. (Which was done.)

*Sol.-Gen.* — Were you in the journey to Tixhall with Mr. Ireland and my lord Ashton in 1678? *Hobson.* — Yes, I was so, my lord.

*Sol.-Gen.* — Pray tell all your knowledge of the matter. *Hobson.* — From the 3d of August till the 16th at night, I was present with him every day. . . .

*Att.-Gen.* — So, my lord, you see, that the 17th of August he departed from my lord Ashton's. Now we shall call Mrs. Harwell to give you an account whither he went on the 17th. Swear Mrs. Jane Harwell. (Which was done.)

*Sol.-Gen.* — Where do you live, Mrs. Harwell? *Mrs. Harwell.* — I live now in town, my lord.

*Sol.-Gen.* — Where did you live in the year 1678? *Mrs. Harwell.* — At Wolverhampton.

*Sol.-Gen.* — Did you know Mr. Ireland, he that was executed? *Mrs. Harwell.* — Very well, my lord.

*Sol.-Gen.* — When did he come to your house at Wolverhampton? *Mrs. Harwell.* — The 17th of August, 1678.

*Sol.-Gen.* — What day of the week was it? *Mrs. Harwell.* — Upon Saturday.

*Sol.-Gen.* — From whence did he say he came at that time? *Mrs. Harwell.* — I do verily believe it was from Tixhall that he came; I cannot positively say.

*Sol.-Gen.* — How long stayed he there? *Mrs. Harwell.* — He came to my house the 17th of August, 1678. He stopped there that night, and I think he lay in my house every night till the 26th of the same month. Upon the 19th day, after dinner, I went with him a good part of the town of Wolverhampton; and upon Friday following, which was the 23d, he went a little way out of town, to a fair hard by, and returned the same day, and stayed at my house the next day, being Bartholomew day. The next day being the 25th, being Sunday, he was at my house, and he stayed, as I said, every night, and lay at my

house; and went away on Monday the 26th of August. It was, to the best of my remembrance, in the morning.

*Sol.-Gen.* — Whither did he say he was going, when he went from your house on the 26th? *Mrs. Harwell.* — I think to Tixhall, he said.

*Sol.-Gen.* — When did you see him again after that? *Mrs. Harwell.* — He returned to me again the 4th of September following. That night he supped at my house, and lay there; and he stayed at my house Thursday the 5th of September, Friday the 6th, and he went away on the 7th from me for good and all.

*Att.-Gen.* — Whither did he go then? *Mrs. Harwell.* — To Tixhall, I think, I cannot tell. . . .

*Oates.* — I desire to know, whether this gentlewoman was at Ireland's trial? *Mrs. Harwell.* — No, my lord; but I heard that upon the 17th of December following, Mr. Ireland was tried at the Old Bailey for High Treason. Upon the 19th, I was informed by the post what was sworn against him; and particularly as to this time, which I knew to be false. And upon my own costs and charges I sent an express away to town here to a friend that I knew, upon reading the letter that was written to me, that Mr. Ireland was falsely accused; and by that express also I sent a petition, humbly beseeching his late majesty, that we might bring in witnesses to prove, that Mr. Ireland was in Staffordshire, when Mr. Oates swore he was in town; and upon that the king stayed the execution about five weeks. We did hope for a second trial, but we could not obtain it; and he was executed. I did it at my own cost and charges; for I thought it my duty, if I could, to save his life, knowing that to be false which was sworn against him.

*L. C. J.* — She speaks gravely and soberly, upon my word.

*Just. Withins.* — So she does indeed.

*Att.-Gen.* — We have abundance of them, my lord. . . .

*Att.-Gen.* — Well, for the present, we do not design to call any more witnesses.

*L. C. J.* — Then let us hear what you say to it.

*Oates.* — My lord, here is an indictment exhibited against me, which sets forth, that I should swear at Mr. Ireland's trial, that Mr. Ireland was in town the 1st and 2d of September; and it sets forth, that in truth he was not in town; and likewise it sets forth, that I swore at the trial of the Five Jesuits, that Mr. Ireland took his leave of me and others here in town at his lodgings in Russel street, between the 8th and 12th of August; whereas the perjury there assigned, is this. That he did not take his leave of me, or any other person, betwixt the 8th and 12th of August, at his lodging in Russel street. . . . Here is nothing but a bare point of time upon which this perjury is assigned; when the substance of the testimony that I gave at the trials of Mr. Ireland and the rest, about the Popish Plot, is not assigned as any perjury at all; it is only a circumstance of time and place. . . . 'Tis hard and unreasonable to tie up witnesses that come to discover plots and conspiracies, to speak positively as to circumstance of time and place, and every little punctilio in their evidence, to bind them up to such niceties in the delivery of their testimonies, as to time and place. It is usual to speak with latitude as to such kind of things, and 'tis probable my evidence which is now in question was not that Ireland was the 1st or 2d of September positively here in town; but, my lord, I did, I believe, give myself a latitude, and would not confine myself to either the 1st or 2d, 5th, 6th, 7th, or 8th; but my lord, that he was in September there, I am positive. . . .

Then, my lord, I shall begin with my proofs: . . . Mr. Jennison

was used as a witness in the trial of Sir George Wakeman, and so was Mr. Bowes, and Mr. Burnet, who was produced to prove the circumstance of Mr. Jennison's evidence; but, my lord, since I cannot have the benefit of his evidence, nor of Sarah Paine's, I must only sum up all I have to say in two or three words. My lord, besides that what I did deliver in evidence at those trials, I gave in upon oath; you have Mr. Bedloe's evidence at the trial of Ireland, testified by Mr. Blaney; and the testimony of him as a dying man, given in to my now lord keeper, wherein he averred, that what he had spoken of the plot, was all true. And you hear that he swore, Mr. Ireland was here in town in August, and so did Sarah Paine too; and I think upon myself as very hardly used, to have such a part of my testimony brought in question, after witnesses are dead, or gone out of the way. . . .

*Sol.-Gen.* — May it please your lordship, and you, gentlemen of the jury, the question that you are to try, is a perjury, which is charged on the defendant Titus Oates, for swearing that William Ireland was in town upon the first or second of September, 1678. And likewise, for swearing, that he took his leave of him at his chamber in Russel street, between the eighth and twelfth of August, 1678. . . . And now, let all the world be judge, if there be any possible room left, that any one word Mr. Oates has said can be true; even giving him the latitude of time he himself desires, and says all witnesses must be allowed. No, there is not one minute for him, wherein he can be verified in any one tittle of his evidence, as to Ireland's being in town. And this is that which I call (and sure, well I may so call it) a demonstrative proof, that what Oates did swear is utterly false. Gentlemen, the jury had not this evidence at the trial of Ireland: some there were that went out of the town with him; and some,

one or two of Wolverhampton, were at the Five Jesuits' trials; but not above five or six in all of these forty odd, that now appear. True indeed it is, all these were not there; and Ireland upon that, unfortunately suffered; for so I may take leave to say, it was unfortunately. . . .

*L. C. J.*—Gentlemen of the jury, this case has taken up a great deal of time; but it is a case of that moment and consequence, that sure no time ought to be thought too long, that is employed for the discovering of the truth, so necessary to be discovered, as the matter now in question. . . . First, You must observe, that this indictment against Oates, is for committing willful and corrupt Perjury; which is also said to be done maliciously. And if it were false, surely it was malicious; because by his false oath have innocent men been convicted, condemned, and executed. Secondly, You are to consider, how far the thing goes, to make it material to the issue: for if it were upon a nicety only, or a catch, or any of those fine words, that he has been pleased to make use of, it were not fit to perjure him upon it. But it is certainly very material: for time and place are matters substantial to discover truth and falsehood by; as in the case of Susannah, the perjury of the Elders, as you may remember, was detected by those very circumstances. . . . Besides, I must observe to you, with what caution, care, and sobriety, both of expression and action, all these gentlemen and women have delivered their testimony, with the greatest tenderness and care that possibly could be: and as well as they have given it with caution, so I cannot but put it home to you, gentlemen at the bar, to give it its due consideration.

For though the other juries did believe Oates, and not them, at

that time; yet that is not to be your measure, because you have not the same reason to do it. Could any person think, that there should be such villains upon earth as impudently to swear downright treason, against their fellow subjects, if there were no truth in the accusation? That was the thing that guided those juries, who were all of them, no doubt, very honest men; and that was it, which influenced the parliament to do what they did in the matter. For it was morally impossible to be thought, any such wickedness could be so publicly attempted. But, God be thanked, the eyes of all honest and understanding men are opened; and we see the fault was in our credulity. . . . And this I say to you, gentlemen, with a purpose to vindicate those persons who were concerned as jurors in the trials of all those causes; because that is the thing much harp'd upon, and aimed at: That because he was believed before, to disbelieve him now would cast a reflection upon the juries; whereas, if that opinion hold, never will there be any such thing as perjury detected, so long as the sun and moon endure: for if a verdict be obtained upon false testimony, and it shall be enough for the witness to say, I was believed at such a trial, and therefore do not you offer to prosecute me for perjury: That would be the finest doctrine that could be taught, to give a license to destroy all truth, justice, and human society. Therefore, I leave it home upon you. Upon your consciences be it. . . .

Then the Jury withdrew, to consider their Verdict; and, after half an hour's recess, returned to the bar; and answering to their names, delivered in their Verdict, "That the defendant was Guilty of the Perjury whereof he stood indicted."

350. JAMES BYRNE'S TRIAL. (1803. HOWELL'S *State Trials*. XXVIII, 808.) . . .

Mr. O'Grady opened the indictment [for treason].

Mr. Attorney-General. — My Lords and Gentlemen of the Jury: The indictment has been read. . . . According to the information which I have, it is stated, that this man appeared a little on one side of the party of rebels in Thomas street, who were met by lieutenant Brady — he came suddenly upon the prisoner, who had a pike in his hand; upon perceiving the persons who came near him, he threw away his pike and endeavored to run, but was immediately seized. After a soldier had taken him he struggled to escape, so that it was necessary for a second soldier to assist in securing him. Gentlemen, the prisoner as I understand, is not a native of Dublin, he is a baker in the town of Naas. I cannot conjecture what brought him to Dublin that evening, unless for the treasonable purpose with which we charge him. It is for him to show that he was occupied in that hour upon lawful business, notwithstanding the agitation which then prevailed in the street. . . .

*Felix Brady, Esq.*, sworn. Examined by the *Solicitor-General*.

You are a lieutenant of the 21st regiment? — Yes.

Where were you stationed upon the 23d of July last? — At Cork street barracks.

Did you at any time of the night see any number of people, and mention what happened? — I went out with a party, between forty and fifty men, for the purpose of going to Usher's island, to report to Col. Browne the information I had received, of an armed mob being in the city. . . . I then ordered my men to form subdivisions, and prime and load. I heard an huzza in front, and a great noise of men coming forward — I heard their feet, but could not see them. When they advanced near me, the leading

subdivision fired a volley; then the men kept up an independent fire, and from their light I observed near me on the left, some men with pikes; they fled in all directions when the firing was kept up about two minutes, leaving six killed and one dying close by me. . . . I saw the prisoner at the bar at the guardhouse in James's street; he was brought there by the men with me, and lodged in the guardhouse. . . .

*Felix Brady, Esq.*, cross-examined by Mr. *MacNally*.

You mentioned that the night was very dark? — It was.

Had you or your party any kind of light? — None, but the flashing of the pans.

Upon the discharge of the pieces by your men, there must have been a smoke between the rebels and the soldiers? — That of course, if the wind blew it against the soldiers.

But it was a calm night? — It was.

Then the smoke would form a screen between the two parties? — I think it would go up.

But for some time, would not the smoke create a darkness between your men and the opposite party? — It is reasonable that it would.

*Court*. — Could you see the men with pikes, notwithstanding the smoke? — I could, and did see them with pikes like white poles; the men I saw were upon my left, not in front, so I saw them distinctly. . . .

*Robert Watt* sworn. Examined by Mr. *Townsend*.

Look about and try if you know the prisoner at the bar? — I do.

You belong to the 21st regiment? — I am a private in that regiment.

When did you first see the prisoner? — I saw him in Thomas street.

Upon what day? — On the night of the 23d of July.

Were you there upon duty? — Yes.

Under whose command? — Under lieutenant Brady.

You were one of his party? — Yes.

In what situation were you? — I was in the second division, the left-hand man, close by the pavement when the firing began.

Where did you see the prisoner? — I saw the prisoner on the pavement with a pike on his shoulder about two yards from me.

Do you know the distinction between the pavement and what we call the flags? — I call them both pavement; one is called broad pavement.

That is the flagged part? — Yes.

Was it there you saw the prisoner? — Yes.

What did you do? — I cried out to him, to stop; when I said that, he threw his pike from him, and I seized him.

Why did you desire him to stop? — He was endeavoring to pass us.

Did he stop when you bid him? — He then threw his pike from him, and I caught him by the breast and brought him among the men.

Did he submit? — No; he struggled to get off, and I was obliged to get another soldier to my assistance. . . .

Did you take the prisoner into the barrack? — Yes; he was taken inside. . . .

*Robert Watt* cross-examined by *Mr. Ball*. . . .

You say when the firing began you saw this man? — Yes. . . .

In what direction was the volley? — Straight down the street.

How far was the first division advanced before the second? — About six paces.

Were you in front or rear of the second subdivision? — In front.

When you saw this man he was endeavoring to pass? — He was. . . .

Your face was to Thomas Street? — Yes, down towards the market house.

And his was to James's Street? — It was.

Was he running fast? — He was.

It was when he moved you saw him? — Yes.

The night was dark? — It was.

Suppose you had moved sideways to the left and he had stopped, how near would he be to you? — When I bid him stop, I only stepped to the flags and gripped him.

Then he was close to you, and you were in the second division? — Yes.

Five or six paces behind the first division? — Yes.

They fired towards the market house? — Yes.

And he was upon a line with you behind the first division? — Yes.

How many feet do you reckon in a pace? — Five feet.

Then you were thirty or five and twenty feet behind the first division? — Not so much. . . .

*James Waddle North* sworn. — Examined by the *Attorney-General*.

You are a private in the 21st regiment? — I am.

Where were you on duty the night of the 23d of July? — I was taken from Cork street to James's street and Thomas street, under the command of lieutenant Brady.

Did you ever see the prisoner at the bar before? — I did.

When did you first see him? — As near as I recollect about ten o'clock on the night of the 23d of July in Thomas street.

Mention the circumstances attending your having taken notice of him? — I was in the second subdivision under lieutenant Brady's command, and seeing Watt go out of his rank to take a prisoner, I made after him, and came up as the prisoner threw down his pike; I came up time enough to hear the pike fall, but did not actually see the pike in the prisoner's possession.

What did you do then? — Watt brought the prisoner to the division, he was struggling very hard for liberty. . . .

Did you see him by candlelight that night? — Not till I saw him at the commander of the forces; but I had no occasion, being so close to him, and by the lamp I could see his person.

*Jury.* — What became of the pike? — It was taken by the men of the division with the rest. . . .

You said you did not see the pike, but heard it fall; how do you know it fell from him? — From the place in which it fell.

Was there any other person near him? — No one but Watt. . . .

*Defense.*

*Mr. MacNally.* — My Lords and Gentlemen of the Jury: . . . The case of my client as to matter of fact is simply this: He has been called upon to account for the occasion which brought him to Dublin from his place of usual residence. . . . The prisoner, gentlemen, is a baker, and he will satisfy you, that some time previous to the rebellion, in consequence of a failure of business in the county of Kildare, he came to Dublin, and determined on taking a house in Rings-end, for the purpose of carrying on trade in that village, and thereby earning an honest livelihood for himself and family. But it may be asked, what brought him to Thomas street at so critical a time? I answer, as instructed, a brother-in-law of his dwelt there, and, while seeking for a proper habitation, he resided with him. It appears that on the 20th of July he was at Rings-end making arrangements for his business. Upon returning to Thomas street to the house of his brother-in-law, on the 23d, he was taken into custody. . . . Consider whether he might not have repaired to Thomas street utterly ignorant of the disturbance which had commenced and raged in his absence, and which at the time of his arrival there had nearly subsided. . . .

As to the witnesses produced for the purpose of identifying the prisoner as one of the acting conspirators — as one of those who were levying war against the Crown by opposing the king's troops, I do not impeach the testimony of the soldiers, by imputing to them willful perjury — I see no motive for

their swearing falsely; on the contrary, I cannot say they do not deserve credit as to many of the facts they have sworn to. But in a scene of such darkness and confusion, without impeaching their integrity, I may fairly advance the probability of their having been mistaken — and, upon discrimination of their evidence, taking it in a comparative view, you will find they have been inconsistent. What is the evidence?

One soldier says, "the prisoner was taken and he struggled, but he had no pike." The other soldier says, "I heard a pike fall"; but he candidly admitted he did not see the weapon; — then observe, there is no proof from either of those men, that the prisoner had a pike, and a jury are not to conclude guilt from inferences. Again, I do say, one of those soldiers swore rashly, and inconsiderate swearing goes strongly to create doubt in the mind of the hearer; I repeat it, I do not charge the man with willful want of veracity, but with rashness, resulting perhaps from too much zeal. He swears he knew the prisoner by the flashes of the pan when the soldiers fired. Does that evidence deserve implicit credence? I say the flash from the pans could not have assisted the sight of the soldier, so as to enable him to discern the features of a stranger with sufficient accuracy to identify his person upon oath. It has been known that the light of the sun has deceived men of great sense and sagacity; it so happened a few years ago in England. Sir Thomas Davenport an eminent English barrister, a gentleman of acute mind, and strong understanding, swore positively to the persons of two men, whom he charged with robbing him and his lady in the open daylight. He was positive, and the hour he stated was about two o'clock in the afternoon. But it was proved, by the most conclusive evidence, that the men on trial were, at the time of the robbery, attending a company at

dinner, one as master of the tavern, the other as waiter, at so remote a distance from where Sir Thomas was robbed, that the thing was impossible. The consequence was, the men were acquitted; and some time after the robbers were taken, and the articles taken from Sir Thomas and his lady found upon them. Sir Thomas, on seeing these last men, candidly acknowledged his mistake — and, as I have heard, gave a recompense to the persons he prosecuted, and who narrowly escaped conviction. I obtrude this anecdote on your consideration, gentlemen of the jury, to show that evidence of identity, however positive the witness may be, or however credible, ought to be received with the most delicate caution. When a man discharges a gun with the lock close to his eye, in my humble opinion, so far from the flash assisting the sight, it would dazzle and render the object before him confused. The flash may illumine for an instant, the figure of a man, and make it perceptible, if near, but cannot distinguish his features with sufficient accuracy to enable the party discharging the piece to swear to them — the flash throws a light on the object, but that light has no continuance, it is momentary, and there is not time for the mind to be impressed by a certain idea of any object seen through such a medium. Consider, gentlemen, all the circumstances — the night was dark, every shot was increasing the smoke collecting about them, and the smoke increased the darkness. The bravest man is not without feeling on such occasions; when the battle rages, even the soldier looks more to himself than to others. I ask you, then, how is it possible for one man to swear to the identity of another man on such an occasion? . . .

*Jeremiah MacShee* sworn. Examined by *Mr. Ball*.

Where do you live? — I have a house at Rings-end.

Who occupied it lately? — One *James Carroll*.

When did he leave it? — Six months ago.

Have you let it? — I was going to let it.

To whom? — To *James Byrne*, the prisoner.

What business was he about to follow there? — As I understood from himself, it was for the baking business. . . .

*James Kearney* sworn. Examined by *Mr. MacNally*.

Do you know the prisoner at the bar? — I do.

Do you know the last witness? — I do.

Were you at the residence of the last witness with the prisoner? — I was.

Upon what day? — On Thursday.

In what month? — Three days before the disturbance in Thomas street.

What occasion had you to go with the prisoner? — When *Mr. Byrne* came to town he called to me at Rings-end, and inquired of me, if I knew any place at Rings-end, or about the place, that would answer for public business for his wife, and that he would build an oven in; I told him of a house in Rings-end, with a bill upon it, which I thought would answer; he said after some time when the business would go on, he would knock up an oven, and I would be a partner.

What business were you? — A baker.

A master, or journeyman? — A master formerly; but have dropped it, not making anything of it.

Of what business is the prisoner? — A baker.

How long have you known him? — Thirty years. I worked journey work for him. We went to *Shee's* and had some porter; he was lame from an accident of the mail coach going over his leg, and we returned to my house, where *Mr. Byrne* slept.

Did *Byrne* go to see the house? — He did not.



He slept at your house?—He did, two nights, Thursday and Friday.

Was he there on Saturday?—He was.

How long did he stay?—Till two o'clock, we were waiting for Shee, who was to come down to show the house, but he did not come.

Did Corcoran show the house?—The taproom belonged to one Brennan, and Corcoran had the setting of it; Brennan said a tailor, next door, had offered money for it.

Can you tell whether it was at a sufficient price?—I cannot tell.

At what time did the prisoner leave Rings-end on Saturday?—After two, drawing to three.

Where did he go?—To my house, No. 13, Townsend street.

Were you with him?—Yes.

How long did he stay there?—Why, by the time we parted at the new street, it was half past nine o'clock.

What new street?—Near the New-bridge.

Then you parted with him?—Yes; he told me he intended to go over the water, to see if Mr. Kennedy had come from Tullamore.

Is Mr. Kennedy a corn factor in Abbey street?—Yes.

*James Kearney* cross-examined by *Mr. Plunket*.

You have known the prisoner a long time?—Yes, thirty years. . . .

At what time of the day did he come to you on Tuesday?—About two o'clock. . . .

You went immediately with the prisoner?—I did, as soon as I drew a batch of bread.

You went down to MacShee's?—Yes.

It was then near three o'clock?—It was.

Did you return home after leaving him there?—No, we returned together. We stopped at Lynch's, my employer, who disputed with me because I was getting this house for Byrne.

But then you returned to Town-

send street?—Yes, and stripped and went to bed.

So that it was bedtime when you returned to town?—It was late. What hour was it?—About nine.

It was two o'clock when Byrne went to you?—Yes.

Then you arrived at MacShee's about half past three, and returned home at nine, so that you must have delayed four hours with the artillery?—I do not say that; I was there three quarters of an hour.

How do you account for four hours, after allowing sufficient time for walking?—I went to Mr. Toole's and got some bread and cheese.

But how do you explain the four hours? Were you not at the Pigeon-house looking at the stores and cannon?—I never did; I did not advance the breadth of my nail. . . .

At what time did you and Byrne separate?—About half past nine.

Where?—At the new street, between the college and the bridge.

Why did he not sleep with you that night?—He said, he wanted to see Mr. Kennedy; and said he would go to his brother-in-law's, as he wanted to be off in the packet next morning.

That was to go home to Naas?—Yes.

At six in the morning?—Yes. . . .

You heard of no disturbance on Saturday, the 23d of July?—No, not a word till the next day.

When on the next day?—Between ten and eleven, when I got up. I worked very hard, and I sleep generally on Sunday morning; when a man is twenty hours on foot, he sleeps a good deal afterwards.

Had you worked that Saturday?—No, I did not work at all that day; but from the habit of working hard upon Saturday, I generally sleep upon Sunday; and having to go to work early the next morning, I slept upon that morning.

Did you work any that night between ten and eleven o'clock?—No.

When you heard of the disturb-

ance in Thomas street, did you go to inquire whether your friend had gone in the packet?—I did not; I thought there was no danger of an innocent fellow at any time.

Why did he go without seeing Mr. Kennedy?—How can I tell?

Did he not tell you?—No; not whether he was come home or not.

*Peter Buller* sworn. Examined for the prisoner by Mr. *Ball*.

Where do you live?—In Abbey street.

What is your business?—A baker.

Do you know Mr. Kennedy?—I do.

Does he live in Abbey street?—He does.

Whom do you work for?—I carry on business for myself.

What business does Mr. Kennedy follow?—He bakes biscuits for government.

Did you ever see the prisoner at Mr. Kennedy's house?—Often.

How near do you live to Mr. Kennedy?—Almost opposite his door.

Did you see the prisoner the night of the 23d of July?—I did.

Where?—At my own house.

At what hour did you first see him that evening?—Very near nine.

When did he leave you?—About half past ten; he would stay till morning if I could drink with him; I was not well, and I said to him, it was a shame for him to stay so long in town. He said he had been taking a house in Rings-end with Kearney and had been drinking with him; I said, it was a shame for him to keep such company; he said the man lived in the place, and he was taking his assistance.

Where did the prisoner lodge?—At Gilligan's house in Thomas street.

Whereabouts?—In the middle of the street, up beyond Dirty lane, near James's gate.

*Peter Buller* cross-examined by Mr. *Townsend*. . . .

You drank with him that night?

—Yes, we had some porter; he stayed

with me some time, about three quarters of an hour, the girl was washing the parlor and we agreed to go to another place, after he had been half an hour at my house, and then we went to another place and had some porter, he stayed till I am sure it was past ten o'clock.

Perhaps it was eleven?—No, it was not.

What night was it?—Saturday night.

Was not his lodging at Townsend street?—He slept there, as I understood.

And lived with Kearney?—I believe so; nobody would treat him as that man did.

Then after ten o'clock he was to go to Thomas street after sleeping two nights at another place?—He would have stayed with me all night: I said it was a shame for him to be so late; he said the hostler would let him in.

You say, he would have stayed longer with you?—He would; he wanted me to go to another place to drink more; but I pushed him away and said he was an unfortunate fellow. . . .

. . . (Here the evidence on behalf of the prisoner closed.)

*Felix Brady*, Esq., again called and examined by the court.

Be as accurate as you can as to the time the action took place in Thomas street?—To the best of my recollection, it could not be more than half past nine, and as far as I recollect we were returning from James's street by ten o'clock and rather before it.

*Jury*.—Are you positive that the action was over at half past ten?—I am positive of that. . . .

Mr. *Ball*.—My Lord, and Gentlemen of the Jury: I have a more oppressive feeling in rising to address you upon this case, than has ever attended me upon any other occasion, though even in itself of equal importance, from the nature of the evidence that has been given—a series of evidence de-

manding a most minute examination and comparison of facts and circumstances. . . . There is not a single *fact* of any sort imputed to the prisoner by the witnesses for the prosecution, nor any circumstance in the smallest degree affecting him, except the one circumstance of the pike; and out of a guard of fifty soldiers and their officer, not one person has been able to say anything as to that fact, except one single soldier; of the evidence of that single soldier, and the circumstances accompanying the facts which he has stated, I entreat your cool and cautious investigation;—consider the position of the several parties concerned in the transaction—the soldiers were proceeding in an easterly direction, the rebels were before them, the first division of the military were advanced five or six paces before the second, the prisoner was discovered on a line with the second division, his face towards the west—the night was extremely dark—there was no ray of light to exhibit any object except that which proceeded from the fire of the musketry. A volley was fired by the front division, and by the light of that volley, fired behind the prisoner's back and five or six paces from him the soldier affects to say, that he not only saw the pike fall from the prisoner's hand, but that he also saw and distinguished his face, and it is in evidence that the wind was blowing from the east, and therefore by throwing the smoke back upon the party must have materially increased the obscurity and darkness of the scene. I do not wish to argue on the intentional truth or falsehood of the evidence of the soldier; it is possible he may have intended to deceive, or he may have intended to give just and true evidence according to his view and conception of the facts—which at best must be confused, if not absolutely doubtful and uncertain—but you, gentlemen, will consider whether it is possible, that

the light of muskets fired from the west, when the wind was easterly, could show the face of a man at such a distance, and in such a relative position—back to back with the soldiers who fired. And even though you should think it physically possible, your next consideration will be, whether such a light may not possibly have misled the soldier, and whether with a good intention, he may not state that to you which he may believe to be true, and yet you may be of opinion, that he could not have such an accurate knowledge of, as to authorize you to take away the life of a fellow creature—and the more especially as, independent of any case made out by the prisoner, he was stated by the witnesses for the crown to be in a situation not consistent with his being a party in the rebellion. . . .

Gentlemen, with regard to the times sworn to by the different witnesses, there appears to be something like a contradiction between the time stated by the witnesses for the prisoner, and that stated by the witnesses for the prosecution. I do think, that is the only part of the evidence upon which it is immediately necessary to argue in support of the evidence for the prisoner; and convinced as I am myself, that the apparent variance between the evidence is not fatal to the credit of the prisoner's witnesses, I have but little doubt that I shall be able to satisfy your minds on that point.—If two men, upon a certain defined and single fact, shall each give a different account, one certainly must speak intentionally false. But if the fact be of such a nature as at all rests in conjecture, to which the common usage of mankind has given great and general latitude, such as time, exact precision cannot be expected, and a complete coincidence would be the very circumstance which would induce a reflecting man to suspect that there was some practice to deceive. Mr. Brady says, it was

half past ten when the transaction took place in Thomas street; he speaks upon *belief*, not having resorted to a watch or clock upon the occasion. . . . I would appeal to your own tried and frequent experience on this subject; I would venture to say, if any of you were called upon to say what the hour is at this moment, you would all mention different hours or parts of hours, and that not one of you would name a time that would not be refuted by looking at his watch, and in your watches would be found perhaps as much variety as in the several guesses you should make yourselves; nay, even the public clocks of the town do not agree. Then see what the supposed contradiction is — he was in company with a poor sickly man, who was anxious to get to his bed, which he could not do till he had first got rid of his friend, that friend too (the prisoner) something intoxicated — the night advanced — the state of his mind calculated to make the time hang heavy and appear long — he is of opinion, it was half past ten o'clock before they separated. . He did not say it was so by his watch — he did not refer to a clock, and, if he had, it might have misled him: his computation then might also deceive him. Gentlemen, you cannot but be of opinion, that two men, intending each of them to speak truth, may differ in the hour at which a shot was fired, or any other fact happened, and may, of course, without fraud or crime or moral falsehood, give a different, and one of course innocently a false account. — But what is the inaccuracy here? it is, in my humble judgment, such an inaccuracy as sets up the witness, Butler, and his credit, instead of putting them down. — Does not the prisoner know at what time he was apprehended, as far as the time could be ascertained? — And is he to be charged with suborning a witness to state a fact which is utterly inconsistent with his defense?

If the defense were fabricated, the witness would ask, "what time am I to state you were with me?" and that time would be made correspondent with the other circumstances: the witness would have been tutored to state an hour or time that should not be contradicted and refuted by the known and indisputable fact of the prisoner's being in custody at the time he should be said to have parted with the witness. But no such thing is done; no preconcerted accuracy is resorted to, and you, gentlemen, can best collect the truth from the evidence which has been given. The difference between the witnesses is, that lieutenant Brady states the prisoner to have been arrested at half past ten in Thomas street; Butler states him to have left Abbey street at half past ten; this amounts to a variance evidently proportioned to the time the prisoner would occupy in walking from Abbey street to Thomas street; twenty minutes would be a large allowance for that purpose; either of the witnesses may easily be mistaken to the amount of twenty minutes; the error may be all on one side, and it is impossible to decide upon which; or both parties may be equally mistaken, each to the amount of ten minutes.

I have said thus much upon this subject — upon the place where the prisoner was found — on the direction in which his face was turned, and the species of light by which the soldier attempted to justify the accuracy of his eye; because, taking all these circumstances together, it is impossible but they must raise a doubt in your minds. . . . I will not undervalue your understandings and your hearts so much as to believe it possible, but that everything taken together — the utter impossibility of accurate vision in the soldier — the insignificance of the difference, or inaccuracy in point of time — the consistency of the prisoner's case with his occupation — . . . I say, taking all these

things together, you must entertain doubts upon the case. . . . The language of the law in such cases is concise and imperative — you must acquit the prisoner. . . .

*Reply.*

*Mr. Solicitor-General.* — My Lords and Gentlemen of the Jury : . . . In this case, no questions of law or difficulties in matter of fact arise. The only question for your consideration is "what part the prisoner took in the insurrection of the 23d of July?" In order to ascertain that, I will first call your attention to the evidence which has been given upon the part of the Crown, and then to the exculpatory evidence on behalf of the prisoner. It appears, that at half past nine o'clock, a party of the army arrived at Thomas street. . . . It appears, that this firing kept up, — and which from its nature spread a continued glare, not sudden like a volley, but constant, the men firing one after another, — afforded a sufficient degree of light to distinguish objects. The witness Watt was upon the left of the division, next the flag way, and the prisoner was upon the flags. The soldier did not observe him till he came close, — which is accounted for, not from want of light, but that the attention of the soldier was directed toward the enemy in front, rather than to the place where the prisoner was. The prisoner approached within a yard, when he was called upon to stop; — at the time he was thus called upon he was armed with a pike, which was described as a white pole. Is there any doubt, that the witness could distinguish that weapon clearly, when the firing was going on in front, and lamps were on the same side of the street with the prisoner? Is it credible or doubtful in the slightest degree, that a soldier could see the weapon under such circumstances? But see how he is fortified by the other witness, North; — he heard something fall the moment the first soldier called

out; and a pike is found at the feet of the prisoner. The first soldier called to the prisoner, and there being only a short interval of space between them, he stepped out and seized the prisoner. North at the same time heard the pike fall, and there was no other person near the prisoner who could throw it down. Can you believe that the soldier threw it down? and therefore when the learned counsel insinuates, that some other person threw down the pike, he must mean the soldier, which you cannot believe. Watt and North both appear to be men of very clear understandings, more capable of ascertaining and describing facts accurately, than usually occurs in their rank of life. . . . Thus is the evidence for the Crown of that kind and character that you cannot well refuse your assent to it. The veracity of the witnesses is not impeached, and it is only said, that they may be mistaken. But it appears to me that there is no circumstance in the case upon which that allegation can be supported. The two witnesses correspond in their testimony, and all they say is irresistibly corroborated by the conduct of the prisoner himself, in making violent resistance, not only at the moment of his arrest, but long after he was in the custody of the king's forces. Such, gentlemen, is the case, as resting on the evidence given by the witnesses for the Crown. . . .

At a quarter past nine, Kearney tells you, he and the prisoner separated. Where does he go? — To a baker in Abbey street — he arrives at Butler's, and stays with him till half past ten — so that there is no mistake by Butler with regard to the time, as alleged by the prisoner's counsel; he and Kearney agree and tally exactly; at half past nine, he quits one and arrives with the other; so that the inconsistency which was relied upon to prove there was no confederacy amongst the witnesses, is not

founded, because they are perfectly consistent. — But, says Mr. Ball, it would be ridiculous to fix upon an hour, when the soldiers, who took the prisoner, could ascertain it. — And why keep back the prisoner from Thomas street? — Because they knew that all the outrages, all the murders of that melancholy night, were committed in Thomas street before ten o'clock — so that upon that account you can reconcile their anxiety for keeping the prisoner out of Thomas street till after ten o'clock. The prisoner produces no companion from Abbey street to Thomas street, because there were none there but such as were implicated in this transaction, and it might not be convenient to them to appear. . . . Then how does he get into the situation in which he is found? It is impossible he could but as one of the rebel party. In addition to all this, it appears, that the house, to which he alleges he was going, is situated upon the opposite side of the street from the place where he was found. But when I allude to the circumstance of his going to Gilligan's house, I must remind you, that the declaration of the prisoner himself is the only evidence in the case to support the assertion. When a man makes an assertion, which becomes material upon his trial, and has witnesses to prove it, if true, it is not to be regarded unless the witnesses are produced. . . .

I have attempted to draw back your attention to the evidence on the part of the Crown. It is a plain and simple narrative against which there is no objection, and I have gone through the evidence of the prisoner, only to meet the observations of his counsel. . . .

*Summing up.*

Mr. Baron DALY. — Gentlemen of the Jury: . . . the defense set up is of a peculiar nature; not so much contradicting or controverting directly the facts which have been proved, as a defense by way of in-

ference, from which you are called upon, if you believe it, to pronounce him an innocent man. It appears that the prisoner is an inhabitant of Naas, a town situated sixteen miles from the city of Dublin, and it certainly was incumbent upon the prisoner, — not being an inhabitant of Dublin, being found in such a place, and upon such an occasion, — to show why he was in the city at that time. — His defense is offered to show, that he was in the city upon an innocent occasion. . . . With regard to the hour, at which the prisoner (if you believe his witnesses) was in Abbey street, it differs from the time stated by the witnesses for the prosecution. If you believe the testimony of lieut. Brady, the prisoner was in Thomas street at a much earlier hour than he could have been, if the witnesses on his part swear true. It is for you to judge with regard to that contradiction; and if you should believe the witness for the Crown as to the hour, the conclusion which would naturally follow, but which is for your determination, is, that the defense is fabricated. The material fact to ascertain is, whether the prisoner was found in Thomas street armed with a pike against the king's troops. That he was there is not disputed; that he struggled is not disputed; and the only circumstance upon which a shade of doubt is cast, is, whether he had a pike? — That is not contradicted by direct evidence; nor could it from the nature of the case. But it is controverted by inference — by showing, that he came from Naas with an innocent intention, and therefore was not likely to have a pike. There is one thing remarkable, however, that though he said he resided for the occasion in Thomas street, there is no evidence that he did reside there. He himself said, that he lodged at Gilligan's in Thomas street, but there is no evidence of the fact. . . . If you believe from his own assertion, that he lodged

in Thomas street, and that he was in Abbey street at the time his witnesses say, and notwithstanding what the witnesses for the Crown say, that he innocently went to Thomas street, and was standing innocently there during the action — or if you have any reasonable doubt of that you ought to acquit the prisoner. But in doing so, you must reject the testimony of the

soldier, and many circumstances that flow from the evidence of the prisoner. . . .

The jury retired, and in five minutes returned a verdict of Guilty. . . .

*Prisoner.* — I am as innocent as the child unborn. I leave it to my God, I never saw a pike in my life.

He was executed the following day in Townsend street.

351. WM. C. ROBINSON. *Forensic Oratory; a Manual for Advocates.* (1893. p. 210.) . . . The cross-examiner may attack a willful liar by attempting to involve him in contradictions with other witnesses whose credibility is above suspicion. The points of inquiry selected for this purpose must be related to the cause, and either conclusively established by evidence already offered, or capable of being proved by that which is about to be produced. They must also be such as the witness clearly knows, or clearly knows that he does not know; for the contradiction sought is one that demonstrates the liar's evil will, and therefore has no reference to matters of opinion, about which upright witnesses may widely differ, nor to long past sensations into which errors of memory or perception may have innocently entered. On any of these points the cross-examiner may test the witness by questions which do not disclose their actual purpose, in the hope that he will make some statement by which his disposition to pervert the truth will be revealed. A single instance of willful falsehood will be sufficient to destroy him. The maxim, "*falsum in uno, falsum in omnibus*," expresses not merely a rule of law, but the natural instinct of all honest men, who will unhesitatingly repudiate a witness when once his voluntary untruthfulness appears.

352. CHARLES C. MOORE. *A Treatise on Facts, or the Weight and Value of Evidence.* (1908. Vol. II, § 1073.) . . . "*Falsus in Uno, Falsus in Omnibus.*" It is a maxim that if a witness willfully and corruptly swears falsely to a material fact in the case, the Court or jury is at liberty to disregard the rest of his testimony, except in so far as it may be corroborated by other credible evidence. . . . It is said that there is no maxim of the law of evidence requiring greater caution in its application, than that of "*falsus in uno, falsus in omnibus.*" A witness may, under great temptations, and in some isolated case, swear falsely; and yet, where the temptation is removed, where there is nothing to operate on his hopes and fears, his passions and prejudices, where he has no interest in the matter except to tell the truth, his testimony may be of great value. . . . In a bastardy case in Massachusetts the following admonitions in the Court's instructions to the jury were pronounced free from objection: "It is not true that because a witness is inaccurate as to some of the circumstances and incidents connected with the story, the story is necessarily false as to the main fact. Illustrations might be given without number of this principle. If one of your friends tells you that he has been fishing, and proceeds to tell you how many fish he caught, and what they weighed, you may distrust somewhat the accuracy of his

count, or the correctness of his scales, without disbelieving the main fact that he went fishing. The weight or significance of such discrepancy is always a question of fact. It may be such as to induce distrust of the whole story; but it is not necessarily so. . . .

Strictly speaking, this maxim is not applied to testimony merely because the witness has committed innocent mistakes. . . . An unintentional mistake respecting a material fact may, and usually does, affect the general credit of the witness to a greater or less degree; but it is often the case under such circumstances that no sufficient cause exists for disregarding his testimony respecting other material matters. . . . Nevertheless, if a witness is proved mistaken in all his statements except one which is incapable of investigation, the Court is quite likely to apply the maxim in an inverted form by concluding that he is mistaken in that one. . . . If a witness testifies emphatically to a series of events identical in character, and is found to be mistaken as to one of them, perhaps the Court will say: "But he swears to this as positively as to the others, and therefore his evidence, as to all, should receive some corroboration before implicit reliance can be placed upon it." *E.g.* where a witness testified that no whistle was blown or bell rung by a locomotive on approaching a crossing, and it was clearly shown that he was mistaken as to the whistle, the Court remarked that he "was equally liable to be as to the ringing of the bell."

353. JOHN C. REED. *Conduct of Lawsuits*. (1912. 2d ed. § 512.) We think that this subdivision [Contradiction] occupies the largest place of all in practice. There is serious disagreement of testimony in the large majority of cases, and it is nearly always the main problem to deal with. To mention but one instance of frequent occurrence, the parties, with their families, are often arrayed against each other. We drop the thread of our connection for a moment to say that it is better for you, if you can, to show that there is actually nothing but apparent clashing with your side, or that both sides can be reconciled in a way to save your case. Jurors, and judges too, trying facts, are loath to discredit witnesses. But if a conflict lies right in your way, you must needs try to show that the evidence of the other side on the point is to be disregarded, while yours is to be accepted. Where the former is palpably suspicious or grossly improbable, you will have but little trouble. But the common difficulty is where the colliding witnesses are all honest and intelligent, or where there are circumstances strongly opposing you. Here you must have the acumen to find the turning point, and the talent to show with patience that what seems to be the superiority of the adversary upon it is deceptive, and is really unequal to your side. One witness of yours, from his greater experience upon the subject, his better means of knowing, his more complete agreement with the probabilities and the indisputable evidence, or a stubborn and speaking fact in your favor, may decidedly overbalance the more numerous proofs offered.

354. HANS GROSS. *Criminal Investigation*. (1907. transl. J. and J. C. Adam, p. 104.) The witness may pretend that a certain man has read him something, whereas the man in question can neither read nor write. Again, a witness affirms that his house was in danger of catching fire, although it was not in the direction in which the wind was blowing at the time; or he



asserts he remained out of doors half an hour with naked feet, although the snow was knee-deep. The witness states that the river frequently rises so high that it overflows; we have only to look at the stones emerging but a little above the water, to see that they are covered with a thick bed of moss which would not be there if the stones were frequently submerged. The witness says his son had already drawn his attention to something; a small calculation shows that at the time in question the son was only four years old. Similar examples of contradictions and self-evident impossibilities are frequently met with in our records; they supply the surest method of demonstrating to the witness the falsity of his deposition, — but we must first discover them. This is never very difficult if one gives sedulous attention to the examination, listens carefully to the reading of the record, and always pictures to one's self in imagination what the witness has related. The last is indispensable and of the greatest assistance. Words alone do not contradict each other so strongly or clearly as facts, or at least one does not notice so clearly the contradiction in the words. But if we compel ourselves to build up in our mind the scene as the witness has described it, or as we know it from previous recitals, and to adjust what we are told with what we already know, if in the course of the narrative of the witness we follow closely the facts and allow in thought the whole scene to unroll itself at the very spot where, according to our previous information, it must have taken place, it is almost impossible for an improbability or an impossibility to escape us.

355. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.)<sup>1</sup> If an eye witness to a homicide swears that the murderer bore a scar upon his cheek, and the accused is perceived by the jury to have no such scar, it is plain that on that particular point the witness is wholly in error. If the same witness should testify, among other circumstances, that the killing was done at night, by the light of the full moon, and a reference to an almanac should show that the moon did not appear in that place on that night, in a similar way his error on that point would be apparent. If his testimony should assert, among other things, that the assailant wore a white hat, and on the other side five unimpeachable eye witnesses should attest that the assailant wore a black hat, then the same result would follow, provided the testimony of the opposing witnesses were believed. Suppose, again, that he makes the same assertion as to a white hat, and five unimpeachable witnesses swear that the accused never owned or possessed a white hat, the same result would follow, provided, first, that the testimony of the opposing witnesses were believed, and, secondly, that the impossibility also be accepted of the accused having been able to obtain temporarily a white hat. Now in all four of these instances the immediate probative effect is the same, namely, the witness is perceived by the tribunal *to be in error on a particular point*; the difference between the instances consists merely in the method of making the error clear to the tribunal. In the first instance, the senses of the tribunal itself determine by inspection and without ordinary evidence; in the second instance, the error appears by means of hearsay testimony of an ordinarily incontrovertible sort; in the third instance it is necessary that faith be given to the opposing testimony before the error can be accepted; in the fourth

<sup>1</sup> [Adapted from the same author's *Treatise on Evidence*. (1905. Vol. II, § 1000).]

instance, it is necessary, not only that the opposing testimony be believed, but also that certain circumstantial facts additionally be accepted as existing and as probative before the error can be accepted. Whatever the method of proving the contrary of the witness's asserted fact, the ultimate result aimed at is the same, namely, to persuade the tribunal that the witness has completely erred on that particular point. Now the commonest instances in practice are the third and the fourth, *i.e.* the marshaling of one or more witnesses (with or without other circumstantial evidence) who deny the fact asserted by the first witness and maintain the opposite to be the truth. Thus, the dramatic feature of the attempt to prove the error is a *contradiction* of the first witness by one or more in opposition. Yet this contradiction in itself does nothing probatively, nor unless the contradicting witness or witnesses are believed in preference to the first one, *i.e.* unless *his error* is established. It is not the contradiction, but the truth of the contradicting assertion as opposed to the first one, that constitutes the probative end. Nevertheless, the contradiction, being the usual and prominent feature of the process by which that end is aimed at, has served as the common name to designate the probative end itself. This is not wrong, provided it be clearly understood what that end is.

Such being the real probative end which the contradiction is intended to serve, what is the exact nature of that probative effect? Assume that the end is accomplished, and that the tribunal accepts as a fact that the witness is completely in error on that particular point, what is the place of this fact in the general system of discrediting or impeaching evidence?

The peculiar feature of this probative fact of Error on a particular point is its deficiency with respect to definiteness and its potency with respect to possible significance. Looking back over the various other kinds of testimonial phenomena considered already, it will be seen that the evidence was aimed clearly and specifically at a particular defect; it showed either that or nothing. Former perjury would indicate probably a deficient sense of moral duty to speak truth; relationship to the party, a probable inclination to distort the facts, consciously or unconsciously;—misjudgment of a test specimen of handwriting, a probable lack of skill in judging of writings; and so on. Now the present sort of fact is not offered as definitely showing any specific defect of any of these kinds, and yet it may justify an inference of the existence of any one or more of them. We know simply that an erroneous statement has been made on one point, and we infer that the witness is capable of making an erroneous statement on other points. The source might be a mental defect as to powers of observation or recollection; it might be a lack of veraciousness; it might be bias or corruption; it might be lack of experiential capacity; it might be lack of opportunity of knowledge. As to all this, nothing can be specified. The inference is only that since, for this proved error, there was *some unspecified defect* which became a source of error, the same defect may equally exist as the source of some other error, otherwise not apparent. No doubt the repetition of instances affects the strength of the inference; *i.e.* if a witness has testified to ten separate points, and if his assertions are proved to be incorrect not merely upon one but upon six of these points, one is more inclined to believe that the underlying defective quality, whatever it may be, is radical and complete, and to assume easily that it applies to and annuls his assertions on all the remaining

points. But it is still true that the error in itself does not definitely indicate any one specific defect; that there is no attempt consciously to analyze its bearings in that respect; and that the typical probative process is that of inferring a general defective trustworthiness on other points from proved defective trustworthiness on one point.

It will thus be seen, as above suggested, that the *strength* and usefulness of this sort of evidence consists in the wide range of defective qualities which it opens to our inference; and that its *weakness* consists in the indefiniteness of its inference.

In view of this source of its weakness, is there no way of determining more accurately the significance of such errors?

In so far as the point on which the proved error exists is removed in conditions and circumstances from the point as to which the inference of other error is desired to be drawn, the possible explanations (in the way of defective qualities) multiply which may be accepted without necessarily accepting one which applies to the desired point; conversely, in so far as the conditions and circumstances are the same, then the explanations tend to become identical, *i.e.* so that the defective quality, whatever it was, that caused the proved error, must have operated, more or less certainly, to cause error also on the point at issue, so closely connected with it in conditions and circumstances. For example, suppose a witness' main assertion to be that the accused struck the first blow in an affray. Suppose it then to appear that this witness, four years ago, incorrectly asserted that a street car conductor had not returned him the right amount of change after payment of fare; or that two years ago he incorrectly asserted that Yankton was the capital of South Dakota; or that one year ago he incorrectly asserted that his brother was in California; or that one month ago he incorrectly stated the day of the month; in all these instances the significance of the error is felt logically to be trifling, because the defect which was the source of any one of those errors may not be operating with respect to his assertion now in question, and the probability of its operating is so indefinite as not to be worth considering. But suppose it to appear that another assertion of this witness, that the deceased had no weapon in his hand when struck, is incorrect; now we may begin to attach significance to this error, because the source of it, while it *need* not be also operating as to the main assertion in question, is much more likely to be operating. Or, if the error consist in asserting that the deceased was knocked down by the accused's blow (when in truth he remained standing), the error is vital, because the defective source of that assertion must almost necessarily have operated also for the assertion that the accused struck first; and, if the former assertion appears to be untrustworthy, the latter must fall with it (so far as this witness's testimony is concerned).

Thus, an error upon a distant and distinct matter is logically much inferior in value to an error upon a closely connected matter, in its bearing upon the trustworthiness of the assertion in question. This seems to be the logical foundation for the readiness of our law to draw a distinction, in allowing proof of such errors between matters "collateral" and other matters. But it remains true that "collateral" errors, though only remotely probative, may be still probative.

**TITLE III (continued): TESTIMONIAL INTERPRETATION**

**SUBTITLE C: SUNDRY ILLUSTRATIONS OF THE FALLIBILITY OF TESTIMONY**

**356. THE DISBELIEVED CHILD'S CASE.** DR. BUCHHOLZ. (*Testimony.* H. Gross' Archiv für Kriminal-Anthropologie und Kriminalistik, 1909, Vol. XXXV, p. 128.)

Some years ago my wife, with our six-year-old son, was paying a visit to her parents. One day the boy went out for a walk with his grandmother. On his return he told us that, while they were out, his uncle had shaken hands with him and asked to be remembered to my wife. The grandmother, however, on hearing this statement, said that no such thing happened, or could have happened; for during the whole walk she had had the boy with her by the hand and no one had spoken to him. But, on being questioned, the little fellow stuck to his story; and added this particular, that his uncle had spoken to him while his grandmother was talking with another lady. All this the grandmother positively denied; she had not talked with any lady while out walking. The grandfather, who took part in the ensuing discussion, was

experienced in criminal cases (being at that time an examining magistrate), and took occasion to deliver himself on the untruthful tendencies of children; when just at that moment the said uncle himself appeared on the scene, and his first remark was to ask if the boy had delivered the message just given him!

The little fellow had been entirely in the right as to the occurrence. The grandmother acknowledged, the moment the lady's name was mentioned, that she had met and conversed with her for one minute; during that minute the uncle's incident with the boy took place.

But in a trial in court, who would have been believed, the boy or the grandmother? And how would it have turned out if the alibi to some crime had depended on these two witnesses?

**357. THE COPIED WILL.** (JOHN C. REED. *Conduct of Lawsuits.* 1912. 2d ed. § 56.)

. . . I add an example of a number of examiners of an important paper falling into the same error. A testator had thus limited certain property: "To be used only for the support and maintenance of each of them (his daughters), and the education and maintenance of the children of each of them." Some three or four copyists, each acting independently of the others, gave

the item just quoted as follows: "To be used only for the support of the children of each of them." Several certified copies had been made, and but one had the words as first quoted. A controversy occurred between the counsel on different sides of a case involving the construction of this will, as to the true contents of the item mentioned. To settle it, one of them, interested

to increase the estate of the testator's grandchildren, wrote to the surrogate of another county, who had the custody of the paper, stating the contention, without disclosing his side, and asking for the truth. The surrogate, thus put upon the alert, inspected both the record and the original will with

particular pains and certified the same mistake. Of course our lawyer felt that his case was sure. But as he could not get his adversaries to admit the words to be as he contended, he examined for himself and, to his great surprise, found that the solitary copy was right and all the others wrong.

**358. PHILIP CLARE'S CASE.** (JOHN PAGET. *Judicial Puzzles*. 1876. p. 60.)

In Stafford, in the year 1857, the body of a girl named Elizabeth Hopley was found in the canal at Bradley, early on the morning of the 30th of April. There were no marks of violence. About ten o'clock on the previous evening she had left the house of her aunt for the purpose of going to the place where a young man, to whom she was engaged to be married, was in the habit of working. Her road led past the place where her body was found, and it was supposed that, dazzled by the light of some coke fires, she had missed her way, and fallen over the low wall by which the canal was, at that spot, very insufficiently guarded.

About three weeks, however, after the girl's death, a neighbor, of the name of Samuel Wall, declared that Elizabeth Hopley had been murdered, and that he had been present when the crime was committed. A day or two afterwards he was summoned before the magistrates, when he told the following story. He said that on the night of the 29th of April he was on duty as a private watchman on some premises near a bridge which crossed the railway; that he saw two persons, a man and a woman, on the bridge, and heard a woman's voice say, "Philip, don't kill me! You said you would kill me before!" That the man then raised his hand and struck the woman a violent blow on the head, which knocked her down. Upon this he went up, and instantly recognized the man as one Philip

Clare, whom he well knew. He exclaimed, "Philip, you'll have to suffer for this!" Clare turned round and replied, "If you speak, I'll serve you the same!" Clare then lifted the young woman up from the ground, and, followed by Wall, carried her over the railway bridge, and down a road past some cottages, until he came to the canal. Here he paused, and turning round again upon Wall, said, "Now, if you speak or tell any one, I will kill you. I will serve you the same way as I served her, and set some one else to watch instead." He then, in Wall's presence, plunged the woman, who still seemed helpless and insensible, into the canal, close to the spot where, the next morning, her body was discovered. Wall fixed the time when this occurred as twenty minutes after midnight; and it must be remarked that he was employed as a watchman, and was likely to be habitually observant of the time. He said that he returned to his employer's premises, being prevented by his fear of Clare from giving any alarm; that after about a quarter of an hour had elapsed, Clare came to him and renewed his threats, when, terrified by the apprehension of immediate violence, he locked himself up in the engine house until daylight.

Upon this statement, Clare was taken into custody, and committed for trial. At his trial Wall repeated the story he had told the magistrates. There was a total absence of confirmation. It was met by

proof that the body showed no sign of having received any blow of the kind described by Wall; that there had been men at work pumping water during the whole night in the immediate neighborhood, who must, in all probability, have heard something, had the affair taken place as Wall described. It was shown, moreover, that from half past six until about eleven P.M., Clare had been in a public house at Bilston, which he left, in company with four other men, one of whom accompanied him till within half a mile of his own house. An-

other witness, a neighbor, proved that about twelve o'clock he met Clare, and entered into conversation with him near his own door; that they remained together until two o'clock next morning. There could not be the slightest doubt of Clare's innocence, and the jury, of course, at once acquitted him.

Nor could there be any doubt that Wall believed the story told. The minuteness, the particularity, the graphic details, the conversation, all bear the stamp of that *subjective* truth, which our language has no word to distinguish from *objective* truth.

359. JOSEPH LESURQUES' CASE. (JAMES RAM. *On Facts as Subjects of Inquiry by a Jury*. 1873. 3d Amer. ed. p. 420.)

In the month of April, 1796, a young man named Joseph Lesurques arrived in Paris from Douai, his native town. He was thirty-three years of age, and possessed a fortune equal to six hundred pounds a year. He hired apartments, and made preparations for residing permanently in Paris. One of his first cares was to repay one Guesno, of Douai, two thousand francs he had borrowed of him. On the following day Guesno invited Lesurques to breakfast. They accordingly went to a refreshment room, in company with two other persons, one of whom, named Couriol, happened to call just as they were sitting down to table. After breakfast they proceeded to the Palais Royal, and having taken coffee, separated. Four days afterwards, four horsemen, mounted on hired horses, were seen to drive out of Paris. They all wore long cloaks and sabers hanging from the waist. One of the party was Couriol. Between twelve and one o'clock the four horsemen arrived at the village of Mongeron, on the road to Melun.

There they dined, and then proceeded at a foot pace towards Lieursaint. They reached Lieursaint about three in the afternoon, and made a long halt at the inn, amusing themselves with billiards, and one of them having his horse shod. At half past seven they remounted and rode off towards Melun. About an hour later the mail courier from Paris to Lyons arrived to change horses. It was then half past eight, and the night had been for some time dark. The courier, having changed horses, set out to pass the long forest of Leuart. The mail at this period was a sort of post-chaise, with a large trunk behind containing the dispatches. There was one place only open to the public, at the side of the courier; and the place was occupied on that day by a man about thirty years of age, who had that morning taken it in the name of Laborde.

The next morning (9th Floreal, year IV = 28th April, 1796) the mail was found rifled, the courier dead in his seat, and the postilion lying dead in the road—both being evi-

<sup>1</sup>[This world-famous case, dramatized in French under the title "Le Courier de Lyon" (played by Sir Henry Irving as "The Lyons Mail"), has been recently studied critically by Professor Jean Appleton of Lyon, in an article entitled "L'histoire vraie du Courier de Lyon," in the "Archives d'anthropologie criminelle," 1912, vol. XXVII, p. 401.—Ed.]

dently slain with sabers. One horse only was found near the carriage. The mail had been robbed of seventy-five thousand livres in silver and bank bills. The officers of justice soon discovered that five persons had passed through the barrier on their way to Paris between four and five in the morning after the murders. The horse of the postilion was found wandering about the Place Royale; and they ascertained that four horses, covered with foam and quite exhausted, had been brought, about five in the morning, to a man named Muiron, Rue des Fosses, Saint Germain l'Auxerrois, by two persons who had hired them the day before. These two persons were named Bernard and Couriol. Bernard was immediately arrested; Couriol escaped. A description was obtained of the four who had ridden from Paris and stopped at Mongeron and Lieursaint, and also of the man who had taken his place with the courier under the name of Laborde. Couriol was traced to Château Thierry, where he was arrested, together with Guesno, the Douai carrier, and one Bruer, who happened to be in the same house. Guesno and Bruer proved alibis so clearly that they were discharged on arriving at Paris.

The magistrate, after discharging Guesno, told him to apply at his office the next morning for the return of his papers, which had been seized at Château Thierry; at the same time he had sent a police officer to Mongeron and Lieursaint to fetch the witnesses, of whom he gave a list. Guesno, being desirous to obtain his papers as soon as possible, left home the next day earlier than usual. On his way to the office he met Lesurques, who consented to accompany him. They went to the office, and as Daubenton, the juge-de-Paix, had not yet arrived, they sat down in the antechamber to await his arrival. About two o'clock the juge-de-Paix,

who had entered his room by a back door, was thunderstruck on being told by the police officer who had come back with the witnesses, that two of them declared that two of the actual murderers were in the house. "Impossible!" he exclaimed, "guilty men would not voluntarily venture here." Not believing the statement he ordered the two women to be introduced separately; and examined each of them, when they repeated their statement and declared they could not be mistaken. . . . The two friends were immediately arrested.

No time was lost in pushing on the prosecution. Seven persons were put upon their trial, amongst whom were Couriol, Madeleine Breban (his mistress), Lesurques, and Guesno. Lesurques was sworn to most positively by several, as being one of the party, at different places on the road, on the day of the robbery and murder. "I attended them (said one witness) at dinner at Mongeron; this one (Lesurques) wanted to pay the bill in assignats, but the tall dark one (Couriol) paid it in silver." A stable boy at Mongeron also identified him. A woman named Alfroy, of Lieursaint, and the innkeeper and his wife of the same place, all recognized him as of the party there—Lesurques declaring that he had never been present at either place. But the witnesses were positive, were unimpeached, were believed. Lesurques called fifteen persons of known probity to prove an alibi.

Eighty persons of all classes declared the character of Lesurques to be irreproachable.

Legrand, a wealthy jeweler and a fellow countryman of the prisoner, deposed that on the day the crime was committed, Lesurques passed a great part of the morning at his (Legrand's) house. His testimony was confirmed by another jeweler, named Aldenof. Ledru and Chauisser, two other witnesses, deposed that Lesurques dined in company

with them on the same day, in the Rue Montorgueil; that they afterwards went with him to a café to take coffee and *liqueurs*, and then they walked with him to the door of his house. Beaudart, a painter, strengthened this evidence, by declaring that he was with Lesurques at his apartment at night, and remained with him until he got into bed. Several workmen employed at the apartment of Lesurques deposed to their having seen him at different times in the days of the 8th and 9th Floreal.

This mass of evidence so effectually contradicted the testimony of the nine persons who declared that they recognized Lesurques as one of the four horsemen at Mongeron and Lieursaint, and produced such a favorable effect on the minds of the jury, that they could not help showing it by their countenances. But a fatal incident occurred which entirely changed the face of things. The jeweler, Legrand, in order to corroborate his evidence, and put the day of Lesurques being with him beyond all doubt, stated that on the 8th Floreal, he, before dinner, made an exchange of jewelry with the other jeweler, Aldenof, which transaction was entered in his books. These books being now brought into court and examined, it appeared sufficiently clear that the original date of the entry was the 9th, and that an attempt had been made, by scratching, to change the nine into an eight. On this discovery, and the consequent observations and questions of the court, Legrand became confounded and unable to give any satisfactory explanation.

The president thereupon ordered him into custody, and, thus terrified, Legrand retracted his previous depositions, and said that he was not certain of having seen Lesurques on the 8th, and that he had altered the book in order to give greater force to his evidence in favor of the prisoner, whom he firmly believed to be

innocent, and whose life he determined to save, even by perjury. This circumstance was of a nature to excite great suspicion in the minds of the judges and the jury as to the whole of the evidence in favor of Lesurques, and to create a belief that all of the depositions already received were nothing more than an act of connivance. Scarcely were those which remained to be heard listened to, and the conviction of the accused from this moment seemed certain. To so many appearances against him, Lesurques constantly replied by an energetic denial. When the jury had retired to consider their verdict, a woman overcome by emotion requested to speak to the president. She was, she said, urged on by the voice of her conscience and desired to spare that court a dreadful error. She declared that she knew positively that Lesurques was innocent, and that the witnesses, deceived by an inexplicable resemblance, had mistaken him for the real culprit, who was named Duboscq. The court would not receive her evidence; and, under the impression that she had been suborned, ordered her to withdraw. This woman, whose name was Madeleine Breban, was the mistress of Couriol and the confidante of his most secret thoughts.

The jury returned a verdict of guilty against Lesurques, and the court condemned him to death. Guesno's alibi was believed, and he was acquitted. Couriol was found guilty. Scarcely had the judgment been passed, when Lesurques, rising up, calmly addressed the judges as follows: "I am innocent of the crime which is imputed to me. Ah! citizens, if it is frightful to murder on the highway, it is not less so to punish an innocent man." Couriol, also condemned to death in his turn, pronounced these words: "I am guilty, and I acknowledge my crime, but Lesurques is innocent." He reiterated this declaration four times, and when he returned to



prison, wrote to his judges a letter full of sorrow and repentance. "I never was acquainted with Lesurques," said he; "my accomplices are Vidal, Roussi, Durochat, and Duboscq. The likeness between Duboscq and Lesurques has misled the witnesses."

Madeleine Breban presented herself, after judgment, to renew her declaration. Two other persons also joined her in declaring that before the condemnation she had told them that Lesurques had never any connection with the prisoners, and that he was the victim of his resemblance to Duboscq. The declaration of Couriol, that he was justly condemned, and his demand for a reprieve in favor of Lesurques caused a doubt to arise in the minds of the judges. They hastened to demand a reprieve from the Directory, which, alarmed at the idea of seeing an innocent man perish, had recourse to the legislative body, all judicial resources having been exhausted. The message of the Directory to the Council of the Five Hundred was pressing. It demanded a delay of the execution, and some indication as to the course to be pursued in the case. It concluded in these words: "Ought Lesurques to perish on the scaffold because he resembles a criminal?"

The Legislative Body passed to the order of the day, saying all had passed legally, and that a particular case could not warrant an information of form previously determined on, and that to put aside for such reasons a condemnation formally pronounced by a jury, would be to overturn all ideas of justice and equality before the laws. The right of pardon had been abolished, and neither resource nor hope remained to Lesurques. He supported his fate with firmness and resignation, and on the day of his death he wrote to his wife: "My dear love, no one can avoid his destiny. Since I am to be murdered juridically, I will at least undergo my fate with

the courage of a man. I send you my hair, and when your children shall have grown up you will divide it amongst them." In a farewell note to his friends, he confined himself to expressing this regret: "Truth has not been able to make itself heard; I am to perish, the victim of a mistake." After his condemnation, and during his appeal, Lesurques published a letter in the journals addressed to Duboscq, whose name had been revealed by Couriol. In this he says: "You, in whose place I am about to die, be satisfied with the sacrifice of my life. If ever you are brought before a court of justice, bear in mind my three children, covered with opprobrium, their mother in despair, and do not prolong so many misfortunes caused by the most funeste resemblance." On the 10th of March, 1797, Lesurques was executed. He was dressed in white as a symbol of his innocence. It happened on Holy Thursday, and he regretted he was not to die on the day after, which was Good Friday. During the passage from the prison of the conciergerie to the Place de Greve, Couriol, who was placed on the cart by his side, kept constantly crying out, with a loud voice, to the people. "I am guilty, but Lesurques is innocent." When Lesurques mounted the scaffold already red with the blood of Bernard, he pronounced the following words in delivering himself to the executioner: "I pardon my judges, also the witnesses whose error caused my condemnation; and Legrand, who has in no small degree procured my judicial murder. I die innocent."

The protestations of innocence of Lesurques, and above all the declarations of Couriol at the scaffold, caused a great sensation in the public mind; and Daubenton, the *juge de paix* who first commenced the proceedings against him, being a conscientious man, resolved to devote all his energy to the investigation of the truth. His first step was to

endeavor to arrest the three persons who had been mentioned by Couriol as his accomplices. Two years passed in fruitless efforts, but at length Durochat, who, according to the declaration of Couriol, was the man who, under the name of Laborde, occupied the seat next to the courier, was in custody for theft. For this offense he was sentenced to imprisonment for fourteen years; but Daubenton, resolved upon arriving at the truth, accompanied him for some distance on the way to prison, and whilst at breakfast, at a village on the road, pressed him so hard that he said, "Citizen, you are an honest man, and as it is all over with me, I will tell you what you want to, know." He then entered into a history of the whole affair, declaring that the criminals were himself, Couriol, Roussi, Vidal, and Duboscq, whose great resemblance to Lesurques had caused the death of that unfortunate man. In consequence of the disclosures of Durochat, Vidal was arrested a few days afterwards and was sworn to by several witnesses as having been of the party who robbed the mail; Durochat was brought to trial and condemned to death, and Vidal was kept in prison to await his trial.

Four years after the commission of the crime, Duboscq was arrested and thrown into prison at Versailles with Vidal. Here they attempted to escape. Vidal succeeded, but Duboscq fell, and, breaking his leg, was again confined. Soon afterwards, however, Duboscq, having been cured, made another attempt to escape, which was successful; but Vidal being retaken was brought to trial, found guilty, condemned to death, and executed.

At the end of another year, Duboscq was again captured, and being confronted with all the witnesses who had sworn to the guilt of Lesurques, they declared that they had been deceived by the extraordinary resemblance of the two, but they had now not the slightest doubt that Duboscq was the criminal. On the trial, this testimony was reproduced, and the declaration of Madeleine Breban had due force. Duboscq was condemned to death, and was executed on the 3d Ventose, year X. Roussi, the remaining criminal, was afterwards taken, and being tried was also condemned to death. He went to the scaffold full of repentance, after having signed the following paper: "I declare that Lesurques was innocent; but this declaration which I have made to my confessor is not to be published for six months." In consequence of this unequivocal evidence of the innocence of Lesurques, strenuous efforts were made by Daubenton, on behalf of the family of the victim, to obtain all that was then possible from human justice, namely, the revision of the sentence, and the public acknowledgment of the error which led to his untimely fate. All his efforts, however, were fruitless. The right of revision no longer existed in the French code. Under the Directory, the Consulate, and the Restoration, the applications of the widow and family were equally unsuccessful. All that they could obtain was the restoration, in the last two years of the elder Bourbons, of a part of the property sequestered at the condemnation of the unoffending husband and father.

**360. GREEN McDONALD'S CASE.** (A. G. W. CARTER. *The Old Court House. [of Cincinnati]* 1880. p. 144.)

But about this business of identity, notwithstanding all the aforesaid, Judge Read was more than two thirds right in what he said;

for it is a fact that I, as prosecuting attorney for this county, had a man sent to the penitentiary a few months before this, for a crime of

which not the convicted was guilty, but this very veritable aforesaid Joseph Andrews himself. The way of it was thus: A midnight burglary and larceny had been committed on a certain night, a long time ago, in one of the rooms of the Dennison House, then on Fifth Street, near Main. One Green McDonald, notorious among the police, and men, women, and children of this city, was arrested as the burglar and thief, and was completely identified as the very thief by the lady in whose room the burglary and theft was committed, and with whom the robber had quite a tussle in the commission of the crime. Green McDonald was convicted, on her evidence, as the robber, and, as his character was already infamous, sent to the penitentiary for a long term of years. After Joseph Andrews was convicted for the daylight burglary and theft of silver in Dr. Wood's mansion, he one day sent for me as prosecuting attorney to come and see him at the jail. I went over and found him, deliberate and composed, and he said to me: "Look at me; view me well. Don't I look like some one in this city?" I surveyed him, closely inspected his form and features, and in surprise I answered: "Yes; you look like Green McDonald." "That's it," said he; "that's it. You sent that poor fellow, Green McDonald, to the

penitentiary for what I myself did at the Dennison house." "Can it be possible?" said I. "Yes," said he, "it is more than possible; it is a fact." And to show me that he was the man, that he alone was guilty of the Dennison house affair, and not Green McDonald, he told me all about it, told and described all the particulars of the room, and the lady, and all about the tussle, and his own escape with the booty, etc. I was thoroughly astounded, but as thoroughly convinced that a great wrong had been officially and judicially done; and I immediately wrote an official letter to the Governor of the State, and had Green McDonald pardoned out of the penitentiary as the only remedy of the wrong left, alas! . . . Ever after this, I was exceedingly careful about this most important question of identity of prisoners, and more than one I let go, when there was a particle of doubt about his or her identity.

What lessons we get about humanity in the administration of so-called justice. From my experience as a man, a lawyer, a prosecuting attorney, and a judge, and a long and observing experience it has been, too, I am compelled to say, that the most uncertain thing I know of, is human testimony. And yet we, poor mortals as we are, cannot make a move in life without reliance upon it.

361. **THE PERREAUS' CASE.** *of Crime.* ed. 1891. Vol. I, 244.)

The circumstances of the cases of these prisoners are of a very remarkable description. It appears that the accused persons were twin brothers, and were so much alike that it was with difficulty that they were known apart. Robert Perreau carried on business in Golden-square as an apothecary, and was in great practice; while his brother lived in a style of considerable fashion, a Mrs. Margaret Caroline Rudd living with him as his wife.

(CAMDEN PELHAM. *The Chronicles*

At the sessions held at the Old Bailey in June 1775, Robert Perreau was indicted for forging a bond for the payment of 7500*l.* in the name of William Adair, Esq. (then a great government contractor), and also for feloniously uttering and publishing the said bond, knowing it to be forged, with intent to defraud Messrs. Robert and Henry Drummond, bankers. From the evidence which was adduced at the trial, it appeared that on the 10th

of March, 1775, the prisoner under trial, whose character up to that time had been considered unimpeachable, went to the house of Messrs. Drummond, and seeing Mr. Henry Drummond, one of the partners, said that he had been making a purchase of an estate in Norfolk or Suffolk, for which he was to give 12,000*l.*, but that he had not sufficient cash to pay the whole purchase money. That he had a bond, however, which Mr. Adair had given to his brother Daniel, for 7500*l.*, upon which he desired to raise a sum of 5000*l.*, out of which he was willing to pay 1400*l.*, which he had already borrowed of the firm.

Mr. Drummond, on the production of the bond, had no sooner looked at the signature than he doubted its authenticity, and very politely asked the prisoner if he had seen Mr. Adair sign it. The latter said he had not, but that he had no doubt that it was authentic, from the nature of the connection that subsisted between Mrs. Rudd, who was known to live with Daniel, and that gentleman; a suggestion having previously been thrown out that she was his natural daughter. Mr. Drummond, however, declined advancing any money without the sanction of his brother, and he desired Perreau to leave the bond, saying that it should either be returned on the next day, or the money produced. The prisoner made no scruple to obey this suggestion, and he retired, promising to call again the next day. In the interim, Mr. Drummond examined the bond with greater attention; and Mr. Stephens, secretary of the Admiralty, happening to call, his opinion was demanded, when, comparing the signature to the bond with letters which he had lately received from Mr. Adair, he was firmly convinced that it was forged. When Perreau came on the following day, Mr. Drummond spoke more freely than he had done before, and told him that he imagined he had been imposed on;

but begged, that to remove all doubt, he would go with him to Mr. Adair, and get that gentleman to acknowledge the validity of the bond, on which the money would be advanced. This was immediately acceded to; and on Mr. Adair seeing the document, he at once declared that the signature was a forgery. The prisoner smiled incredulously, and said that he jested; but Mr. Adair remarked that it was no jesting matter, and that it lay on him to clear up the affair. On this he went away, requesting to have the bond, in order to make the necessary inquiries—a request which was refused; and persons being employed to watch him, it was found that immediately on his arrival at his house, he and his brother and Mrs. Rudd got into a coach, carrying with them all the valuables which they could collect, with a design to make their escape. They were, however, stopped, and taken into custody, and being conveyed to Sir John Fielding's, at Bow-street, they there underwent an examination, and upon the evidence adduced, were committed to prison. Other charges were subsequently brought against them by Sir Thomas Frankland, from whom they had obtained two sums of 5000*l.* and 4000*l.* on similar forged bonds, as well as 4000*l.* which they had paid when the amount became due; and by Dr. Brooke, who alleged that they had obtained from him 1500*l.* in bonds of the Ayr bank, upon the security of a forged bond for 3100*l.*; and Mrs. Rudd was then admitted as evidence for the Crown.

Her deposition then was, that she was the daughter of a nobleman in Scotland; that, when young, she married an officer in the army named Rudd, against the consent of her friends; that her fortune was considerable; that on a disagreement with her husband, they resolved to part; that she made a reserve of money, jewels, and effects, to the amount of 13,000 pounds, all of

which she gave to Daniel Perreau, whom she said she loved with the tenderness of a wife; that she had three children by him; that he had returned her kindness in every respect till lately, when, having been unfortunate in gaming in the alley, he had become uneasy, peevish, and much altered to her; that he cruelly constrained her to sign the bond now in question, by holding a knife to her throat, and swearing that he would murder her if she did not comply; that, being struck with remorse, she had acquainted Mr. Adair with what she had done; and that she was now willing to declare every transaction with which she was acquainted, whenever she should be called upon by law so to do.

Upon the cross-examination of Mr. Drummond, however, he swore that Mrs. Rudd, on her being first apprehended, took the whole on herself, and acknowledged that she had forged the bonds; that she begged them "for God's sake to have mercy on an innocent man," and that she said no injury was intended to any person, and that all would be paid; and that she acknowledged delivering the bond to the prisoner. They then entertained an opinion that the prisoner was her dupe; and Mr. Robert Drummond having expressed a notion that she could not have forged a handwriting so dissimilar from that of a woman as Mr. Adair's, she immediately, in order to satisfy them of the truth of what she said, wrote the name "William Adair" on a paper exactly like the signature which appeared attached to the bond.

Mr. Watson, a money scrivener, also deposed, that he had filled up the bonds at the desire of one of the brothers, and in pursuance of instructions received from him; but he hesitated to fix on either, on account of their great personal resemblance; and being pressed to make a positive declaration, he fixed on Daniel as his employer.

The case for the prosecution being concluded, the prisoner entered upon his defense. In a long and ingenious speech, which he addressed to the jury, he strove hard to prove that he was the victim of the artifices of Mrs. Rudd.

He said that she was constantly conversing about the influence she had over Mr. W. Adair; and that Mr. Adair had, by his interest with the king, obtained the promise of a baronetage for Daniel Perreau, and was about procuring him a seat in parliament. That Mr. Adair had promised to open a bank, and take the brothers Perreau into partnership with him. That the prisoner received many letters signed "William Adair," which he had no doubt came from that gentleman, in which were promises of giving them a considerable part of his fortune during his life; and that he was to allow Daniel Perreau two thousand four hundred pounds a year for his household expenses, and six hundred pounds a year for Mrs. Rudd's pin money. That Mr. Daniel Perreau purchased a house in Harley-street for four thousand pounds, which money Mr. William Adair was to give them. That when Daniel Perreau was pressed by the person of whom he bought the house for the money, the prisoner understood that they applied to Mr. William Adair, and that his answer was, that he had lent the king seventy thousand pounds, and had purchased a house in Pall Mall at seven thousand pounds, in which to carry on the banking business, and therefore could not spare the four thousand pounds at that time. He declared that all attempts at personal communication with Mr. Adair were strenuously opposed by Mrs. Rudd as being likely to destroy the effects of her exertions on his behalf, and contended that his conduct throughout the whole transaction with Mr. Drummond, showed that he was innocent of any guilty intention, and that he firmly believed

that he was acting honestly and justly.

He then proceeded to call the following witnesses, whose evidence we shall give in the most concise manner:—

George Kinder deposed that Mrs. Perreau (the only name by which he knew Mrs. Rudd) told him "that she was a near relation of Mr. James Adair; that he looked upon her as his child, had promised to make her fortune, and with that view had recommended her to Mr. William Adair, a near relation and intimate friend of his, who had promised to set her husband and the prisoner up in the banking business." He also deposed that she said that Mr. Daniel Perreau was to be made a baronet, and described how she would act when she became a lady. The witness further deposed that Mrs. Rudd often pretended that Mr. William Adair had called to see her, but that he never had seen that gentleman on any visit.

John Moody, a livery servant of Daniel Perreau, deposed that his mistress wrote two very different hands; in one of which she wrote letters to his master, as from Mr. William Adair, and in the other the ordinary business of the family. That the letters written in the name of William Adair were pretended to have been left in his master's absence; that his mistress ordered him to give them to his master, and pretend that Mr. Adair had been with his mistress for a longer or shorter time, as circumstances required. This witness likewise proved that the hand at the bottom of the bond and that of his mistress's fictitious writing were precisely the same; that she used different pens, ink, and paper, in writing her common and fictitious letters; and that she sometimes gave the witness half a crown when he had delivered a letter to her satisfaction. He said he had seen her go two or three times to Mr. J. Adair's, but never to William's; and that Mr.

J. Adair once visited his mistress on her lying-in.

Susannah Perreau (the prisoner's sister) deposed to her having seen a note delivered to Daniel Perreau, by Mrs. Rudd, for nineteen thousand pounds, drawn as by William Adair, on Mr. Croft, the banker, in favor of Daniel Perreau.

Elizabeth Perkins swore that a week before the forgery was discovered, her mistress gave her a letter to bring back to her in a quarter of an hour, and say it was brought by Mr. Coverley, who had been servant to Daniel Perreau; that she gave her mistress this letter, and her master instantly broke the seal.

Daniel Perreau swore that the purport of this letter was "that Mr. Adair desired her to apply to his brother, the prisoner, to procure him five thousand pounds upon his (Adair's) bond, in the same manner as he had done before; that Mr. Adair was unwilling to have it appear that the money was raised for him, and therefore desired him to have the bond lodged with some confidential friend, who would not require an assignment of it; that his brother, on being made acquainted with his request, showed a vast deal of reluctance, and said it was very unpleasant work; but undertook it with a view of obliging Mr. William Adair." The counsel for the prosecution demanding "if he did not disclaim all knowledge of the affair before Mr. Adair," he said he denied ever having seen the bond before, nor had he a perfect knowledge of it till he saw it in the hands of Mr. Adair.

David Cassady, who assisted Mr. R. Perreau as an apothecary, deposed that he lived much within the profits of his profession, and that it was reported he was going into the banking business.

John Leigh, clerk to Sir John Fielding, swore to the prisoner's coming voluntarily to the office before his apprehension, and giving

information that a forgery had been committed. Mr. Leigh was asked if Mrs. Rudd "ever charged the prisoner with any knowledge of the transaction till the justices were hearing evidence to prove her confession of the fact;" and he answered that he did not recollect that circumstance, but that on her first examination she did not accuse the prisoner.

Mr. Perreau now called several persons of rank to his character. Lady Lyttleton being asked if she thought him capable of such a crime, supposed she could have done it as soon herself. Sir John Moore, Sir John Chapman, General Rebow, Captain Ellis, Captain Burgoyne, and other gentlemen, spoke most highly to the character of the prisoner; but the jury found him guilty.

It will be unnecessary now to give anything more than a succinct account of the trial of Daniel Perreau, which immediately followed that of his brother. He was indicted for forging and counterfeiting a bond, in the name of William Adair, for three thousand three hundred pounds, to defraud the said William Adair, and for uttering the same knowing it to be forged, to defraud Thomas Brooke, doctor of physic. Mr. Scroope Ogilvie, clerk to Mr. William Adair, proved the forgery; and Dr. Brooke swore to the uttering of the bond. The defense set up by the prisoner was, that Mrs. Rudd had given the bond to him as a true one; and he asserted, in the most solemn manner, that he had had no intention to defraud any man. Like his brother, he called several witnesses to show the artifices of which Mrs. Rudd had been guilty; and many persons proved the great respectability of his character.

The jury, however, returned a verdict of guilty, and both prisoners were sentenced to death; but the execution did not take place until January 1776, in consequence of the

proceedings which were subsequently taken against Mrs. Rudd.

After conviction the behavior of the brothers was, in every respect, proper for their unhappy situation. Great interest was made to obtain a pardon for them, particularly for Robert, in whose favor seventy-eight bankers and merchants of London signed a petition to the king: the newspapers were filled with paragraphs, evidently written by disinterested persons, in favor of men whom they thought dupes to the designs of an artful woman: but all was of no avail.

On the day of execution the brothers were favored with a mourning coach, in which to be conveyed to the scaffold; and their conduct throughout was of the most exemplary description. After the customary devotions were concluded, they crossed hands, and joining the four together, in that manner were launched into eternity. They had not hanged more than half a minute when their hands dropped asunder, and they appeared to die without pain.

Each of them delivered a paper to the Ordinary of Newgate, which stated their innocence, and ascribed the blame of the whole transaction to the artifices of Mrs. Rudd; and, indeed, thousands of people gave credit to their assertions, and a great majority of the public thought Robert wholly innocent.

Daniel Perreau and Robert Perreau were executed at Tyburn on the 17th of January, 1776. . . .

On the 16th of September, 1775, Mrs. Rudd was put to the bar at the Old Bailey, to be tried for forgery; but the counsel for the prisoner pleading that, as she had been already admitted an evidence for the crown, it was unprecedented to detain her for trial, and the judges differing in opinion on the point of law, she was remanded to prison till the opinion of the judges could be taken on a subject of so much importance.

prisoner at the bar, and had known him a number of years; that witness and Parker were jointly engaged, in the latter part of the year 1800, in loading a vessel for Capt. Tredwell, of New York; that they began to work on the 20th day of December, 1800, and were employed the greater part of the month of January, 1801, in the loading of the vessel; that during that time the witness and Parker worked together daily; the witness recollected well that they worked together on the 25th day of December, 1800; he remembered it, because he never worked on Christmas day, before or since; he knew it was in the year 1800, because he knew that Parker lived, that year, in a house belonging to Capt. Pelor, and he remembered their borrowing a screw for the purpose of packing cotton into the hold of the vessel they were at work at, from a Mrs. Mitchell, who lived next door to Parker; that witness was one of the city watch, and that Parker was also at that time upon the watch; and that witness had served with him from that time to the present day, upon the watch, and never recollected missing him any time during that period from the city.

*Aspinwall Cornwall* testified, that he lived in Rutger street, and had lived there a number of years; that he kept a grocery store; that he knew Parker, the prisoner at the bar, in 1800 and 1801; that Parker then lived in Capt. Pelor's house; that he lived only one year in Pelor's house; that Parker, while he lived there, traded with witness; that witness recollected once missing Parker for a week, and, inquiring, found he had been at work on Staten Island, on board one of the United States frigates; that, excepting that time, he never knew him to be absent from his family, but saw him constantly.

*Elizabeth Mitchell* testified, that she knew Parker, the prisoner at the bar, well; that in the years

1800 and 1801 Parker lived in a house adjoining to one in which witness lived; that the house Parker lived in belonged to Capt. Pelor; that witness was in habits of intimacy with Parker's family, and visited them constantly; that Parker being one of the city watch, she used to hear him rap with his stick at the door, to awaken his family, upon his return from the watch in the morning; that she also remembered, perfectly well, Parker's borrowing a screw from her on Christmas day, in 1800; she offered him some spirits to drink, but he preferred wine, which she got for him; the circumstance of her lending the screw to him she was the more positive of, from recollecting, also, that it was broken by Parker in using it: that Parker never lived more than one year in Capt. Pelor's house, and from that time to the present day, witness had been on the same terms of intimacy with Parker's family; she therefore considered it as almost impossible that Parker could have been absent from town, any time, without her knowing it; and she never knew him to be absent more than one week, while he lived at Pelor's house.

*James Redding* testified, that he had lived in the city a number of years; that he had known Parker, the prisoner at the bar, from his infancy; that Parker was born at Rye, in Westchester county; that Parker, in the year 1800, lived in Capt. Pelor's house; that witness saw him then continually, and never knew him during that time to be absent from town, during any length of time; that witness particularly remembered that, sometime in the beginning of the month of January, 1801, while Parker lived in Capt. Pelor's house, witness assisted Parker in killing a hog.

*Lewis Osborne* testified, that he had been acquainted with Parker, the prisoner at the bar, for the last four years; that witness had been one of the city watch: that from



June, 1800, to May, 1801, Parker served upon the watch with witness; that, at first, Parker served as a substitute; that witness remembered that Parker, a few days after Christmas, in 1800, was placed upon the roll of the regular watch, in the place of one Ransom, who was taken sick; witness was certain it was in the period above mentioned, because that was the only time witness ever served upon the watch; that during the above period, witness and Parker were stationed together, while on the watch, at the same post; witness was certain that Parker, the prisoner at the bar, was the person with whom he had served upon the watch, and was confident that during that time Parker was never absent from the watch, more than a week, at any one time.

The prisoner's counsel here rested his defense, and testimonies on behalf of the prosecution were continued.

*Moses Anderson* testified, that he had lived at Haverstraw, Rockland county; that he had lived there since the year 1791; that he knew prisoner at the bar well; that he came to the house of the witness in the beginning of September, 1800; that he then passed by the name of Thomas Hoag; that he worked for the witness eight or ten days; that from that time till the 25th of December, prisoner passed almost every Sunday at witness's house; that during prisoner's stay in Rockland county witness saw him constantly; and if prisoner was the person alluded to, he had a scar on his forehead, which he told witness was occasioned by the kick of a horse; he had also a small mark on his neck [those marks the prisoner had]; he had also a scar under his foot, between the heel and ball of the foot, occasioned, as he told witness, by treading on a drawing knife; that that scar was easy to be seen; that his speech was remarkable, his voice being effeminate; that he spoke quick and lisped a little [these pecul-

iarities were observable in prisoner's speech]; that prisoner supped at witness's house on the night of his marriage in December, 1800; that witness had not seen prisoner until this day, since prisoner left Rockland, which was between three and four years ago; that witness was perfectly satisfied in his own mind that prisoner was Thomas Hoag.

*Lavina Anderson* testified, that she knew prisoner at the bar; his name was Thomas Hoag; that in September, 1800, he came to witness's house in Rockland county, and worked for her husband eight or ten days, then worked for Judge Suffrein; every Saturday night until the prisoner was married, he and a person who passed for his brother, came to witness's house and stayed till Monday morning; that witness washed for him; there was no mark upon his linen; that prisoner, if he is Thomas Hoag, has a scar upon his forehead, and one also under his foot; was certain of the mark under his foot, because she recollected that the person who passed as his brother, having cut himself severely with a scythe, and complaining very much of the pain, Thomas Hoag told him he had been much worse wounded, and then showed the scar under his foot. Witness also testified, that about a year ago, after a suit had been brought in the justices' court in New York, wherein the identity of the prisoner's person came in question, witness was in town, and having heard a great deal said on the subject, she was determined to see him and judge for herself; that accordingly she went to prisoner's house, but he was not at home; she then went to the place where she was informed he stood with his cart; that she there saw him lying on his cart with his head on his hand; that in that situation she instantly knew him; that she spoke to him and when he answered she immediately recognized his voice; that it was very singular, shrill,

thick, hurried, and something of a lisp; that Hoag had also a habit of shrugging up his shoulders when he spoke, which she also observed in prisoner; that prisoner said he had been told she was coming to see him, and it was surprising people could be so deceived, and asked witness if she thought he was the man, to which witness replied that she thought he was, but would be more certain if she looked at his forehead; that she accordingly lifted up his hat, and saw the scar upon his forehead, which she had often before seen; that prisoner then told her it was occasioned by the kick of a horse. Witness added that it was impossible she could be mistaken — prisoner was Thomas Hoag.

*Margaret Secor* testified, that about four years ago she lived at Rockland with her father, Moses Anderson; that prisoner at the bar, Thomas Hoag, came to their house in September, 1800; that he remained in Rockland five or six months; that he had a scar on his forehead, that Hoag used to come every Saturday night to her father's to pass Sunday with them; that she used to comb and tie his hair every Sunday, and thus saw the scar; that witness married about two years ago, and came immediately to live in the city of New York; that after she had been in town a fortnight, she was one day standing at her door, when she heard a cartman speaking to his horse; that she immediately recognized the voice to be that of Thomas Hoag, and upon looking at him, saw the prisoner at the bar, and instantly knew him; that as he passed her he smiled and said, "How d'ye do, cousin?" that the next day he came to her house and asked her how she knew he was the man; witness replied she could tell better if he would let her look at his head; that accordingly she looked and saw a scar upon his forehead, which she had often remarked upon the head of Hoag. Witness admitted she had mentioned

her suspicions to her husband, and that her husband had told prisoner of it, and had brought him to the house. Witness added that she was confident prisoner was the person who passed at Rockland as Thomas Hoag.

*James Secor* testified, that he had been married about two years and a half; that he brought his wife to town about a week after his marriage; that he knew Hoag in Rockland, and had repeatedly seen him there; when he saw prisoner at his house in town, thought him to be the same person; witness's wife had mentioned to him that Hoag had a remarkable scar on his forehead, and when prisoner was at witness's house, he saw on his head the scar that his wife had described.

*Nicholas W. Conklin* testified, that he lived in Rockland county; that he knew the prisoner at the bar; that his name was Thomas Hoag; that he could not be mistaken; that Hoag had worked a considerable time for him; that during that time he had eaten at witness's table; that Hoag being a stranger, and witness understanding that he was paying his addresses to Catharine Secor, witness took a good deal of notice of him; thought him a clever fellow; saw a great deal of him; lived in a house belonging to witness. When witness saw prisoner at this place, he knew him instantly; his gait, his smile, which is a very peculiar one, his very look was that of Thomas Hoag. Witness endeavored, but in vain, to find some difference in appearance between prisoner and Hoag; he was satisfied in his mind that he is the same person. Hoag, he thought, was about twenty-eight or thirty years of age; he thought Hoag had a small scar on his neck.

*Michael Burke* testified, that he lived in Catharine street; that he formerly lived in Haverstraw; he saw prisoner several times at Haverstraw, before and after his marriage in December, 1800; that he was as well satisfied as he could be of any-

thing, that prisoner was the same person he knew in Haverstraw, that about two years ago he met the prisoner in the Bowery, at the time of the Harlem races; prisoner spoke to witness, and said, "Am I not a relation of yours?" Witness replied, "I don't know." Prisoner said, "I am; I married Katy Secor." Upon cross-examination witness admitted that he and prisoner had had a quarrel respecting witness calling prisoner Thomas Hoag; that the above conversation was after the trial in the justice's court, and witness when asked if he was at the trial, said he was not, though when interrogated particularly whether he was not in the court room admitted that he was.

*Samuel Smith* was called, merely as to the character of one of the witnesses on the part of the prosecution, a Mr. Knapp, and testified that he bore an unexceptionable character.

*Abraham Wendell* testified, that he knew one Thomas Hoag in the latter end of the year 1800; he was then in Haverstraw; that he had been very intimate with him, and knew him as well as he knew any man; that he had worked with him, had breakfasted, dined, and supped with him, and many a time had been at frolics with him, and that the prisoner at the bar was the same man; that he had no doubt whatever about it. That about a year ago, witness being in this city, was told by some persons that Hoag had beat the Haverstraw folks in an action wherein his identity had come in question; that witness told them he could know him with certainty; that they said they would send him down to him that day; that witness was aboard his sloop, saw prisoner at a distance of a hundred yards, coming down the street, and instantly knew him; prisoner came up to him and said immediately, "Mr. Wendell, I am told you will say you know me"; to which witness replied, "So I do;

you are Thomas Hoag"; that witness was as confident prisoner is the person, as he was of his own existence.

*Sarah Conklin* testified, that she lives in Haverstraw; that in September, 1800, a person calling himself Thomas Hoag was at witness's house, was very intimate there, used to call her aunt; is sure prisoner is the same person; never can believe two persons could look so much alike; would know Hoag from among a hundred people by his voice; prisoner must be Thomas Hoag; had not seen prisoner since he left Haverstraw till the present day.

*Gabriel Conklin* testified, that he lived in Haverstraw; that he knew Thomas Hoag; that he was at witness's house in September, 1800, and often afterwards; prisoner is the same person, unless there can be two persons so much alike as not to be distinguished from each other; prisoner must be Thomas Hoag; Thomas Hoag had a scar on his forehead and a small scar just above his lip, and prisoner had also these marks.

Further testimony was now produced on behalf of the prisoner, as follows:

*James Juquar* testified that he had known Joseph Parker, the prisoner at the bar, for seven years past; that he had been intimate with him all that time; that they had both worked together as riggers until Parker became a cartman; knew Parker when he lived in Capt. Pelor's house; never knew him absent from the city during that time, for a day, except when he was working on board one of the United States frigates, about a week at Staten Island. In the year 1799, prisoner hurt himself on board the Adams frigate, and then went to his father's in Westchester county, and was absent near a month; he was very ill when he left town; witness went with him, and brought him back again, before he was quite

recovered; recollects Parker and some other company passing Christmas eve at witness's house the year that Parker lived in Capt. Pelor's house, which was in 1800.

*Susannah Wendell* testified, that she had known prisoner for six years past; that he married witness's daughter; knew him when he lived in Capt. Pelor's house. Parker's wife was then ill, and witness had occasion frequently to visit her; saw prisoner there almost daily. Prisoner, excepting the time when he was sick and went to his father's in Westchester, has never been absent from the city more than one week since his marriage with witness's daughter.

Here it was agreed between the attorney-general and the counsel for prisoner, that the prisoner should exhibit his foot to the jury, in order that they might see whether there was that scar which had been spoken of in such positive terms by several of the witnesses on the part of the

people. Upon exhibiting his foot, not the least mark or scar could be seen on either of them.

In further confirmation of prisoner's innocence, there was adduced on his behalf one more witness:

*Magnus Beekman*, who testified, that he was captain of the city watch of the second district; that he was well acquainted with the prisoner, Joseph Parker; that he, Parker, had been for many years a watchman, and had done duty constantly on the watch; that witness, on recurring to his books, where he keeps a register of the watchmen and of their times of service, found that prisoner, Joseph Parker, was regularly upon duty as a watchman during the months of October, November, and December, 1800, and January and February, 1801, and particularly that he was upon duty the 26th of December, 1800.

The jury, without retiring from the bar, found a verdict of not guilty.

363. Another account of **THOMAS HOAG'S CASE.** (CAMDEN PELHAM. *The Chronicles of Crime.*

A man was indicted for bigamy under the name of James Hoag. He was met in a distant part of the country by some friends of his supposed first wife, and apprehended. The prisoner denied the charge, and said his name was Thomas Parker. On the trial, Mrs. Hoag, her relations, and many other credible witnesses, swore that he was James Hoag, and the former swore positively that he was her husband. On the other side, an equal number of witnesses, equally respectable, swore that the prisoner was Thomas Parker; and Mrs. Parker appeared, and claimed him as her husband. The first witnesses were again called by the Court, and they not only again deposed to him, but swore that by stature, shape, gesture, complexion, looks, voice, and speech, he was

ed. 1891. Vol. I, p. 238.)<sup>1</sup> James Hoag. They even described a particular scar on his forehead, by which he could be known. On turning back the hair, the scar appeared. The others, in return, swore that he had lived among them, worked with them, and was in their company on the very day of his alleged marriage with Mrs. Hoag. Here the scales of testimony were balanced, for the jury knew not to which party to give credit. Mrs. Hoag, anxious to gain back her husband, declared he had a certain more particular mark on the sole of his foot. Mrs. Parker avowed that her husband had no such mark; and the man was ordered to pull off his shoes and stockings. His feet were examined, and no mark appeared.

The ladies now contended for the

<sup>1</sup>[This account illustrates how untrustworthy the report of a case may become when transmitted from one chronicler to another. — Ed.]

man, and Mrs. Hoag vowed that she had lost her husband, and she would have him; but during this strife, a justice of the peace from the place where the prisoner was apprehended entered the Court, and turned the scale in his favor.

His worship swore him to be Thomas Parker; that he had known, and occasionally employed him, from his infancy; whereupon Mrs. Parker embraced and carried off her husband in triumph, by the verdict of the jury.

**364. GEORGE CANT'S CASE.** (CAMDEN PELHAM. *The Chronicles of Crime*. ed. 1891. Vol. II, p. 490.)

At the Central Criminal Court on Thursday the 31st of October, 1839, George Cant, a publican, aged forty years, was indicted for a rape upon Jane Bolland; and in order that the course which the case took may be understood, we shall repeat the evidence which was given by the witnesses at the trial, in preference to a general narrative of the proceedings.

Jane Bolland deposed that she resided with her brother in Solomon-terrace, St. George's-in-the-East. On the 30th of September she went to live as barmaid at the Windsor-castle, public house, Holborn, kept by the prisoner. She slept in one of the attics, and the prisoner and his wife slept in the room underneath. The prisoner called her on the morning of Thursday, the 3d of October; when she came down to the bar the prisoner patted her on the cheek with something; he laid his hand upon her breast, and insisted upon kissing her. She threatened to inform Mrs. Cant of his conduct, and he said, "What the eye did not see the heart would not believe." He then wished her to leave the door of her room open that he might come in when he came to call her in the morning; but she told him that she was not the sort of person he imagined her to be, and left the parlor. In the course of the day her brother and a person named Balfour called upon her, and she communicated to them what the prisoner had said and done to her. Mr. Balfour said, that after what had passed he did not think the prisoner would again attempt to use indecent liberties with her, and her brother,

at the suggestion of Mr. Balfour, advised her not to leave her situation. Subsequently on that day she became unwell, and about eight o'clock in the evening she was conveyed upstairs to bed, but she was then so ill that she could not recollect who went up to her room with her. She was insensible when she reached her bed, but during the night she partially recovered, and then she found the prisoner at the bedside. He placed one of his hands upon her mouth to prevent her calling out, and a struggle took place and she fainted. There was a candle on the table in the room. About six o'clock in the morning she recovered her senses, and found her clothes, which had not been taken off, in disorder, and the bone of her stays broken. The offense charged in the indictment had been committed when she was in a state of insensibility. The prisoner was then standing at the door of her room, and she cried out to him, "You villain, you shall not come in." He answered, that she was a drunkard and should not again enter his bar. She went downstairs to inform Mrs. Cant of what the prisoner had done; but when she told that person that her husband had used indecent liberties with her, Mrs. Cant said, "I will not hear you, you drunken hussy." She immediately left the house, and went to her brother's, where she told what had happened to her. On the Saturday following she was examined by a medical gentleman.

On her cross-examination by Mr. C. Phillips, who appeared for the

now said. On the way home on Friday, the prosecutrix said that Mr. Cant had called her a drunkard, and she would fix him for it. She then seemed happy enough.

Murphy corroborated this statement by declaring that the witness had told him of what he had done, after the time at which the communication had been made to Mr. Williams.

A number of witnesses were then called, who gave the prisoner an excellent character, and

Mr. Adolphus proceeded to reply. He rejoiced that Mr. Phillips had not attempted to cast any aspersion upon the character of the prosecutrix, and declared his belief that no attempt could be successfully made to show that she was unworthy of belief. The case depended entirely now upon the testimony of Edwards, and the simple question was, whether the jury would credit his statement in preference to that of the girl Bolland. No attempt was made to deny the advances which Cant had made to the girl on the morning of the 3d of October; and he asked the jury first, whether having made those advances, it was improbable that he should have followed them up; and secondly, whether they could believe a person who came forward and told such an improbable tale as Edwards. The testimony of the prosecutrix was materially sustained in many particulars — that of Edwards received no important confirmation. True, he had gone to two persons to relate his story before he told it here, but at that time the prisoner was at large on bail; and it was to be observed that he might have done so for the express purpose of propping up an improbable story. He had said nothing about it at the police

office, although he had heard the prosecutrix examined there; and the whole relation bore so much of the impress of fiction, that the jury, he was sure, would attach no credit to his declaration.

The learned judge (Mr. Baron GURNEY) in summing up contrasted the statements of the prosecutrix and Edwards with great force, and having instructed the jury upon the law affecting the case, informing them that the offense of rape might have been committed upon the prosecutrix while she was in a state of insensibility, although no resistance had been made by her, left the whole case to them for decision.

After about two hours' consideration, a verdict of "Guilty" was returned. The prisoner appeared somewhat astonished at this conclusion of the case, and loudly declared his innocence. Judgment of death was, however, recorded against him, and he was removed from the bar.

The very peculiar circumstances of this case attracted a large share of public attention; and a feeling was commonly entertained that the verdict was founded upon an erroneous view of the facts of the case. The persons who adopted this impression lost no time in conveying their opinion to the Secretary of State for the Home Department; but in spite of their most strenuous exertions in favor of Mr. Cant, the Government declined to give a decision in opposition to that which had been arrived at by the jury, although it was resolved that the sentence of death should be changed for a punishment of transportation for life.

In obedience to this determination Mr. Cant was subsequently sent out of the country.

365. **CHICAGO & ALTON R. CO. v. GIBBONS.** (1895. APPELLATE COURT OF ILLINOIS. 65 Ill. App. 550.) . . .

Mr. Justice HARKER delivered the Opinion of the Court. — This is an action on the case to recover for the use of the widow and next of kin of

Thomas Comeford, killed on a crossing of appellant's railroad at Dwight, while driving in front of freight cars being switched on a side track. There was a recovery for \$2500. . . . The main ground upon which a reversal is asked is that the evidence fails to show any cause of action. The facts as disclosed by the record are as follows:

Thomas Comeford was a farmer, living near Dwight and engaged in the milk business. It was his habit to serve his customers from a covered milk wagon drawn by two horses from house to house. While making his rounds on the evening of October 18th, 1894, he had occasion to cross appellant's railroad at its intersection with Chippewa street and Prairie avenue. Chippewa street runs east and west, Prairie avenue north and south, and they intersect at right angles where the railroad crosses them diagonally from southwest to northeast. It was near seven o'clock and quite dark. Comeford approached the railroad from the east on Chippewa street. Before reaching the track he discovered that a freight engine was switching cars, and stopped. The engine with several cars had just gone north over the crossing when the conductor, who was upon the ground assisting in the switching, signaled the engine to back south over the crossing. Just after the signal was given Comeford started his team over in a sharp trot. Before he could clear the side track on which the cars were moving, his wagon was caught and crushed and he was killed.

A witness for appellee named George Webster, testified that just before the signal to back was given he heard some one say, "Come on, get a move on you." Two other witnesses testified that they heard some one say, "Come on," just before the accident. Neither one of these witnesses testify that the words were addressed to Comeford, or were spoken by anyone connected with the train. A boy named John W.

Maiden testified that he stood talking with Comeford while the latter was waiting at the crossing; that he heard Comeford ask one of the railroad men if he could go across; that the man said, "Yes, get a hustle on yourself," and that Comeford then started on a trot, when he was struck. Several persons testified that the reputation of this witness for truthfulness was bad. No testimony was introduced to contradict the impeaching evidence, and no one seems to have seen Maiden on the ground. The main point in dispute is whether Comeford was invited to cross by some one of appellant's servants. It is insisted that he was, by the words, "Come on, get a move on you," and that Waugh, the conductor uttered them. If Waugh did thus invite him, then clearly appellant is liable. Under the evidence heard it is the only ground upon which a recovery can be based; for if Comeford, without such invitation, attempted to cross, his recklessness in so doing must debar a recovery.

Charles Montague, a brakeman, assisting in the switching, testified that just before the accident, after the train had pulled north and was about to back south, he saw a man passing around the end of the train and he called out to him, "Hurry up, get a move on you," but there is no pretense that such remark was made to Comeford. Waugh and Montague, the conductor and brakeman who were controlling by signals the movements of the train at this crossing, both deny that any invitation was given Comeford to cross. They both testify that when he attempted to cross they called out loudly for him to stop and by waving their lanterns before the team tried to stop him. Two other witnesses, Daniel Morris and James Williams, testify to hearing the calls of Waugh and Montague for Comeford to stop and their efforts to keep him from crossing. Williams himself called out several times for him to stop. It

is uncertain whether Comeford heard the calls to stop or saw the signals. He was almost lifeless when picked up and died within a few minutes after.

He was sitting well back in his covered wagon and in the rapid movement of the team and wagon much noise was made.

The clear preponderance of the testimony shows that the deceased was not invited to cross. Maiden was so thoroughly impeached and his testimony is so in conflict with the other testimony that we cannot believe him.

The witnesses who testified to hearing the call of "Come on, get a move on you," do not pretend to say that it was made by Waugh or made to Comeford. We think it was the one made by Montague to the man he saw passing around the end of the train. In view of the uncertainty in the testimony of Webber, Patterson, and Boyer, and the positive denial of Waugh and Montague, and the testimony showing the efforts of Waugh and Montague to stop Comeford from crossing, we do not see how the verdict can stand.

366. HANS GROSS. *Criminal Investigation*. (transl. J. and J. C. Adam, 1907. Introd., p. XXV.) . . . It must be admitted that at the present day the value of the testimony of even a truthful witness is much overrated. The numberless errors in perceptions derived from the senses, the faults of memory, the far-reaching differences in human beings as regards sex, nature, culture, mood of the moment, health, passionate excitement, environment, all these things have so great an effect that we scarcely ever receive two *quite similar* accounts of one thing; and between what people really experience and what they confidently assert, we find only error heaped upon error. Out of the mouths of two witnesses we *may* arrive at the real truth, we may form for ourselves an idea of the circumstances of an occurrence and satisfy ourselves concerning it, but the evidence will seldom be true and material; and whoever goes more closely into the matter will not silence his conscience, even after listening to ten witnesses. Evil design and artful deception, mistakes, and errors, most of all the closing of the eyes and the belief that what is stated in evidence has really been seen, are characteristics of so very many witnesses, that absolutely unbiased testimony can hardly be imagined. If Criminal Psychology teaches us this much, so the other parts of the subject show us the value of facts, where they can be obtained, how they can be held fast and appraised — these things are just as important as to show what can be done with the facts when obtained. The trace of a crime discovered and turned to good account, a correct sketch be it ever so simple, a microscopic slide, a deciphered correspondence, a photograph of a person, or object, a tattooing, a restored piece of burnt paper, a careful survey, a thousand more material things are all examples of incorruptible, disinterested, and enduring testimony from which mistaken, inaccurate, and biased perceptions, as well as evil intention, perjury, and unlawful co-operation, are excluded. As the science of Criminal Investigation proceeds, oral testimony falls behind and the importance of realistic proof advances; "circumstances cannot lie," witnesses can and do. The upshot is that when the case comes for trial, we may call as many witnesses as we like, but the realistic or, as lawyers call them, circumstantial proofs, must be collected, compared, and arranged beforehand, so that the chief importance will attach not so much to the trial itself as to the Preliminary Inquiry.



### **TITLE III (continued): TESTIMONIAL INTERPRETATION**

#### **SUBTITLE D: CLASSIFICATION OF "IMPEACHING" OR DISCREDITING FACTS**

367. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.) A testimonial assertion comes, as evidence, in the same logical form as a circumstantial evidential fact (*ante*, No. 2); *i.e.*, the form of proposed inference is: A asserts the existence of fact X; therefore, fact X exists. Hence, the problem of the cogency of this inference involves (as all other judicial inferences do) the question how many and what other hypotheses there are which explain away the evidential fact of A's assertion as due to some other cause than the existence of fact X (*ante*, No. 2). The evidential fact is simply that A makes the assertion; the problem is, Can it be explained away, so that we need not accept fact X as the conclusion? In short, the whole process of Impeachment or Discrediting of a witness, as known to practitioners, is nothing but the general logical process of Explanation (*ante*, No. 2, § 5). So, too, the process of corroboration or support of a witness is the logical process of closing up the possible avenues of Explanation, and thus making the proposed inference more and more necessary and unavoidable.

What, then, is the distinction, if any, between Explanation for circumstantial evidence and Explanation for testimonial evidence? Practically the distinction is a real one, — is in fact the chief basis for the time-honored division of all evidence into these two classes. Circumstantial evidence is heterogeneous and multifarious in its varieties; testimonial evidence is homogeneous. Circumstantial evidence has no single common feature, and few features partly in common; testimonial evidence has one great feature in common, and numerous large classes having common features. *E.g.* the finding of an old coat in an empty baker's wagon on a back lot in Halsted street, Cook county, — the presence of a broken oil can in a grain car on a sidetrack near Onondaga, New York, — the lack of one ten-dollar bill in a roll of ten-dollar bills in a Louisville bank on Monday, January 4, — these are unique, isolated facts which have never happened before in precisely the same way; hence there are no generic truths or laws involved in our inference from them; it is purely empiric. But A's assertion that a street lamp was lighted at a given time or place is generically of a piece with hundreds of thousands of former evidential data, *viz.* it is a human assertion, resting for credit on human qualities. The human element in this testimony is an element in common, running through the vast mass of prior human testimonies. And even though human beings differ, yet their differences also are generic, each on a vast scale. Moral character, bias, experience, powers of perception in light and dark, powers of memory after a lapse of

time, susceptibility to falsify under torture, — these and other qualities have been under observation in so many thousands of instances under varying conditions that we have built up generalizations (more or less correct or uniform), which pass for general truths (or at least, as working guides) on those subjects. In short, we *possess a fund of general principles*, applicable to specific instances of this class of evidence, and almost totally lacking for specific circumstantial evidence. It does not here matter whether those general principles are all sound or not; the point is that we believe them to be, and that we are always disposed to use them in our reasoning upon the probative value of specific human assertions.

How does this bear upon the process of Impeachment or Explanation? In this way: Through this more or less explicit appeal to such general principles, *most of our reasoning upon the credit of witnesses is put into the Deductive form*; in which form these general principles or truths come out into the open as the avowed basis of our inference.<sup>1</sup> Thus they can and must be tested for their validity; and thus, if well founded, they may serve as aids to the valuing of other testimony. These aids are generally lacking for circumstantial evidence; their possession is a great advantage in valuing testimonial evidence, and is its prime feature for practical purposes.

1. *Classification of Impeaching Evidence.* Since, then, the process of Impeachment or Explanation (*i.e.* the valuation of the discount to be made from the credit of a testimonial assertion) rests usually on a more or less explicit deduction from some generalized truth, and since the force of the Explanation will depend much on the number, nature, and correctness of

<sup>1</sup> This distinction between the Deductive and the Empiric processes of inference is here so important that the following exposition of it will be useful:

Professor ALFRED SIDGWICK, *Fallacies; A View of Logic from the Practical Side* (1884, 212 ff.): "The real foundation of Proof is always the recognition of resemblance and difference between things or events known and observed, and those which are on their trial, — whether such recognition is based (1) on knowledge already reached and formulated in names or propositions or (2) on direct observation and experiment. In proportion as we openly and distinctly refer to known principles (already generalized knowledge) is Proof *deductive*; in proportion as we rapidly and somewhat dimly frame new principles for ourselves from the cases observed is Proof *inductive, empirical*, or (in its loosest form) *analogical*. . . . The whole history of the rise and growth of knowledge (it has been also already remarked) is a record of fruitful rivalry and interaction between two opposite processes. Observation of facts has demanded theory — statement of 'laws' or uniformities — to explain, and even to name, the things and events observed; theory in its turn has always been more or less liable to purging criticism of 'fact.' . . . Strictly speaking, all Proof, so far as really *proof*, is deductive. That is to say, unless and until a supposed truth can be brought under the shadow of some more certain truth, it is self-supporting or circular. . . . But there is yet a meaning in the distinction [between inductive and deductive], and, with certain limitations and apologies, I propose to make some use of it.

"Although the dependence of any Thesis on its Reason must be rationalized — *i.e.* must have the underlying principle made clear — before the testing operation can be called complete, yet in regard to special dangers it makes considerable difference whether that principle is at first definitely apprehended or not, — whether (as it is commonly expressed) the Proof professes to rely (1) upon laws known or supposed to be true, or (2) upon facts observed or supposed to be observed. We must distinguish, then, as far as possible, between that kind of Proof which rests openly and distinctly upon already generalized knowledge — Deductive Proof — and that which rests upon what may be loosely described as 'isolated facts' or 'perception of resemblance and difference' or 'observation and experiment' . . . or however the phrase may run, — that which is commonly known in its highest form as Inductive Proof, and in its lowest form as the Argument from Analogy. . . . However we choose to name the two different kinds of arguments, the distinction between them has a certain real importance, as already shown; and all that is intended to be done with it is to recognize that so far as the given argument may be seen to belong to one or the other class, so far we are already on the track of special dangers."

the general principles thus involved, it would seem that the classification of the data should attempt an answer to these questions: What data are virtually Deductive? What data are virtually Empiric? Under the former head, we should further classify according to the number of general principles or deductions involved. Under the latter head, we should endeavor to analyze the possible general principles latent, and thus to learn the force of the explanations.

*a. Deductive Impeachment.* The generic human qualities affecting testimony, and the state of knowledge on the subject, have already been considered (*ante*, Part II, Title I). The tripartite elements of the testimonial process — perception, memory, narration — have also been examined (Part II, Title II). But the latter do not form separate steps in the inference; they are merely modes in which the deduction operates; hence they do not need to figure separately in the inference. *E.g.* in estimating the witnesses' credit for an assertion as to a midnight explosion, the facts are offered that one witness has no special experience in explosion sounds, and that another is afflicted with insane delusions; the forms of the inferences are: (1) Persons not experienced in explosion sounds are apt to obtain erroneous impressions of direction and intensity; this witness lacks such experience; therefore he is possibly in error as to the fact perceived; (2) Persons of insane delusions are apt to imagine non-existent facts; this witness is insane on a certain subject; therefore he is likely to be in error either by his original perception or by the subsequent operation of his memory. Now the former discrediting fact affects only the element of perception, in the testimonial process; the latter affects either or both perception and recollection. Whichever of such elements may be the one affected, it enters as a term of the truth used deductively, and not as a separate step of deduction. Hence, we may ignore those three elements in classifying the separate steps.

Proceeding to the impeaching facts, then, we premise further that they may be first grouped (merely for convenience) as comprising external and internal conditions. *External* conditions include general truths as to the effect of light, distance, temperature, position, time, etc., on the functions of perception, memory, and narration. *E.g.* that an object in a strong light may give misleading impressions as to color; that events observed ten years ago cannot be as well remembered as more recent ones; that a threat of violence usually deters from telling the exact truth, — these (if there are such truths) may roughly be grouped as 'external conditions. *Internal* conditions include general truths as to moral disposition, emotions, sex, experience, etc.; *e.g.* that a strong emotion disturbs the powers of correct perception and correct memory; that moral unscrupulousness makes correct narration less likely, and so on.

All the foregoing generalities form the first class of data, *i.e.* data of *Immediate* deduction. There is a single step of inference from them to the supposed discrediting conclusion. The formal statement would be: Persons affected by a strong emotion of revenge are apt to distort the facts; this witness has such an emotion; hence, his assertion may not represent the facts as they are. Notice that here we have but one (supposed) general truth to deal with, — the major premise; the minor premise is a concrete fact, *viz.* this man's specific emotion.

The next class is formed by the data of *Mediate* deduction. Here the above minor premise comes under analysis. Do we get it from a simple concrete fact, interpreted empirically, or do we get it by the aid of another general truth coupled with another concrete fact as a minor premise? If by the latter way, we must note and test that second general truth also. In this particular instance, either way may be available. *E.g.* the witness's language of hostility, on or off the stand, may be the simple concrete fact from which the emotion may be inferred; or, the witness may be an accomplice or a policeman (concrete fact), to which we may couple some supposed general truth about accomplices or policemen having generically an emotion of hostility. In the latter case, we thus have a second general truth, upon whose correctness or force our ultimate conclusion will depend. There are scores of such supposed general truths current in the books and in tradition. They are drawn from the more or less extensive experience of life, accumulated and compared and condensed. Sometimes these partial experiences are puzzlingly contradictory, *e.g.* the views as to the bias of experts and of policemen. Sometimes they are relics of former experience now practically discarded, *e.g.* the rooted distrust of a convict's testimony.

It is at this point that we meet most of the doubtful general truths affecting testimonial evidence. The data of immediate deduction are seldom formulated; their generality is obviously so broad and loose (at least, for what are above called internal conditions) that they seldom do harm by receiving an exact phrasing; and so far as they have fallen within the range of the scientific psychologist (*e.g.* the effect of light on color) there are as yet established few general laws having any exact tenor. But the supposed general truths falling within the mediate class, which have mostly grown up empirically in judicial practice, are apt to need special caution, by reason of their plausible verities.

By insisting on the foregoing two processes — those of stating explicitly the immediate data and the mediate data, with one or both of their general truths — we shall have forced out into the open the real basis of our proposed inference. We may verify our concrete fact or facts (*i.e.* we may settle whether this man *is* a policeman or an accomplice or a convict or has uttered hostile language, by asking him or by calling another witness); and we may lay aside our general truth or truths for reflection and testing. This process we could seldom use for circumstantial evidence; but we can and must use it most of the time for testimonial evidence.

Such is the practical application of the logical process of Explanation in making use of the data set forth in Titles I and II for the valuation of testimonial evidence. Thus, when the process of analysis has been completed for a given witness, we shall have passed in review all the possible immediate data affecting the topics of his testimony, noting the supposed general truths, if any, on which they rest, — all the concrete mediate data which complement the former as minor premises, — all the further general truths therein involved, — and all the further concrete data which complete the supposed inference. After the appropriate rejections and acceptances, we are ready to estimate the probability that the witness's assertion is due rather to some other cause than to the actuality of the fact asserted by him.

*b. Empiric Impeachment.* The common varieties of empiric impeachment are few. Most of them have been illustrated in Title III, Subtitle

B, — specific circumstances forming a defect in basis of perception, specific instances of lack of recollection, specific errors involved in contradiction and self-contradiction, usually in some detail "collateral" to the main issue. Now the ordinary use of these data is purely empiric or inductive in form; *e.g.* "A erroneously asserted that the defendant wore a black hat, instead of a light one; therefore A's main assertion that the defendant struck first is erroneous." Occasionally, when the arguer is questioned as to the soundness of the inference (for, as Professor Sidgwick says, "the whole cogency of inductive proof depends upon the extent to which the principle, hitherto out of sight, is rendered definite"), he will offer some general truth which fortifies the inference by giving it a deductive form, *e.g.* "falsus in uno, falsus in omnibus." But such general truths, when then examined, usually are found to be either inapplicable or too loose to be forceful. Hence, until we arrive at a more accurate knowledge of the general truths applicable in this field, we must class these inferences as essentially empiric.

This is not saying that they are not strong. At times, none can be stronger. Indeed, in the ordinary course of trials none are more sought after or more relied upon than this class of data; which at least shows how highly their force is valued by practitioners. All we are concerned for here is that their distinct nature shall be understood, and that their weaknesses shall not be ignored.

So far as they are sometimes intangible and sometimes supportable by various general truths, these proposed inferences are sufficiently analyzed in prior passages (*ante*, Nos. 306, 313, 322, 323, 332, 333, 352-355). In charting them for a given witness, it is prudent to assume some undetermined general truth or quality as the immediate datum, add the specific instance, etc., as the mediate datum, and then, after reflection, fill in tentatively the description of the immediate datum.

2. *Corroborating Evidence.* Corroborating evidence has several aspects. Some data usually spoken of as corroborating are not such, in a strict sense. Corroboration, applied to testimonial evidence, is merely the complement of Explanation (Impeachment). The logical process of accepting an inference as to a fact in issue has only two results, — belief (in some degree) or non-belief. Non-belief consists in regarding some other hypothesis (than the fact alleged) as equally or more probable; the process of showing those other hypotheses and their probability, and thus of preventing belief, is that of Explanation (*ante*, No. 2). This the opposing party will usually undertake to do. But even if he does not, the tribunal may see for itself that some such other hypotheses are possible. Hence the first party (whether or not the opponent suggests these explanatory hypotheses) may well strengthen his case by certain data which demonstrate those hypotheses to be not available. Thus he stops up possible exits for non-belief, and makes it more unavoidable to believe his own alleged conclusion. And this process of stopping up exits is Corroboration (*ante*, No. 2).

As applied to testimonial evidence, Corroboration consists in establishing data which refute possible discrediting circumstances. And (as above noted) this may properly be done even though the opponent has made no attempt to establish any of the impeaching hypotheses; for the mere possibility of them may cause the tribunal to hesitate, and the Corroboration will remove these grounds of hesitation. The mere fact of the witness's making an

assertion does not require us to believe the matter asserted; our knowledge of human nature forbids this.<sup>1</sup> Hence the tribunal, in view of possible discrediting hypotheses, may cautiously be disinclined to believe until those hypotheses have been shown groundless. For example, a witness Smith, whose name and face signify nothing to the tribunal and whose moral character may or may not be trustworthy, may receive instantly more credit when it appears that he is the well-known citizen Smith. This class of data may appear on the "voir dire" of the direct examination, quite as well as on the case in rebuttal after an attempted impeachment, and on the witness's own examination as well as from the testimony of others. Thus the rule of practice which forbids most sorts of so-called corroboration until after an attempted impeachment is a rule of orderly convenience only, and its distinction has no correspondence to any logical feature of Corroboration.

Every fact, then, which closes up an exit of *possible* distrust of the testimony, *i.e.* which prevents or refutes a possible discrediting hypothesis, is a corroborative fact. Hence the varieties of corroboration are as numerous as the varieties of impeachment.

There is, however, little occasion for the use of new or different general truths by way of deduction. The general truths, so far as used, would be the same as those used in impeachment, with a reverse application. *E.g.* in a street-car collision, the testimony of a bystander waiting on the corner is strengthened by the fact that he was a cool spectator; *i.e.* the general truth that persons excited by a catastrophe are not likely to observe correctly is negatived as a possible impeachment of him, and thus one possible source of distrust is removed.

As to empiric data, only a very few types are common. The prior consistent narration of a witness's story is one of these. For such data the same cautions apply as for empiric impeaching data.

3. *Opposing Assertions.* Suppose that on a specific fact in issue, three witnesses on one side assert its existence and one witness on the other side denies its existence; what belief should ensue? We assume that the respective witnesses' assertions have been duly valued, after noting all impeaching and corroborating circumstances. We assume also that we value them somewhat differently, for one reason or another. Is there any canon for reaching a conclusion as to the due total effect?

Negatively, there is the canon that numbers in themselves count for nothing. The medieval conception as to numerical weight<sup>2</sup> no longer finds any acceptance in logic, — however it may persist in crude popular judgment. Any method we may use must at least be qualitative, not quantitative.

Moreover, numbers may in themselves signify something qualitatively, so far as the witnesses on the same side are concerned, and irrespective of opposing assertions. *E.g.* if three persons, standing in the same place at the same time, see a lamplight, the possible chances of error by individual peculiarity are lessened; they corroborate each other. But that is not the present problem. That corroboration would be just as strong if there were no opposing witness.

<sup>1</sup> To be sure, judges sometimes caution juries that they need not believe a witness simply because he is uncontradicted; but this is merely a precaution against jurors' lack of intelligence.

<sup>2</sup> Wigmore, *Treatise on Evidence*, § 2032.

Assume, then, that the three have testified, and that we have reflected upon their combined testimony and given it a combined value; add the fact that the fourth witness makes a contrary assertion, and value that assertion in itself. Now contrast the two opposing assertions. Is there anything in the mere numerical preponderance which should control our belief?

Current judicial language is apt to answer in the affirmative.<sup>1</sup> There are reasons for doubting this, and for saying that any such conclusion can rightly be based on a qualitative superiority only, not a quantitative one. But this problem is really only a part of the greater and general problem of the ultimate effect to be given to a mass of opposing evidence. Logically the problem is the same for opposing circumstantial evidence and for mixed circumstantial and testimonial evidence, and cannot be solved for either class independently of the other. No systematic guidance to this conclusion seems yet to have been discovered. What little can be offered in the present work is set forth in No. 376, *post*.

<sup>1</sup> Moore, *Treatise on Facts*, § 62.

**TITLE IV: RELATIVE PROBATIVE VALUE OF CIRCUMSTANTIAL AND TESTIMONIAL EVIDENCE**

369. DANIEL DEFOE. *Robinson Crusoe*. (1719. Dent's ed. p. 108.)

It happened one day, about noon, going towards my boat, I was exceedingly surprised with the print of a man's naked foot on the shore, which was very plain to be seen in the sand. I stood like one thunder-struck, or as if I had seen an apparition. I listened, I looked round me, I could hear nothing, nor see anything. I went up to a rising ground, to look farther. I went up on the shore, and down the shore. But it was all one; I could see no other impression but that one. I went to it again to see if there were any more, and to observe if it might not be my fancy; but there was no room for that, for there was exactly the very print of a foot—toes, heel, and every part of a foot. How it came thither I knew not, nor could in the least imagine. But after innumerable fluttering thoughts, like a man perfectly confused, and out of myself, I came home to my fortification, not feeling, as we say, the ground I went on, but terrified to the last degree, looking behind me at every two or three steps, mistaking every bush and tree, and fancying every stump at a distance to be a man; nor is it possible to describe how many various shapes affrighted imagination represented things to me in, how many wild ideas were found every moment in my fancy, and what strange unaccountable whimsies came into my thoughts, by the way. When I came to my castle, for so I think I

called it ever after this, I fled into it like one pursued. Whether I went over by the ladder, as first contrived, or went in at the hole in the rock, which I called a door, I cannot remember; no, nor could I remember the next morning, for never frightened hare fled to cover, or fox to earth, with more terror of mind than I to this retreat. I slept none that night. The farther I was from the occasion of my fright, the greater my apprehensions were; which is something contrary to the nature of such things, and especially to the usual practice of all creatures in fear. But I was so embarrassed with my own frightful ideas of the thing, that I formed nothing but dismal imaginations to myself, even though now I was a great way off it.

Sometimes I fancied it must be the devil, and reason joined with me upon this supposition; for how should any other thing in human shape come into the place? Where was the vessel that brought them? What mark was there of any other footsteps? And how was it possible a man should come there? . . .

I presently concluded then, that it must be some more dangerous creature, viz. that it must be some of the savages of the mainland over against me, who had wandered out to sea in their canoes, and, either driven by the currents or by contrary winds, had made the island, and had been on shore, but were gone away again to sea, being as loath,



perhaps, to have stayed in this desolate island as I would have been to have had them. . . . Then terrible thoughts racked my imagination about their having found my boat, and that there were people here; and if so, I should certainly have them come again in greater numbers, and devour me; that if it should happen so that they should not find me, yet they would find my inclosure, destroy all my corn, carry away all my flock of tame goats, and I should perish at last for mere want. . . .

In the middle of these cogitations, apprehensions, and reflections, it came into my thought one day, that all this might be a mere chimera of my own; and that this foot might be the print of my own foot, when I came on shore from my boat. This cheered me up a little too, and I began to persuade myself it was all a delusion, that it was nothing else but my own foot; and why might not I come that way from the boat, as well as I was going that way to the boat? Again, I considered also, that I could by no means tell, for certain, where I had trod, and where I had not; and that if, at

last, this was only the print of my own foot, I had played the part of those fools who strive to make stories of specters and apparitions, and then are frightened at them more than anybody. . . . But I could not persuade myself fully of this till I should go down to the shore again, and see this print of a foot, and measure it by my own, and see if there was any similitude or fitness, that I might be assured it was my own foot. But when I came to the place, first, it appeared evident to me, that when I laid up my boat, I could not possibly be on shore anywhere thereabout; secondly, when I came to measure the mark with my own foot, I found my foot not so large by a great deal.

Both these things filled my head with new imaginations, and gave me the vapors again to the highest degree; so that I shook with cold, like one in an ague; and I went home again, filled with the belief that some man or men had been on shore there; or, in short, that the island was inhabited, and I might be surprised before I was aware. And what course to take for my security, I knew not.

370. MR. (later Attorney-General) H. M. KNOWLTON, arguing for the prosecution, in *COMMONWEALTH v BORDEN*. (1893. Massachusetts. 27 Amer. Law Rev. 837): What is sometimes called circumstantial evidence is nothing in the world but a presumption of circumstances. It may be one or fifty. There is no chain about it. The word "chain" is a misnomer, as applied to it. Talk about a chain of circumstances! When that solitary man had lived on this island for twenty years, and believed that he was the only human being there, and that the cannibals and savages that lived around him had not found him and had not come to his island, he walked out one day on the beach, and there he saw the fresh print of a naked foot on the sand. *He* had no lawyer, to tell him that was nothing but a circumstance! *He* had no distinguished counsel, to urge upon his fears that there was no chain about that thing which led him to a conclusion! His heart beat fast; his knees shook beneath him; he fell to the ground in fright, — because Robinson Crusoe *KNEW*, when he saw *THAT* circumstance, that a man had been there that was not himself!

It was circumstantial evidence!

It was *nothing* but circumstantial evidence!

But it satisfied *HIM*!

371. *COMMONWEALTH v. WEBSTER*. (1850. 5 Cush. 295, 311.) *SHAW, C. J.* Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood. But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

372. *W. WILLS. A Treatise on Circumstantial Evidence*. (1838. p. 26.) The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence; a conclusion which seems to follow necessarily from the very nature of the different kind of evidence.<sup>1</sup> But language of a directly contrary import has been so often used of late, by authorities of no mean note, as to have become almost proverbial.

It has been said that "circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither."<sup>2</sup> "Circumstances," says Paley, "cannot lie."<sup>3</sup> It is astonishing that sophisms like these should have passed current without animadversion. The "circumstances" are assumed to be in every case established, beyond the possibility of mistake; and it is implied, that a circumstance established to be true, possesses some mysterious force peculiar to facts of a certain class. Now, a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts, that they cannot lie; for a fact cannot at the same time exist and not exist: so that in truth the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that "cir-

<sup>1</sup> Menochius, *De Præsumptionibus*, lib. 1. quest. 1. 6; Mascardus, *De Probationibus*, vol. I, quest. 8. n. 8; Burnett on the *C. L. of Scotland*, p. 506; Starkie's *Law of Evidence* vol. I, pp. 515, 521 (2d ed.). *The Theory of Presumptive Proof*; *Benth. Jud. Ev.*, vol. III, c. XV, s. IV.

<sup>2</sup> Burnett on the *C. L. of Scotland*, p. 523.

<sup>3</sup> *Principles of Moral and Political Philosophy*, b. VI, c. IX.

cumstances are inflexible proofs," but assuredly of nothing more than of their own existence: so that this assertion is only a repetition of the same truism in different terms. It seems also to have been overlooked that circumstances and facts of every kind must be proved by human testimony; that although "circumstances cannot lie," the narrators of them may; and that, like witnesses of all other facts, they may be biased or mistaken. So far then, circumstantial possesses no advantage over direct evidence.

A distinguished statesman and orator has advanced in unqualified terms the proposition, supported, he alleges, by the learned, that "when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof."<sup>1</sup> Paley has said, with more caution, that "a concurrence of well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords."<sup>2</sup> Mr. Baron Legge, upon the trial of Mary Blandy for the murder of her father by poison,<sup>3</sup> told the jury that where "a violent presumption necessarily arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, because facts cannot lie." Mr. Justice Buller, in his charge to the jury in Captain Donellan's case, declared, "that a presumption which necessarily arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part if not all of those circumstances."

It is obvious that the doctrine laid down in these several passages is propounded in language which not only does not accurately state the question, but implies a fallacy, and that extreme cases — the strongest ones of circumstantial, and the weakest of positive evidence — have been selected for the illustration and support of a general position. "A presumption which necessarily arises from circumstances," cannot admit of dispute, and requires no corroboration; but then it cannot in fairness be contrasted with and opposed to positive testimony, unless of a nature equally cogent and infallible. If evidence be so strong as necessarily to produce certainty and conviction it matters not by what kind of evidence the effect is produced; and the intensity of the proof must be precisely the same, whether the evidence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief; nor that in many individual instances it may be superior in proving power to other individual cases of proof by direct evidence. But a judgment based upon circumstantial evidence cannot in any case be more satisfactory than when the same result is produced by direct evidence, free from suspicion of bias or mistake. Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect, as the anno-domini watermark usually contained in the fabric of writing paper, and in many instances it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt (and several instances of the kind

<sup>1</sup> Burke's *Works*, *ut supra*, vol. II, p. 624.

<sup>2</sup> *Principles of Moral and Political Philosophy*, b. VI, c. IX.

<sup>3</sup> *State Trials*, vol. XVIII, p. 1187.

<sup>4</sup> Gurney's *Report of the Trial of John Donellan, Esq.*, for the willful murder of Sir Theodosius Edward Allesley Broughton, Bart., at the Assize at Warwick, March 30th, 1781,

have recently occurred) that issues of paper have taken place bearing the watermark of the year succeeding that of its distribution, — a striking exemplification of the fallacy of some of the arguments which have been remarked upon. How often has it been iterated in such cases, that circumstances are inflexible facts, and facts cannot lie !

373. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence.* (1868. p. 207.) Some lamentable mistakes have, in times past, been made in the application of circumstantial evidence, in judicial investigations of crime ; and jurors, acting either in the exclusive exercise of their own discretion, or under the influence of narrow or erroneous views of the law of evidence, as expounded by the courts, have drawn conclusions entirely at variance with truth and justice ; condemning innocent persons to suffer death for the crimes of others. This has led to the opinion that a species of evidence which not only admits but actually requires a certain latitude and discretion of reasoning in its application, is a dangerous instrument of investigation ; and that its use, at least in cases where human life is put in jeopardy, should be discouraged or disallowed. Jurors are constantly accustomed to hear from eloquent advocates for prisoners, the open condemnation, and sometimes the unmeasured denunciation of the use of indirect evidence, as a basis and means of conviction in capital cases. . . . Jurors, instead of acting, as in former days, with an undue desire to enforce the effect of circumstances, as evidence, even where the life of the accused was at their disposal ; have been found to entertain, and openly to express a determination not to convict upon such evidence, however strong and clear, in any case where life should be placed in peril.

It may tend to a clearer understanding of the subject of this chapter, to consider this adverse view of circumstantial evidence, with a more particular reference to the grounds upon which it has been formally maintained. These are, first, that it is intrinsically *liable* to mistake and abuse ; and secondly, that it *has* actually led to gross injustice, in the conviction and execution of innocent persons.

The liability to error is said to arise from the very process of reasoning and inference which is inseparable from its application. Men, it is said, may and constantly do reason inaccurately, and form opinions, in the way of deduction and presumption, without any sufficient foundation ; and human life, in being made to depend upon the correctness of such conclusions, is exposed to great and obvious peril : whereas, by the exclusive employment of direct or positive evidence, which admits of no such latitude of reasoning or range of discretion, this source of error and consequent danger is entirely cut off. But it may well be doubted whether the process of inference can be wholly avoided, in the application of judicial evidence of any kind. . . . As the jury must always observe with the senses of the witness, putting themselves, mentally, in his place ; and thus transferring themselves to the scene and time of the occurrence related ; they must see and hear as the witness saw and heard ; and, if they believe him, must of course infer, as he did.

The other reason which has been urged against the propriety, and, indeed, the justice and safety of circumstantial evidence, as a medium of proof in capital cases, is that a reliance upon it *has* repeatedly led to the execution

of persons whose entire innocence of the crimes for which they suffered, has afterwards been clearly demonstrated. In support of this position, several actual cases, taken chiefly from the records of English courts, have been referred to, and some of them so repeatedly and uniformly on criminal trials, as to justify the appellation given to them by Mr. Justice Story,<sup>1</sup> of being "the common-places of the law" on such occasions. Among the earliest of these are the case of the uncle and niece, given by Lord Coke [*ante*, No. 151], and that of the person executed for stealing a horse, mentioned by Sir Matthew Hale.<sup>2</sup> But the most elaborate collection of cases, considered applicable to the point in question, is to be found in the Appendix to the work published in England, some years ago, under the title of *The Theory of Presumptive Proof*.<sup>3</sup> The composition of this work appears to have been occasioned by the result of the trial of Captain John Donellan [*post*, No. 379], who was convicted and executed in 1781, for the murder of his brother-in-law, Sir Theodosius Boughton, by poisoning him with laurel-water: its immediate object being to prove that the accused in that case was convicted on insufficient evidence. The drift of the work itself is, on the whole, unfavorable to the employment of circumstantial evidence, as an instrument of capital conviction. But the object of the Appendix is not to be mistaken; the cases there presented going to show (and in fact being intended to show) the actual and extreme danger of relying upon such evidence as proof in any capital case. So clearly did this appear on their publication in this form, that great and confident use soon came to be made of them, by advocates for prisoners; and sometimes to such an extent as to draw special remark from the courts.

Considered superficially, these cases (of which there are eleven) appear entirely adequate to produce the impression intended. But, upon a close analysis, they will all, with a single exception, be found to be possessed of characteristics which deprive them of their appositeness and applicability to the object in question: the convictions, in some of the cases, being founded on palpable fraud, perjury and conspiracy; in others, being attributable to professional error, the prejudice or superstition of juries, or the honest mistakes of witnesses; and in others, to the admixture of direct evidence itself. The only case in the collection, of purely circumstantial evidence, in which the conviction, had it taken place, could not, in itself, have been censured, is the sixth (anonymous) in the series, which, it must be admitted, was an extraordinary one. But even had the whole eleven been cases of purely legitimate circumstantial evidence, rationally applied, and, thus applied, fatal to innocence, it might have been said of them, in the words of an American judge,<sup>4</sup> "the wonder is that there have not been more." They are scattered over a space of more than a century, and are taken from the

<sup>1</sup> *The United States v. Gibert*, 2 Sumner, 19. 27.

<sup>2</sup> A man was convicted and executed for stealing a horse, on the strength of the presumption of the animal's being found in his possession on the same day on which it was stolen; but it afterwards appeared that the real thief, being closely pursued by the officers of justice, had met the unfortunate man, to whom he was a total stranger, and requested him to walk his horse for him, while he turned aside upon a necessary occasion: and so escaped. Best on Pres. § 210. 2 Hale's P. C. 289.

<sup>3</sup> This work was published anonymously, but has always been considered to have proceeded from the pen of Mr. Phillipps, the author of the well-known *Treatise on the Law of Evidence*.

<sup>4</sup> Gibson, C. J., in *Commonwealth v. Harman*, 6 Am. Law Journal, 321.

records of a country whose criminal code then made a great variety of offenses capital. It would probably not be difficult to find, on an investigation of the same sources of information, during an equal period, eleven cases in which a reliance on *direct* evidence itself was attended with results equally disastrous and unjust.<sup>1</sup>

On a review of the two leading grounds just considered, upon which the unfavorable view of circumstantial evidence is sought to be maintained, the following considerations present themselves.

First. Intrinsic liability to error is no sufficient objection against the employment of any species of otherwise legitimate evidence. All human evidence is imperfect and fallible, simply because it all comes and must come through an imperfect and fallible medium. The only species of infallible evidence is one which, it has been well said, it would be absurd to require; namely, that which, without the intervention of human testimony, presents itself directly to the senses of the tribunal.

Secondly. If the fact that courts and juries have actually been misled by a species of evidence, even to the extent of convicting innocent persons in capital cases, be a sufficient ground for excluding that species of evidence from use, then direct evidence itself must be discarded; for it is known that innocent persons have sometimes been convicted and executed on what is called "positive" proof; the witnesses against them either designedly swearing to what they knew to be false, or, with an honest intention, having been led by mistake to testify to facts which had no actual existence.

"But to what just conclusion," we may, on the whole, ask in the language of the same eminent judge, "does this tend? Admitting the truth of such cases, are we then to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice."<sup>2</sup>

From the consideration of the opinion that circumstantial evidence is a dangerous and unreliable medium of proof, on account of its liability to mislead the judgment of human tribunals, especially in cases where the consequences of error cannot be repaired, we turn next to the opposite opinion which has sometimes been maintained, — that such evidence is worthy of all confidence, because *it cannot mislead*. The essence of this opinion seems to be summed up in the brief expression, which has been used even in judicial opinions, — that "facts or circumstances cannot lie."<sup>3</sup> Before uniting, however, in the condemnation which has been bestowed on this proposition by some able writers on judicial evidence,<sup>4</sup> the actual meaning of the expression, or the idea intended to be conveyed by it, should be clearly ascertained.

In the literal sense of the term "lie," — the utterance of a known falsehood, — the proposition is undoubtedly true, to its fullest extent. Facts cannot lie, and never lie. They are not moral agents, who alone are capable

<sup>1</sup> Story, J., in *United States v. Gibert*, 2 Sumner, 19, 27. 3 Phill. Evid. (Cowen & Hill's notes), Note 305, p. 556.

<sup>2</sup> *United States v. Gibert*, 2 Sumner, 28.

<sup>3</sup> Paley's *Moral and Political Philosophy*, book vi, chap. 9.

<sup>4</sup> Mr. Wills calls it "a sophism." Circ. Evid. 27. Mr. Best speaks of it as a "*dictum*" which has led to mischievous results. Best on Pres. § 192.

of such action, nor are they subjects of those moral influences which divert human beings from the path of truth. They are inanimate existences, and thus, in their nature, inflexible; — in the common phrase, “stubborn things.” Hence they have sometimes been significantly called “mute” or “dumb witnesses.”<sup>1</sup> But, giving to the term “lie” a sense more appropriate to inanimate subjects (and probably the one intended), that of deceiving or misleading the senses or the judgment, let us see whether facts or circumstances can ever be said to possess this most undesirable quality.

The expression that “a fact” — that is, a reality or verity — “cannot lie” — that is, express a falsehood — may very properly be regarded as a truism, or another form of saying that a fact is a fact. But this is not the only sense in which the term “fact” is used; for, however paradoxical it may appear, there may be such things as *false facts*. In order to be available for any human purpose, facts must become the subjects of human observation. In this point of view, a fact, as observed, is often the real fact as it exists; and the impression made through the senses, upon the mind, is, so to speak, an exact copy of it. But frequently this is otherwise; an *appearance* resembling the fact, or a “counterfeit presentment” of it, impresses the sense so strongly, that it is allowed to take its place, and is believed and reported as such; as may be explained by a few familiar examples.

A sees an act done by B, who, to his view, and possibly to that of many others, so closely resembles C as to convey the impression that it is actually C himself. Here the real and absolute fact of the case is, that the person seen is B. The fact, as it appears to A’s sense, and as it impresses his mind and memory, is, that it is C. In this there is manifest delusion and error. The *semblance* of a fact has deceived the observer or witness. . . . To honest mistakes of this kind, direct as well as indirect evidence is constantly liable.

Again, A has been showing to B a valuable coin from the drawer of a cabinet. B, after handling and closely examining it, returns it to the drawer, and soon after takes his leave. Immediately on his departure, the coin is missed; it is carefully and repeatedly sought for, but cannot be found. No other person except B has been present. The fact, as it appears to A and as he would no doubt be willing to state it on oath, is that the coin is not in the cabinet; the inference being that it has been taken by B. But the real fact is just the reverse. It is actually in the cabinet; but having slipped into an unknown or unperceived crevice, it has been entirely overlooked in the search. Here again, the deception or error is in the observer himself, and it arises from the same cause, as that intimated in the last example, — neglect or omission to carry the process of observation *far enough* to reach the fact *as it exists*.<sup>2</sup>

But there is a class of facts, of which it has been confidently said that they may and do “lie”; namely, such as are *fabricated* or *forged* by the perpetrators of crimes, with the express and only intent of deceiving those who may observe or witness them. A intending to commit a murder, and being desirous to avert suspicion from himself, by fastening it on another, gets possession of the shoes of B, the soles of which have certain peculiar marks, and also a knife belonging to B; puts on the former and proceeds unob-

<sup>1</sup> “Témoins muets,” Mittermaier, *Traité de la Preuve*, ch. 53.

<sup>2</sup> A case resembling this is said to have occurred a few years since, at the British Museum.

served to the scene of the crime, leaving the prints of his feet distinctly impressed on the snow or ground; perpetrates the crime with the knife, which he places near the dead body; and then returns to B's house, leaving the knife and the footprints to tell the story of the transaction. The impressions are seen as soon as the crime is discovered, traced to the house of B, compared with the shoes found upon his person, and ascertained to correspond with all the peculiar marks upon the soles. The knife is also found, bloody and proved to belong to B. The observer of these facts concludes that B was the murderer; and hence it is said that the facts or circumstances "lied" to him. He states them to a jury, on the trial of B for the crime. If they take his view, adopt his conclusion, and declare B guilty, the facts are said to lie to them, and to lie "wickedly and cruelly." They undoubtedly do "speak," in the figurative language of Mr. Bentham, to the inculpation of a wholly innocent person, because they have been made to speak so. But the criminal has been the liar, rather than the facts or appearances which he has fabricated; they being merely passive, senseless instruments in his hands. The facts reported and acted upon in such a case are not, as in the preceding examples, *false facts*; that is, facts existing only in statement. . . .

From the preceding explanation, it may be seen that, in a judicial point of view, and as materials of evidence, facts or circumstances are of several kinds: first, the genuine *facts of a case*, properly so called, that is, the facts as they actually occurred, proceeding in a natural way from the criminal, and indicating truly and consistently their connection with the crime: secondly, *extraneous* facts, having in themselves a real existence, but interpolated into the case, either by some natural accident or by the fraudulent act of the criminal himself, or the innocent or unconscious act of some other person; and thirdly, facts reported by witnesses as such, but having *no existence* whatever, being the offspring either of honest mistake or corrupt design. It is obviously to the last two only, that the mendacious or deceptive quality under consideration can, with any propriety, be attributed; and the (so-called) facts of the third class are full as likely to be encountered where the evidence is direct, as where it is circumstantial. And even in the case of fabrication, the deception has been shown to be produced as much by the *absence* of facts as by their presence.

The proposition that "facts or circumstances cannot lie," that is, cannot indicate a wrong conclusion, is strictly true in the case of circumstantial evidence of the *certain* kind, as has already been explained.

There is also another sense in which it may be said of facts or circumstances, that they cannot lie; that is, where they are presented as actual verities, to the senses of the tribunal itself. In this aspect, they have been well called "inflexible proofs"<sup>1</sup> and "dumb witnesses";<sup>2</sup> speaking to the sight only. . . . But facts of this kind, dispensing with the usual channel of judicial communication, are of extremely rare occurrence. In the vast majority of cases, facts must come through witnesses, and here the objection to the expression, that "facts cannot lie," occurs in another form. Granting that facts cannot lie, the witnesses who report them to the jury can and may. Unquestionably; and they may honestly misrepresent also, with results

<sup>1</sup> Burnet's *Criminal Law of Scotland*, ch. 21, p. 523.

<sup>2</sup> Mittermaier, ch. 53, cited *ante*.



equally disastrous and unjust. That the great source of deception and inlet of error lie in the *medium* of evidence has perhaps been seen in the analysis of facts already given. . . .

Both the opinions respecting circumstantial evidence which have just been reviewed, considered in their broadest expression, are extravagant propositions, occupying opposite extremes: the one placing circumstantial evidence far below direct, — and, in some cases, wholly excluding its use; while the other elevates it to a rank far above direct evidence. They thus present the two species of evidence in an adverse relation to each other, as though they were naturally in conflict and as though one species could be employed or relied on, only at the other's expense. But this is obviously an incorrect view of the subject, — the two species being parts of *one* system of means, natural as well as judicial; intended, where they are faithfully used in the cause of truth to aid, and not to thwart, each other; and, when legitimately employed, having constantly such effect. As distinct species, however, they undoubtedly possess characteristic peculiarities; and, in this point of view, they have often been made the subjects of comparison. . . . But, in truth, these two kinds of evidence ought not, in a general view of their merits, to be contrasted or set in opposition to each other. "In the abstract," observes Mr. Starkie, "and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness admit of comparison; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty."<sup>1</sup> If the object of comparison were to determine the question which of the two should be exclusively adopted, as a medium of proof, there would be greater reason in insisting upon the supposed superior merits of the one or the other. But as long as it is admitted that *both must* continue to be employed as instruments of judicial investigation, the only legitimate and rational object of comparison is to bring out more prominently the respective excellencies and imperfections, or advantages and disadvantages of each, with the view of more effectually and safely regulating their application in practice.

<sup>1</sup> 1 Stark. Evid. 526.

### PART III: PROBLEMS OF PROOF, IN MASSES OF MIXED EVIDENCE

[COMPILER'S EXPLANATION. The ensuing Problems may be used for thorough analysis and study, by the method expounded in No. 376, or merely for mental entertainment and stimulus as curious problems of fact.

For purposes of study (by whatever method) they are here arranged in a sequence graded so as to lead on from the simplest to the highest order of probative task.

First come eleven cases stated in narrative form; the cases increasing in complexity. The narrator (a judge or a commentator) has done the main work of perusing the original evidence and arguments, selecting the salient data, and arranging them in groups and stating their connection. This leaves only the final process of reflection for the reader. He is still far short of the task which falls to every counsel and juryman. The probative process is in no sense realistic.

Next comes a case similarly stated (No. 388, Franz' Case), but in three different accounts, each variant from the others. Here is presented a new item of effort, in their piecing together. The defects and variances of the three accounts begin to suggest the difficulties, in reconstructing the data for belief, which are inherent in every remove from the original sources, and help to cultivate a proper skepticism.

Next comes another narrative (No. 389, the Hillmon Case), partly stating the testimony also and the counsel's arguments; the case being the most complex of the series to that point.

Next comes a trial with the testimony substantially in full, but reported by a journalist (No. 390, Throckmorton v. Holt). This furnishes an element lacking in the verbatim reports (and indeed in all printed reports), viz. the personal impression of the respective witnesses' probative status and importance. The lack of this personal impression is what makes forever impossible a realistic conviction of certainty for one studying the mere printed trial. To supply this in some degree, a journalist's report has a value.

Next come three trials in which the original testimony, as reported "*ipsissimis verbis*," is set out (No. 391, Braddon's Trial; No. 392, Thanet's Trial; No. 393, Knapp's Trial). In each of these, special elements of testimonial untrustworthiness are illustrated; so that the trials cover different fields.

In the last of these (Thanet's Trial and Knapp's Trial), the arguments of counsel also are given, practically in full. This enables the reader to

construct his own scheme of proof, from the original testimony, and to compare it with the probative scheme used by the respective counsel. The arguments of Erskine, Dexter, and Webster are masterpieces worthy of careful study. In several different ways such a trial can be used as an exercise in the study of individual testimony, masses of evidence, and methods of presentation. With this example the student finally arrives at the highest form of the probative task as it is presented in actual controversy.

In the Appendix will be found a List of Trials suitable for the further study of probative problems.]

375. ALEXANDER M. BURRILL. *A Treatise on Circumstantial Evidence.* (1868. p. 598.) The course of illustration, thus far adopted, exhibits the process of constructing a body of evidence out of elementary facts. It is in this way, too, that the infirmative considerations which are always necessary to be taken into view are most effectually presented, and, at the same time, most readily expunged from the process.

The theory of judicial investigation, however, requires that the juror should keep his mind wholly free from impression, until *all the facts* are before him in evidence; and that he should then frame his conclusion from *all these facts, taken together*. The difficulty attending this mode of dealing with the elements of evidence (especially in important cases requiring protracted investigation) is that the facts thus surveyed in a mass and at one view are apt to confuse, distract, and oppress the mind by their very number and variety, especially as they are only mentally contemplated, with little or no aid of the bodily senses. They are, moreover, necessarily mixed up with remembrances of the mere machinery of their introduction, and the contests (often close and obstinate) attending their proof; in the course of which attempts are sometimes made to suppress or distort the truth, in the very act of its presentation. And the reservation of the use of infirmative hypotheses, as a *final* means of testing a presumption or conclusion provisionally formed, is attended with more or less of danger of overlooking some single hypothesis, which, though not readily suggested, might be at the same time not unreasonable in itself, and might eventually prove to be the absolute truth of the case.

On the other hand, the manner in which the facts of a case are presented before a jury on a trial is attended with advantages peculiar to itself. In order to construct the required body of evidence out of the materials or elements which may be available for the purpose, with the nearest approach to truth, or to the actual case as it occurred, it is requisite not only that *all* the materials should be got *together*, but that they should be arranged, as far as possible, in their *proper places*, or in the relative positions which they occupied, or are reasonably supposed to have occupied, in the actual case; it being, in fact, as already observed, a process of reconstructing and representing, with more or less of completeness and truth, the original case itself. These relative positions cannot always be effectually ascertained until all the attainable facts have been brought together, examined, and compared, or adjusted temporarily (as it were) to each other, so as to develop the traces of their former actual connections; much as an architect would proceed who was required to reconstruct a demolished edifice, out of the

same materials which originally composed it, with the nearest possible approach to identity in every particular. This preliminary process is essentially performed by the public prosecutor, and the course of his proceedings in submitting its results to the jury may be briefly described as follows :

His investigations having resulted in connecting, to his own satisfaction (as sanctioned by the action of the grand jury), the two fundamental facts of a crime and a criminal, he frames out of them the compound fact or proposition that the prisoner at the bar committed the crime charged (which is the essence of the indictment as found) and presents it formally to the jury, as the "*factum probandum*" of the case. Placing this in a central position, in connection with the hypothesis of guilty agency, as he has extracted it from the facts, he proceeds to present and prove in detail the particular circumstances or indicatory facts themselves; giving to them their necessary relative positions, grouping them around the assumed central point, and in this way establishing lines or links of connection between it and them; and finally compacting and, as it were, crossing, this framework of evidence, by lines connecting the facts with each other; thus realizing the common but significant figure of a *network* of circumstances. . . .

The defense is made in a corresponding course, by means of exculpatory facts proved and supposed; it being insisted that the criminative facts presented are not the genuine facts of the case; that the positions assigned them are not the true ones; that the connections claimed to have been established do not exist; that, in their indications, they do not converge upon the point or fact assumed, or upon any one common point or center, or that they may converge upon other points as well as that occupied by the principal fact in issue; in other words, that they may be explained and accounted for, on one or more hypotheses consistently with the innocence of the accused, as reasonably as upon the affirmative hypothesis, or more so. And, in fine, these adverse hypotheses are specifically placed before the jury; thus relieving them, in most cases, from the necessary duty of seeking for them themselves. . . .

The figure which has, thus far, been used in illustrating the process of circumstantial proof, and which has been suggested by the meaning of the word "circumstance" itself, is that of a *framework* of facts, arranged in certain positions of relation to the fact sought, and connected with it and with each other by lines expressive, at once, of their separate and united significance. Another figure more frequently used as descriptive of the same process, or rather of the body of evidence constructed by it, is that of a *chain* connecting the two great and fundamental points of a case, — the crime committed, and the individual charged with its commission, — the links of such chain answering to the evidentiary facts proved. This figure expresses, with great force and aptness, the historical order of the facts, and the necessity of a continuous connection between them throughout, but it does not represent that other feature of the process, which has been prominently presented in the present section; namely, the aggregation of *distinct* elements, or elements drawn from distinct sources into one consistent and homogeneous body.<sup>1</sup> The evidence does not always present a

<sup>1</sup> Mr. Bentham has taken some pains to expose the inaccuracy of the application of the metaphorical term "chain" to a body of circumstantial evidence. In such a body, the more numerous the constituent facts, if relevant, the greater its strength and efficacy.

*single line* of continuous and connected circumstances, but often exhibits lines of connection from different points in *collateral* positions. Supposing, however, a chain to be composed of a number of minor and constituent chains, the figure acquires aptness in every sense.

The evidentiary facts, with their inferred and assigned meanings, may also in many cases be very appropriately compared to the strands of a rope or cable, forming so many lines of connection with the principal fact, each continuous in itself, though weak in its connecting power; but, when woven together in sufficient numbers, constituting a medium of connection which cannot be broken.

376. JOHN H. WIGMORE. *Principles of Judicial Proof*. (1913.) The problem of collating a mass of evidence, so as to determine the net effect which it should have on one's belief, is an everyday problem in courts of justice. Nevertheless, no one hitherto seems to have published any logical scheme on a scale large enough to aid this purpose.<sup>1</sup> What is here offered is therefore only an attempt at a working method, which may suffice for lack of any other yet accessible.

Three questions naturally arise. What is the *object* of such a scheme? What are the necessary *conditions* to be satisfied? What is the *apparatus* therefor?

1. THE OBJECT. The object, of course, is to determine rationally the net persuasive effect of a mixed mass of evidence. Many data, perhaps multifarious, are thrust upon us as tending to produce belief or disbelief. Each of them (by hypothesis) has some probative bearing. Consequently, we should not permit ourselves to reach a conclusion without considering all of them and the relative value of each. Negatively, therefore, our object is (in part) to avoid being misled (it may be) through attending only to some fragment of the mass of data. We must assume that a conclusion reached upon such a fragment only will be more or less untrustworthy. And our moral duty (in court) is to reach a belief corresponding to the actual facts; hence it is repugnant to us to contemplate that our belief is not as trustworthy as it could be.

Why is there such a danger of untrustworthiness? Because *belief* is *purely mental*. It is distinct from the external reality, or actual fact.<sup>2</sup>

But "take an iron chain," he observes, "the more links you add to it, the weaker you will make it, not the stronger; and, by adding link to link, you will at last make it break by its own weight." 3 Jud. Evid. 223, 224, 225, note.

[Ex parte Hayes, Oklahoma Court of Criminal Appeals (1912; 118 Pac. 609). "We think that the application of the chain theory to circumstantial evidence is improper. No chain is stronger than its weakest link, and will never pull or bind more than its weakest link will stand. With its weakest link broken, the power of the chain is gone. But it is altogether different with a cable. Its strength does not depend upon one strand, but is made up of a union and combination of the strength of all its strands. No one wire in the cable that supports the suspension bridge across Niagara Falls could stand much weight, but when these different strands are all combined together they support a structure which is capable of sustaining the weight of the heaviest engines and trains. We therefore think that it is erroneous to speak of circumstantial evidence as depending upon links, for the truth is that in cases of circumstantial evidence each fact relied upon is simply considered as one of the strands, and all of the facts relied upon should be treated as a cable."]

<sup>1</sup> See what was said in the Introduction.

<sup>2</sup> W. Stanley Jevons, *The Principles of Science; a Treatise on Logic and Scientific Method*, 2d ed., 1877, reprint of 1907, p. 198: "Probability belongs wholly to the mind. This is proved by the fact that different minds may regard the very same event at the same time

Hence the approximation of our belief to a correct representation of the actual fact will depend upon how fully the data for that fact have entered into the mental formation of our belief. But those data have entered into the formation of our belief *at successive times*; hence a danger of omission or of inferior attention. "Knowledge in the highest perfection would consist in the *simultaneous* possession of a multitude of facts. To comprehend a science perfectly, we should have every fact present with every other fact. We are logically weak and imperfect in respect of the fact that we are obliged to think of one thing after another."<sup>1</sup> And in the court room or the office the multitude of evidential facts are originally apprehended one after another. Hence the final problem is to coördinate them. Logic ignores time; but the mind is more or less conditioned by it. The problem is to remove the handicap as far as possible.

It may be answered that psychologically each evidential detail, when originally apprehended, did have its due effect, and that subconsciously the total impression is meanwhile being gradually produced. For example, when a thousand bales of cotton are piled one by one in a warehouse, the whole original thousand will finally be found there, available for sale, even though they went in there piecemeal at different times. To rebut this argument, it is enough to say that we do not yet know by psychological science that this analogy is true of the mind in its successive apprehension of sundry facts; hence we cannot afford to assume it. But furthermore, even if it were true under certain abstract conditions, it is not the fact in the ordinary conduct of justice. So many interruptions and distractions occur, both to the lawyer in preparation and to the jurors in the trial, that facts cannot be properly coördinated on their first apprehension. Hence our plain duty remains, to lift once more and finally into consciousness *all* the data, to attempt to coördinate them consciously, and to determine their net effect on belief.

Our object then, specifically, is in essence: *To perform the logical (or psychological) process of a conscious juxtaposition of detailed ideas, for the purpose of producing rationally a single final idea. Hence, to the extent that the mind is unable to juxtapose consciously a larger number of ideas, each coherent group of detailed constituent ideas must be reduced in consciousness to a single idea; until the mind can consciously juxtapose them with due attention to each, so as to produce its single final idea.*

2. THE NECESSARY CONDITIONS. Any scheme which will aid in the foregoing purpose must fulfill certain conditions, at least to a substantial degree.

(a) It must employ *types* of evidence, suitable for representing all kinds of cases presented. And these types must be based on some logical *system*, i.e. a system which includes all the fundamental logical processes.

(b) It must be able with these types to include *all the evidential data* in a *given case*. This requirement is mechanically the most exacting. The types of evidence and the processes of logic are few; but the number of instances of each one of them in a given case varies infinitely. *E.g.* there may be in

with widely different degrees of probability; as when a steam vessel, for instance, is missing; . . . the steam vessel either has sunk or has not sunk, and no subsequent discussion of the probable nature of the event can alter the fact. . . . Probability thus belongs to our mental condition."

<sup>1</sup> Jevons, p. 34.

one case fifteen witnesses to a specific circumstance and two each to two others; while in the next case there may be neither circumstance nor witness of that sort, but thirty separate groups of other sorts; and this would be a simple example. Hence, the desired scheme must be capable mechanically of taking care of all possible varieties and the repeated instances of each.

(c) It must be able to show the *relation* of each evidential fact to each and all others. The process leading to belief is one of successive subsumings of single instances into groups of data and of the reduction of these groups into new single instances, and so on; hence the relations of the data to each other must be made apprehensible, and not merely the data per se. By "relations" of data is here meant that each believed fact does or does not tend to produce in the mind a belief or disbelief in some other specific alleged fact.

(d) It must be able to show the distinction between a "*fact*" as *alleged* and a *fact as believed* or disbelieved; *i.e.* between the evidential data as *first proffered* for a purpose, and the effect of those data for the purpose *after* the mind has passed on them. *E.g.* the party offers a witness as proving that the defendant was on a near-by street corner at a certain hour; yet when the tribunal proceeds to reckon that alleged fact as an item towards the main issue, it must have had some way of noting for later use whether it does or does not believe the witness and accept that alleged fact as an actual fact. Any scheme which fails to provide this would be like a bridge with the bolts left out of the truss angles; there would be nothing to show that it does not rest merely on an aggregation of hypotheses.

(e) It must be able to represent all the data as potentially *present in time to the consciousness*. The very aim of the scheme is to enable all the data to be lifted into consciousness at once. To be sure, the mind itself is not completely capable of this task, in other than the simplest cases. Numerous groups of subordinate data have to be first subsumed into other single data by separate acts, until the number of these is small enough to be considered in a single continuous consciousness. Hence, the scheme in question *may* be so constructed that the records of these preliminary mental acts are not all exhibited at once. Nevertheless, the mind will have to be sent back over these preliminary acts, from time to time, to verify, amplify, and correct them. And so (as first stated above) all of them must be at least *potentially* presentable to the consciousness, if the scheme is to be efficient.

(f) It must, finally, be *compendious* in bulk, and *not too complicated* in variety of symbols. These limitations are set by the practical facts of legal work. Nevertheless, men's aptitudes for the use of such schemes vary greatly. Experience alone can tell us whether a particular scheme is usable by the generality of able students and practitioners who need or care to attack the problem.

(g) But, negatively, the scheme need *not* show us what our belief *ought* to be. It can hope to show only what our belief *actually is*, and *how* we have actually reached it.

For example, assuming that the mind has accepted certain subordinate facts A, B, C, D, and E; and that A, B, and C point to X, the defendant's doing of an act, while D and E point to Not-X, *i.e.* his not doing it; there is no law (yet known) of logical thought which tells us that  $(A + B + C) + (D + E)$  must equal X, or must equal Not-X. We know only that our mind, reflecting upon the five evidential data, *does* come to the conclusion

X, or Not-X, as the case may be. All that the scheme can do for us is to make plain the entirety and details of our actual mental process. It cannot reveal laws which should be consciously obeyed in that process.

This is because no system of logic has yet discovered and established such laws.<sup>1</sup> There are no known rules available to test the correctness of the infinite variety of inferences presentable in judicial trials. Much indeed has been done that is theoretically applicable to circumstantial evidence; *e.g.* the method of differences, in inductive logic, may enable us, with the help of a chemist, to say whether a stain was produced by a specific liquid. But these methods must be pursued by a comparison of observed or experimental instances, newly obtained for the very case in hand, and usually numerous; hence they are impracticable for the vast mass of judicial data. Moreover, even so far as practicable in theory (so to speak), the required consumption of time would forbid their use in trials for any large masses of varied evidence. Hence, they do not serve our purpose. For testimonial evidence, also, those methods would be to some extent applicable in modern psychological experimentation. Yet merely to imagine two or three witnesses elaborately tested to determine their degree of trustworthiness as to memory or observation of sundry subjects of testimony, is to realize that such methods, by reason of the consumption of time alone, are not yet feasible in judicial trials. Finally, even so far as logic and psychology have gone with methods for estimating the probative force of individual inferences, they have apparently done nothing practical towards a method for measuring the net effect of a series or mass of mixed data bearing on a single alleged fact.

For these and other reasons, then, it must be understood that the desired scheme is not expected to tell us what *ought* logically to be our belief, — either as to individual subordinate data or as to the final net fact in issue.

What it *does* purport to achieve is to *show us explicitly* in a single compass how we *do reason and believe* for those individual facts and from them to the final fact. To achieve this much would be a substantial gain, in the direction of correctness of belief. Each separate proffered fact is tested in our consciousness, and the result is recorded. Perhaps we cannot explain *why* we reach that result, but we know at least that we *do* reach it. And thus step by step we set down the separate units of actual belief, — connecting, subsuming, and generalizing, until the subfinal grouping is reached; then dwelling in consciousness on that; until at last a belief (or disbelief) on the final fact evolves into our consciousness.

Hence, though we may not be able to demonstrate that we *ought* to reach that belief or disbelief, we have at least the satisfaction of having taken every precaution to reach it rationally. Our moral duty was to approximate, so far as capable, our belief to the fact. We have performed that duty, to the limits of our present rational capacity. And the scheme or method, if it has enlarged that capacity, will have achieved something worth while.

<sup>1</sup> They will perhaps some day be discovered. But the methods of observation and experiment in all inductive search for psychological laws involve inevitably a lengthy study of large masses of data. Moreover, the data available from judicial annals, though perhaps numerous enough, are almost always defective, in that the objective truth, necessary to test the correctness of any belief, can seldom be indubitably ascertained. *E.g.* if we were to study one hundred murder trials, so as to ascertain some law of thought lurking in certain combinations of evidence, the very basis of the study, *viz.* the actual guilt or innocence of the accused, cannot usually be known to us, and our study is useless without that fact.



We now proceed to the third and final topic: an Apparatus suitable as a working method for attaining the foregoing purpose while fulfilling the necessary conditions just set forth.

### 3. EXPLANATION OF APPARATUS FOR CHARTING AND LISTING THE DETAILS OF A MASS OF EVIDENCE.

The apparatus consists of a Chart for symbols and a List for their translation. The types of evidence and logical processes have already been set forth in Nos. 2 and 367.

1. *Symbols for Kinds of Evidence.* (Each human assertion, offered to be credited, is conceived of as a testimonial fact; each fact of any other sort is a circumstantial fact).

□ Testimonial evidence affirmatory (M testifies that defendant had the knife).

◻ Testimonial evidence negatory (M testifies that defendant did not have the knife).

○ Circumstantial evidence affirmatory (Knife was picked up near where defendant was; hence, defendant had it).

◐ Circumstantial evidence negatory (Knife was found in deceased's hand; hence, defendant did not have it).

◑ } Same four kinds of evidence, when offered by the *defendant* in a case. (These are the same four kinds of evidence; it is merely convenient to note which party offers them.)

◒ } Same four kinds of evidence, when offered by the *defendant* in a case.

¶ Any fact judicially admitted, or noticed as a matter of general knowledge or inference, without evidence introduced.

∞ Any fact presented to the *tribunal's own senses*, i.e. a coat shown, or a witness' assertion made in court on the stand. Everything actually evidenced must end in this, except when judicially noticed or judicially admitted.

> *Explanatory* evidence; i.e. for *circumstantial* evidence, explaining away its effect (Knife might have been dropped by a third person); for *testimonial* evidence, discrediting its trustworthiness (Witness was too excited to see who picked up the knife).

△ *Corroborative* evidence; i.e. for *circumstantial* evidence, strengthening the inference, closing up other possible explanations (No third person was near the parties when the knife was found); for *testimonial* evidence, supporting it by closing up possibilities of testimonial error (Witness stood close by, was not excited, was disinterested spectator).

> } Same two kinds of evidence, when offered by the *defendant* in a case.

△ } Same two kinds of evidence, when offered by the *defendant* in a case.

## 2. Relation of Individual Pieces of Evidence, shown by Position of Symbols

A supposed fact tending to prove the existence of another fact is placed *below* it.

A supposed explanatory or corroborative fact, tending to lessen or to strengthen the force of fact thus proved, is placed to *left* or *right* of it, respectively.

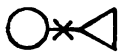
A single *straight* line (continued at a right angle, if necessary) indicates the supposed relation of one fact to another.

The symbol for a fact observed by the tribunal or judicially admitted or noticed ( $\P$ ,  $\infty$ ) is placed directly below the fact so learned.

## 3. Probative Effect of an Evidential Fact

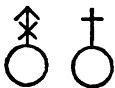
When a fact is offered or conceived as evidencing, explaining, or corroborating, it is noted by the appropriate symbol with a connecting line. But thus far it is merely *offered*. We do not yet know whether we believe it to be a fact, nor what probative force we are willing to give it, if a fact. As soon as our mind has come to the necessary *conclusion* on the subject, we symbolize as follows:

- (1) *Provisional credit* given to *affirmatory* evidence, testimonial or circumstantial, is shown by adding an arrow-head.
- Provisional credit given to *negatory* evidence, testimonial or circumstantial, is shown by adding an arrow-head above a small cipher.
- Particularly *strong credit* given to those kinds of evidence respectively is shown by doubling the arrow-head; this is usually applicable where several testimonies or circumstances concur upon the same fact.
- (2) A small interrogation mark, placed alongside the connecting line, signifies *doubt* as to the probative effect of the evidence.
- Similarly, for each kind of symbol, a small interrogation mark within it signifies a mental balance, an uncertainty; the alleged fact may or may not be a fact.
- (3) A dot within the symbol of any kind of alleged fact signifies that we now *believe* it to be a fact. Particularly strong belief may be signified by two dots; thus  $\circ\circ$ .
- A small cipher within the symbol of any kind of alleged fact signifies that we now *disbelieve* it to be a fact. Particularly strong disbelief may be signified by two such ciphers; thus  $\circ\circ$ .
- (4) If a single supposed *explanatory* fact does, in our estimation after weighing it, detract from the force of the desired inference (in case of a witness, if it discredits his assertion), we signify this by an arrow-head pointing to the left, placed halfway across the horizontal connecting line.



If a single *corroborative* fact is given effect in our estimation, we signify this by a short Roman letter X, placed across the connecting line.

Doubling the mark indicates particular strength in the effect, *i.e.*  $\llcorner$ , or  $\times$ .



Ultimately, when determining the total effect, in our estimation, of *all* explanatory and corroborative facts upon the *net probative value* of the specific fact explained or corroborated, we place a short horizontal mark or a small X, respectively, upon the upright connecting line of the latter fact.

Thus, for *net probative value*, several grades of probative effect may be symbolized:  $\dagger$  signifies that the inference is a weak one;  $\ddagger$  signifies that it has no force at all;  $\uparrow$  signifies that it is a strong one;  $\times$  signifies that it is conclusive. When the supposed inference is a *negatory* one, the same symbols are used, with the addition of the negatory symbol, *i.e.*  $\square$  (Witness

asserts that defendant had *not* a knife in his hand; witness's credit is supported by the fact that he is a friend of the deceased).

#### 4. Numbering the Symbols

Each symbol receives a number, placed at the upper left outside margin. These numbers are then placed in the Evidence List; they are written down consecutively, and opposite each one in the list is written a brief note of the evidential fact represented by it.

The List is thus the translation of the Chart.

The separate pieces of evidence are given *consecutive* numbers in the List as they are being analyzed and noted in symbols, till all the evidence is charted. They need not run consecutively on the *Chart*; though naturally the numbers in any one chain of inferences will be consecutive. Should a further analysis of a particular piece of evidence develop new appurtenant evidence, the additional evidence can be given a decimal of the main number (so that on the Evidence List it will be found conveniently near to the main fact). *E.g.* if  $\circ$  is found later to have two new explanatory facts, one of them, with its appurtenant witnesses, may be numbered 27.1, 27.2, 27.3; the other may be numbered 27.4, 27.5, 27.6. N. B. that on the *Chart* it is immaterial whether the numbers are consecutive; the numbers serve merely to guide the eye quickly to the description of the fact on the Evidence List.

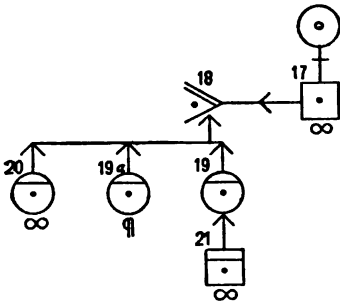
#### 5. Analyzing and Classifying the Evidence

a. Each supposed piece of evidence must be *analyzed*, so far as practicable and reasonably necessary, into all its *subordinate inferences*. Only in this way can the possibilities of explanation and corroborative facts be discovered. *E.g.* the defendant's threats in *Com. v. Umilian*; the inference really is: threats show a plan to kill, and plan to kill shows actual killing. This enables us to chart separately the possible explanations weakening the inference from threats, and the testimony, if any, asserting those explanatory facts.

b. Where a *Human Act* is the issue, the classification in Part I of this work will be found convenient, *i.e.* Moral Character, Motive, Design, etc. Under Motive (Emotion) it is sounder to separate at the outset the distinct alleged motives, if any; *e.g.* desire for money, desire for revenge, etc., because they are in effect distinct and perhaps inconsistent probative facts.

c. In the same way, the *discrediting* (explanatory) facts for a witness's assertion should be separated into their component items. Thus, if bias is the general nature of the impeachment, let *e.g.* <sup>18</sup> be the supposed general fact of actual bias and let <sup>19</sup>○ and <sup>20</sup>○ be the two circumstances tending to evidence it, 19 being the witness's relation to the defendant as a discharged employee, 21 being another witness who testifies to this, and 20 being the impeached witness's strong demeanor of bias while on the stand.

Thus the whole representation would be :



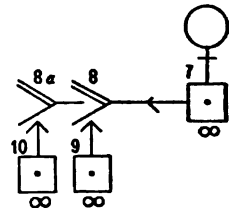
Here the added symbols of belief show that the probative effect has been that we refuse belief (if we do) to the fact asserted by this witness, because of his bias as shown by those facts.

Note that 19 is here supplemented by 19 a, *i.e.* the supposed general truth that discharged employees are apt to have an emotion of hostility; the letter a added to the main number will indicate the appurtenant relation of this fact to 19.

In accordance with the analysis of impeaching evidence (as set forth in No. 367, *ante*) it is usually desirable to note separately on the Chart any supposed general truth implicitly or explicitly relied upon. This is more commonly the case where a *mediate* or second step of inference is involved, as in the above example. But even where a general truth may not always be involved; *e.g.* in the above example 20 ○ is the specific language or demeanor from which an inference is made, without aid of a general truth, to the supposed emotion. Where an *immediate* inference is involved, the only cases where the supposed general truths need to be explicitly noted will usually be those involving external conditions, — light, sound, etc.; in such a case the first symbol can be doubled, using the letter a with the main number to indicate the appurtenant general truth. For example, if the location of the witness is said to have obstructed his vision and thus to discredit his statement, it would be thus indicated :

Here: 7 is the witness to be impeached; 8 is the facts of his location on the sidewalk, and 9 is a witness to those facts; 8 a is the impossibility of correct vision from such location, and 10 is a witness to experiments showing such impossibility.

A special advantage in thus plotting separately the concrete facts and the general truths is that the witnesses thereto may then be plotted separately, and thus all the evidence thereon can be more clearly distinguished and weighed.



### 6. *Plotting the Chart*

Use an oblong sheet of unruled paper.

Allot the right-hand half to the plaintiff or prosecution, the left-hand half to the defendant.

Allot the right-hand quarter to the plaintiff's testimonial evidence directly on the fact in issue; the next quarter (towards the left) to his circumstantial evidence; and so on for the defendant. If there are two or more distinct facts necessary in law to the issue, use a separate chart sheet for each; unless the mass of evidence is small enough for a single sheet (as in the annexed examples of charts).

Since the quantity of each kind of evidence varies in each case, the above allotments of one quarter each are of course provisional only. In practice, a smaller or larger fraction will usually be needed. But by beginning at the right-hand end and disposing of all of each kind of evidence before proceeding to the next, the spacing will adjust itself. If desired, a line can be drawn perpendicularly to mark off the mass of one kind of evidence when charted.

When beginning on the next kind, allow a little extra space for later discoveries in the kind of evidence just finished.

Use right-angled continued lines freely in connecting the symbols, so as to economize space and to keep together the same kind of evidence.

Use a sharpened lead pencil.

If new inferences are later discovered and no space is left, erase some former symbols and rechart them, prolonging the lines so as to leave the new space needed.

Wherever a disbelief or doubt symbol is found, there ought to be some explanatory fact (>) to account for it. Hence, if such has been inadvertently omitted, analyze it into consciousness, chart it, and describe it in the Evidence List.

Where two or more witnesses, as to whose credit no question is raised, testify to the same fact, one symbol in the Chart may serve for all; but as many numbers should be given it as there are witnesses, bracketing these numbers to one description in the Evidence List.

A fact is to be classed as negatory or affirmatory in itself, and not according to the party offering it. Thus, as in Nos. 51, 52, 48, 49, of *Hatchett v. Com.* (see Chart), the defendant may offer an affirmatory fact to prove another fact which is negatory of his guilt.

### 7. *Sundries*

For clearness and quickness in studying the total effect of the mass of evidence when charted, colored pencils may be used.

Use a *blue* pencil for important facts favoring the plaintiff's or prosecution's contention, and a *green* one for those favoring the defendant's. Mark the arrow point of the belief symbol (↑), or the cross of the disbelief symbol (†), respectively blue or green. Thus the subfinal facts can be conveniently concentrated in the mind, for the purpose of the net total effect on the mind. Varieties of detail in the use of the colored pencil can be invented as convenient; e.g. a simple arrow point (↑), blue or green, can be used for the subordinate facts at the basis of a long line of inference, and a triangular arrow point (⤴) for the subfinal facts when reached.

When ready to reach a final verdict, refresh the memory from the List,

so that the tenor of the Chart symbols is as clear as possible in the mind. Then go over the whole Chart in the mind, force the subfinal facts into juxtaposition, and determine the net impression as to the ultimate fact in issue.

8. Finally, remember that

*The logical (or psychological) process is essentially one of mental juxtaposition of detailed ideas for the purpose of producing rationally a single final idea. Hence, to the extent that the mind is unable to juxtapose consciously a larger number of ideas, each coherent group of detailed constituent ideas must be reduced successively to a single idea, until the number and kind is such that the mind can consciously juxtapose them with due attention to each. And the use of symbols has no other purpose than to facilitate this process. Hence, each person may contrive his own special ways of using these or other symbols.*

As examples of the use of the Chart and List, the cases of *Com. v. Umilian* (No. 377) and *Hatchett v. Com.* (No. 378) are charted and listed in the following pages. Note that these Examples might have been charted with more economy of space, but in their present shape they show how the Chart develops in the actual making. The charter cannot know beforehand how many data will be found under each inference; hence he must allow space, which may not afterwards be needed.







**EXAMPLE A. COMMONWEALTH v. UMILIAN (No. 377).****Evidence Chart.** [See Plate.]**Evidence List** (*Com. v. Umilian, No. 377*).

- 1 Design to kill J.
- 2 Threats of unstated tenor, made on discovery of J.'s interference in prevention of marriage.
- 3 Anon. witnesses thereto.
- 4 Threats might have meant merely some lesser harm.
- 5 Threats of revenge at later time.
- 6 Anon. witnesses thereto.
- 7 Threats might have meant merely some lesser harm.
- 8 Revengeful murderous emotion towards J.
- 9 J. had charged him with intended bigamy Nov. 18., and had tried thereby to prevent his marriage.
- 10 Letter received by priest, stating that U. already had family in old country.
- 11 Anon. witnesses to this.
- 12 J. was author of letter, though it was in fictitious name.
- 13 Anon. witnesses to this.
- 14 Letter communicated by priest to U., with refusal to perform marriage; refusal later withdrawn.
- 15 Anon. witnesses to this.
- 16 Letter's statements were untrue.
- 17 Anon. witnesses to this.
- 18 U. being innocent, and marriage being finally performed, U. would not have had a strong feeling of revenge.
- 19 J. remaining in daily contact, wound must have rankled.
- 20 Wife remaining there, jealousy between U. and J. probably continued.
- 21 U. uttered threats and other hostile expressions between Nov. 18 and Dec. 31.
- 22 Anon. witnesses to this.
- 23 U., on Dec. 31, charged J. to K. with stealing K.'s goods.
- 24 Anon. witnesses to this.
- 25 Does not appear that these charges were false, hence not malicious.
- 26 U.'s opportunity in time and place was almost exclusive.
- 27 On Dec. 31 U. was on premises.
- 27.1 Witnesses to this.
- 28 U. was only man so seen.
- 28.1 Anon. witnesses to this.
- 29 U.'s wife and a woman visitor were there.
- 30 Anon. witnesses to this.
- 31 Passing tramp-villain might have been there.
- 32 In time between Dec. 31 and April others had access to J., if alive still.
- 33 U. had uneasy consciousness of guilt about J.'s disappearance.
- 34 U. lied about J.'s going to Granby.
- 35 U. said J. had gone there, though J. was then dead.
- 36 Anon. witnesses to this.
- 37 J. might really have gone there, not being killed till later.

- 38 U. was conscious that the well was a place where damaging things would be discovered.
- 39 He watched those who searched there.
- 40 Anon. witnesses to this.
- 41 That might have been due to natural curiosity of a farm hand at strange doings.
- 42 U. lied about the reason for Olds and K. searching the well.
- 43 Anon. witnesses to this.
- 44 U. did not go to the well to see the body when found.
- 45 Anon. witnesses to this.
- 46 Several other reasons would explain this.
- 47 U. knew that J. was dead, though others did not.
- 48 He gave away J.'s boots and said that J. would not come back; this was about the middle of January.
- 49 Anon. witnesses thereto.
- 50 Like others, U. may merely have believed that J. had given up work at the farm.
- 51 Data of slayer on J.'s body were of a person having free and intimate access to horse barn of K.
- 52 Wound-marks were those of a horse-cutter from barn.
- 53 Anon. witnesses thereto.
- 54 Precise correspondence not stated; might have been a different weapon.
- 55 No other person but U. had at that time such access.
- 55.1 Anon. witnesses to 55; and see 26.
- 56 Sacks holding body and clothes came from horse barn.
- 57 Anon. witnesses thereto.
- 58 Stone in sack fitted wall near barn.
- 59 Anon. witnesses thereto.
- 60 Clothing in sack had marks of mud from barn cellar.
- 61 Anon. witnesses thereto.
- 62 Mud not specifically identified.



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**EXAMPLE B. HATCHETT v. COMMONWEALTH (No. 378).****Evidence Chart.** [See Plate.]**Evidence List** (*Hatchett v. Com., No. 378*).

- 1 Y. himself, just before dying, declared that the drink of whisky was the source of his pains and illness.
- 2 } His wife, O. N., and C. N. testified to this statement; but see 17-24,
- 3 } as discrediting them.
- 4 }
- 5 Y. might have had his colic cramps, and could not have had skill enough to *know* that the drink was the cause of the pain.
- 6 Same possibility for ptomaine or other poisoning in food at supper.
- 7 Y. died, being apparently in health, within three hours after the drink of whisky.
- 8 }
- 9 } Same witnesses to this as 2, 3, 4.
- 10 }
- 11 Y. might have died by colic, from which he had often suffered.
- 11.1 Colic would not have had as symptoms the leg cramps and teeth clenching; only strychnine could produce these.
- 11.2 O. N., and C. N. and wife, witnesses to cramps, etc.
- 11.3 Expert witnesses to significance of symptoms.
- 11.4 No testimony as to strychnine traces in body by post mortem.
- 12 Anon. witnesses to his former attacks.
- 13 Y. might have died from the former injury in his side.
- 14 Anon. witnesses to that injury.
- 15 Y. himself declared when dying that the whisky drink was killing him.
- 16 Y.'s wife Sallie, witness to this.
- 17 Sallie's bias to save herself at H.'s expense discredits her.
- 18 } Sallie had a paramour, and might herself intend the death of Y.,
- 18a } hence might desire to fix crime on H.
- 18.1 Anon. witnesses to 18.
- 19 O. N. witness also to 15.
- 20 O. N.'s bias to save Sallie discredits him.
- 21 } O. N. knew of Sallie's paramour and of her probable wish to get rid
- 21a } of the old man; hence probably biased to support Sallie's story.
- 21.1 Anon. witnesses to 21.
- 22 C. N. witness also to 15.
- 23 C. N.'s bias to save Sallie discredits him.
- 24 }
- 24a } Same as 21, 21a, 21.1.
- 24.1 }
- 25 Y. died apparently in good health, within three hours after drinking deft.'s whisky.
- 26 }
- 27 } Sallie Y., O. N. and C. N. witnesses to time of death.
- 28 }
- 28.1 H. witness to time of drink.

- 29 Neither H. nor his father are shown to have possessed any strychnine to put in the drink.
- 30 Y. might have died by colic, from which he had often suffered.
- 31 Y. might have died from the former injury in his side.
- 32 Y. might have died of ptomaine poisoning in supper-food.
- 33 Y. might have died from poison put in his supper-food by third person; the only third person having access being Sallie his wife.
- 34 Sallie had desire for Y.'s death.
- 35 Her illicit relation with Henry Carroll points to 34.
- 36 Anon. witnesses to this relation with H. C.
- 37 Sallie possessed means of strychnine poisoning; see 38.
- 38 Sallie had a plan to kill Y.
- 39 Sallie had received strychnine from H. C. three weeks before, with instructions to put it in Y.'s coffee or food.
- 39.1 Witnesses to 39.
- 40 Sallie's failure to use it during those three weeks' opportunity indicates abandonment of her design.
- 41 Secrecy of H.'s mode of giving drink indicated consciousness of something wrong.
- 42 Same witnesses as 26-29.
- 43 This perhaps due to desire not to waste whisky on Sallie.
- 43.1 Transaction was not really secret, for he knew Sallie and others were there when he summoned the old man.
- 44 His confession that his father had told him the whisky would fix Y. shows that he knew something was wrong.
- 45 Anon. witnesses to this confession.
- 46 H.'s second statement, retracting on that point, makes it doubtful whether he knew.
- 47 Anon. witnesses to this second statement.
- 48 Lack of any desire in H. to kill Y.
- 49 H. was even unacquainted with Y. up to this time.
- 50 Anon. witnesses to 49.
- 51 H. himself drank of whisky; hence did not know of strychnine in it.
- 52 This is shown by bottle being only one-third full on return.
- 53 Anon. witnesses to 52.
- 54 Y. might have drunk two thirds of the bottle.
- 55 H. might have been deterred, by father's directions, from drinking any.

**377. COMMONWEALTH v. UMILIAN.** (1901. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 177 Mass. 582.)

Indictment for murder, returned June 12, 1900. At the trial in the Superior Court, before SHERMAN and STEVENS, JJ., the defendant at the close of the evidence asked the judges to rule and instruct the jury: first, that there was not sufficient evidence to warrant the jury in finding a verdict of guilty; and, second, that there was not sufficient evidence to warrant the jury in finding a verdict of guilty in the first degree. The judges declined to give either of these rulings. The jury found a verdict of guilty of murder in the first degree; and the defendant alleged exceptions.

*J. B. O'Donnell*, for the defendant.  
*J. C. Hammond*, District Attorney, for the Commonwealth.

KNOWLTON, J. — The defendant was found guilty of murder in the first degree, and the only question before us is whether there was any evidence to warrant the verdict. He and Casimir Jedrusik were working together as farm laborers for one Keith in Granby. On Sunday, December 31, 1899, Jedrusik disappeared, and was never afterwards seen alive. On April 10, 1900, his headless, mutilated body was found inclosed in a bran sack in an unused well between four hundred and five hundred feet from Keith's horse barn. His clothing was found inclosed in another sack in the same well. His skull was afterwards found buried in the cellar of the horse barn. The sacks were similar to those which Keith had in the horse barn. The stone, which was inclosed in the sack of clothing, exactly fitted a vacant place in a stone wall about in line between the old well and the north door of the horse barn. On the day of the disappearance there was no snow on the ground, and the surface of the ground was entirely frozen. In the cellar of the horse barn pigs were kept, and there was soft mud

there. The clothing which was exhibited to the jury had mud upon it which the Commonwealth contended on the evidence was like that in the cellar. Mr. and Mrs. Keith drove away to church on December 31st, leaving the defendant and Jedrusik about the barn. The defendant's wife was in the house, where she was employed as a housemaid, and there was evidence tending to show that the only other person who came there during that day was a young woman who came to visit her. The defendant was outside of the house, about the premises, for some hours after Mr. and Mrs. Keith went to church, and when he came in he said that Jedrusik had gone to Granby. There were wounds on the head of Jedrusik, which the Commonwealth contended were made by a corn cutter that was in the horse barn, and was exhibited to the jury. The evidence tended to show that the defendant had ample opportunity to commit the murder, and that no other person had an opportunity to do it without discovery.

On November 18th the defendant went to Chicopee to the house of a Polish priest, to have the ceremony of marriage performed between him and a young woman who had been living as a maid at Keith's house, and he found that the priest had received a letter in a name which proved to be fictitious, charging him with having a wife and children in the old country, and with receiving letters from his wife asking for money for the support of herself and her children. The priest refused to marry him, and sent a trusted person with him to investigate. It turned out that Jedrusik wrote the letter, and that its contents did not appear to be true. The defendant was then married by the priest, and the evidence tended to show that he was very angry with Jedrusik,

and that he made strong threats of vengeance against him. There was evidence from several witnesses that at different times between the defendant's marriage and Jedrusik's disappearance, the defendant manifested deeply hostile feelings towards him, and made threats against him. On the morning of December 31st there was a new manifestation of this feeling in charges made to Mr. Keith that Jedrusik had stolen a plane and had stolen butter. There was evidence that, between the time of the disappearance and the discovery of the body, the defendant was seen to take up one of the planks covering the unused well, and also that when he was told in the daytime that Keith and one Olds had gone out of the house with a lantern, he said he "knew what they were going to do. Mr. Olds wants to buy the pump in the old well." There was evidence that nothing had ever been said by Olds about buying the pump.

Immediately after being told this the defendant went into the horse barn, and was seen looking out of a window from which the well could be seen. When others went to the well after the body was found, he did not go. There was also evidence that about the middle of January he gave away Jedrusik's rubber boots, and said that he did not think Jedrusik would come back. There were many other things in his language and conduct after Jedrusik's disappearance which the Commonwealth relied on as tending to show guilty knowledge, and much of his testimony in explanation of facts was in direct contradiction of other witnesses.

Without going more at length into the evidence, which was voluminous, we are of opinion that it would have been error to take the case from the jury. So far as we can judge from the bill of exceptions the evidence well warranted the verdict. *Exceptions overruled.*



378. **HATCHETT v. COMMONWEALTH.** (1882. COURT OF APPEALS OF VIRGINIA. 76 Va. 1026.) . . .

LEWIS, J., delivered the opinion of the Court. The plaintiff in error was indicted in the county court of Brunswick county for the murder of Moses Young, by administering to the said Young strychnine poison in whisky. . . . The facts proved, as certified in the record, are substantially these: That on the night of the 17th day of December, 1880, Moses Young died at his house in Brunswick county, and under such circumstances as created suspicions that he had been poisoned. He was an old man, 65 years of age, and was subject to the colic, and a short time previous to his death had been hurt in his side by a cart. In the afternoon of that day the father of Oliver Hatchett, the prisoner, gave him a small bottle of whisky, with instructions to take it to Moses Young; at the same time telling him not to drink it himself. The deceased lived about three miles from the prisoner's father, to whose house the prisoner at once proceeded. It seems that he was not acquainted with the deceased; or, if so, very slightly, and that he succeeded in finding the house only by inquiry of one of the neighbors. Soon after his arrival at the house of the deceased, he took supper with him, and a few minutes thereafter requested the deceased to go with him into the yard, and point out the path to him—it then being dark. After getting into the yard, the prisoner produced the bottle and invited the deceased to drink—telling him that it was a little whisky his father had sent him. The deceased drank and returned the bottle to the prisoner, who at once started on his return home. The deceased then returned into the house. In a short while thereafter he complained of a pain in his side, began to grow worse, and told his wife that the man (meaning the prisoner) had

tricked him in a drink of whisky. He then got up, but fell immediately to the floor. Osborne and Charlotte Northington, two near neighbors, were then called in by his wife; and these three, whom the record describes as ignorant negroes, were the only persons present with the deceased until his death, which occurred about three hours after he drank of the whisky from the bottle handed him by the prisoner. They described his symptoms as follows: The old man had the jerks, complained of great pain, and every now and then would draw up his arms and legs and complained of being cramped; that he put his finger in his mouth to make him vomit, and his teeth clinched on it so that one of his teeth was pulled out in getting out his finger. They also testified that his dying declaration was that the man had killed him in a drink of whisky. From the symptoms as thus described, two physicians, who were examined as witnesses in the case, testified that as far as they could judge from the statements of the ignorant witnesses, they would suppose that Moses Young died from strychnine poison. No post-mortem examination of the deceased's body was made or attempted; nor was any analysis made of the contents of the bottle, which was returned about one-third full by the prisoner to his father, and was afterwards found.

After the arrest of the prisoner, and while under guard, he stated to the guard in charge of him that he would not be punished about the matter; that he intended to tell all about it; that his father, Littleton Hatchett, gave him that mess and told him he would give him something, to carry it and give it to Moses Young, and that it would fix him. He further stated that he went to Moses Young's house, called him out and gave him a drink,

and returned the bottle and put it where his father had directed him to put it. The next day he made a statement on oath before the coroner's jury, and when asked by the foreman whether he was prepared, upon reflection, to say that what he had stated on the previous day was not true, he answered: "I am prepared to say that a part of what I said yesterday was true." He then made a statement in which he said that he carried the whisky to the deceased by direction of his father, who told him not to drink of it; that he went to the house of the deceased and gave him a drink, and returned the bottle as directed by his father. But he did not state that his father told him that the whisky would "fix" the deceased, or that he (the prisoner) knew that it contained poison or other dangerous thing.

It was also proved that Henry Carroll, who was jointly indicted with the prisoner, gave to Sallie Young, wife of the deceased, about three weeks before his death, something in a bottle which he said was strychnine, and which he told her to put in the coffee or food of the deceased; and that Osborne and Charlotte Northington knew of the fact, but did not communicate it to the deceased. It was also proved that Henry Carroll was the paramour of Sallie Young, which fact was also known to Osborne and Charlotte Northington.

Such are the facts upon which the plaintiff in error was convicted and sentenced to death. Now, under the allegations in the indictment, it was incumbent upon the prosecution, to entitle the Commonwealth to a verdict, to establish clearly and beyond a reasonable doubt these three essential propositions: (1) That the deceased came to his death by poison. (2) That the poison was administered by the prisoner. (3) That he administered it knowingly and feloniously. These propositions, we

think, are not established by the evidence in this case.

In the first place, there is no sufficient proof that the deceased died from the effects of poison at all. From the symptoms, as described by ignorant witnesses, one of whom at least was a party to the conspiracy to poison the deceased, and who had been supplied with the means to do so (a fact known to the others), the most that the medical men who were examined in the case could say was that they *supposed* he died from strychnine poison. Strange to say, there was no post-mortem examination of the body of the deceased, nor was there any analysis made of the contents of the bottle from which he drank at the invitation of the prisoner, and which was returned by the latter to his father and afterwards found — all of which, presumably, might easily have been done, and in a case of so serious and striking a character as this ought to have been done. . . . Great strictness should be observed, and the clearest proof of the crime required, to safely warrant the conviction of the accused and the infliction of capital punishment. Such proof is wanting in this case to establish the death of the deceased by the means alleged in the indictment.

Equally insufficient are the facts proved to satisfactorily show that if in fact the deceased died from the effects of poison, it was administered by the prisoner; and if administered by him, that it was done knowingly and feloniously. It is not shown that if the whisky he conveyed to the deceased contained poison, he knew or had reason to know the fact. It is almost incredible that a rational being, in the absence of provocation of any sort, or the influence of some strong and controlling motive, would deliberately take the life of an unoffending fellow man. Yet in this case no provocation or motive whatever on the part of either the prisoner or

his father, from whom he received the whisky of which the deceased drank, to murder the deceased, is shown by the evidence. It is true that the facts proved are sufficient to raise grave suspicions against the prisoner; but they fall far short of establishing his guilt clearly and satisfactorily, as required by the humane rules of the law, to warrant his conviction of the crime charged against him. On the other hand, the facts proved show that the wife of the deceased, three weeks before his death, had been supplied by her paramour with strychnine to administer to her husband; and there is nothing in the case to exclude the hypothesis that the death of the deceased may

not have been occasioned by the felonious act of his own unfaithful wife. It was not proven that the prisoner at any time procured, or had in his possession, poison of any kind; nor was the attempt made to connect him with, or to show knowledge on his part of, the poison which was delivered by Henry Carroll to Sallie Young, to be administered to her husband.

In short, the facts proved are wholly insufficient to warrant the conviction of the plaintiff in error for the crime for which he has been sentenced to be hanged: and the judgment of the circuit court must, therefore, be reversed, the verdict of the jury set aside, and a new trial awarded him.

379. **JOHN DONELLAN'S CASE.** (CAMDEN PELHAM. *The Chronicles of Crime*. Ed. 1891. Vol. I, 302.)

The case of Mr. Donellan is one of a very remarkable nature, and from the character of the testimony produced has been the subject of much conversation and remark amongst persons connected with the professions of medicine and chemistry.

The accused, Mr. Donellan, had been a captain in the army, and was the son of Colonel Donellan. At the age of twelve years he entered into the Royal Regiment of Artillery, with part of which he went to the East Indies in 1754. On his arrival there he changed his service into the 39th foot; but on that regiment being ordered home, he, with many other of his officers, had his majesty's leave to remain in the service of the East India Company, without prejudice to their rank in the army. He then obtained a company, and certainly distinguished himself as a good soldier, not only having been much wounded in the service, but, if his own account may be credited, being singularly instrumental to the taking of Mazulapatam. Being appointed, however, one of the four agents for prize-money, he condescended to receive presents from some black merchants, to whom part of their effects had been ordered to be restored, for which he was tried by a court-martial, and cashiered. He subsequently purchased a share in the Pantheon, where he figured for some time as master of the ceremonies; and after a variety of applications he at length obtained a certificate from the War-office, that he had behaved in the East Indies "like a gallant officer"; in consequence of which he was put upon half-pay in the 39th regiment. But notwithstanding the most strenuous memorials and petitions representing his great services, and insisting that the offense for which he was broke was of a civil nature only, and not cognizable by a court-martial, he never could obtain a

restoration into the Company's service. In June, 1777, he married Miss Boughton; and on Friday, March 30th, 1781, he was tried at the assizes at Warwick for the willful murder of Sir Theodosius Edward Allesley Boughton, Bart., his brother-in-law. The evidence was of such a nature that the fairest mode of stating it will be by repeating it as it appeared on the trial.

Mr. Powell, apothecary of Rugby, deposed that he had attended Sir Theodosius Boughton for two months before his death, on account of a slight complaint of a certain description.

On Wednesday morning, the 27th of February, he was sent for to Lawton Hall, and on his arrival there at a little before nine o'clock, Captain Donellan conducted him to the apartment of Sir Theodosius. On his entering, he perceived that the baronet was dead, and on his examining the body he concluded that it was about an hour since life had fled. He had some conversation with Captain Donellan with regard to the deceased, and he was told by him that he had "died in convulsions." He could not recollect the precise nature of the conversation, but the general effect of what Captain Donellan said was, that the deceased gentleman had taken cold.

Lady Boughton, the mother of the deceased, deposed that Sir Theodosius was twenty years old on the 3d of August last. On his coming of age, he would have been entitled to above 2000*l.* a year; and in the event of his dying a minor, the greater part of his fortune was to descend to his sister, the wife of Mr. Donellan. It was known in the family on the evening of Tuesday, the 26th, that Sir Theodosius was to take his physic the next morning. He used to put his physic in the dressing-room. He happened once

to omit to take it; upon which Mr. Donellan said, "Why don't you set it in your outer room? then you would not so soon forget it." After this he several times put the medicines upon his shelf over the chimney-piece in his outer room. On the evening of Tuesday, the 26th, about six o'clock, Sir Theodosius went out fishing, attended only by one servant, Samuel Frost. Witness and Mrs. Donellan took a walk in the garden, and were there above an hour. To the best of her recollection she had seen nothing of Mr. Donellan after dinner till about seven o'clock, when he came out of the house-door in the garden, and told them that "he had been to see them fishing, and that he would have persuaded Sir Theodosius to come in, lest he should take cold, but he could not." Sir Theodosius came home a little after nine, apparently very well; and he went up into his own room soon after, and went to bed. He requested her to call him the next morning and give him his physic.

She accordingly went into his room about seven in the morning, when he appeared to be very well. She asked him "Where the bottle was?" and he said "It stands there upon the shelf." He desired her to read the label, which she accordingly did, and found there was written upon it "Purging draught for Sir Theodosius Boughton." As he was taking it, he observed, "it smelled and tasted very nauseous;" upon which she said "I think it smells very strongly like bitter almonds." He then remarked that "he thought he should not be able to keep the medicine upon his stomach."

Here a bottle was delivered to Lady Boughton, containing the genuine draught, which she was desired to smell at and inform the Court whether it smelt like the medicine Sir Theodosius took. She answered in the negative. She was then desired to smell at another, containing the draught with the addition of laurel-water, which she

said had a smell very much like that of the medicine she gave to Sir Theodosius. Lady Boughton then proceeded with her evidence. In two minutes after Sir Theodosius had taken the draught, he struggled very much. It appeared to her as if it was to keep the draught down. He made a prodigious rattling in his stomach, and guggling; and these symptoms continued about ten minutes. He then seemed as if he was going to sleep, or inclined to doze; and perceiving him a little composed, she went out of the room. She returned in about five minutes after, and to her great surprise found him with his eyes fixed upwards, his teeth clenched, and foam running out of his mouth. She instantly desired a servant to take the first horse he could get and go for Mr. Powell. She saw Mr. Donellan in less than five minutes after. He came into the room where Sir Theodosius lay, and said to her, "What do you want?" She answered that she wanted to inform him what a terrible thing had happened; that it was an unaccountable thing in the doctor to send such a medicine, for if it had been taken by a dog it would have killed him; and she did not think her son would live. He inquired in what way Sir Theodosius then was; and on being told, he asked her where the physic bottle was; on which she showed him the two draughts; when he took up one of the bottles, and said, "Is this it?" She answered "Yes." He then, after rinsing it, emptied it in some dirty water that was in a wash-hand basin; and on his doing so she said, "What are you at? you should not meddle with the bottles." Upon that he snatched up the other bottle and rinsed it, and then he put his finger to it and tasted it. She repeated that he ought not to meddle with the bottles; upon which he replied, that "he did it to taste it." Two servants, named Sarah Blundell and Catherine Amos, afterwards came into the room, and he desired

the former to take away the basin and the bottles, and he put the bottles into her hands. The witness, however, took the bottles from her, and set them down, bidding her not to touch them; and the prisoner then desired that the room might be cleaned, and the dirty bottles thrown into the inner room. This being done, the witness turned her back for a moment, on which the prisoner again handed the servant the bottles, and bid her take them away, and she accordingly removed them. Witness soon afterwards went into the parlor, where she found Mr. and Mrs. Donellan; and the former told his wife "that her mother had been pleased to take notice of his washing the bottles, and that he did not know what he should have done, if he had not thought of saying that he put the water into them to put his finger to it to taste." The witness made an answer to this observation, and the prisoner directed his wife to ring the bell in order to call up the servant. When the servant came, he ordered him to send in the coachman; and when he came, the prisoner said, "Will, don't you remember that I set out of these iron gates at seven o'clock this morning?" "Yes, sir," said he. "And that was the first time of my going out; I have never been on the other side of the house this morning: you remember that I set out there this morning at seven o'clock, and asked for a horse to go to the wells?" "Yes, sir." Mr. Donellan said, "then you are my evidence." The servant answered, "Yes, sir." She did not recollect that the prisoner made any observation. The witness further said that Mr. Donellan received a letter from Sir William Wheeler, desiring the body might be opened, and that he showed her his answer to this letter. She told him he had better let it alone, and not to send such a letter as that; but she did not tell him the reason of her disliking it. He replied, that "it was necessary to send an answer, and

he would send that." She afterwards attended before the coroner and the jury in order to be examined, when Mr. Donellan also was present; and she mentioned to the jury the circumstance of the prisoner's rinsing the bottles. Being returned to Lawford Hall, the prisoner said to his wife before the witness, that she had no occasion to have told the circumstance of his washing the bottles: she was only to answer such questions as were put to her; and that question had not been asked her. Being asked whether Mr. Donellan did not endeavor to account to her for her son's death, she answered, that when the things were removed, in order to be put in the inner room, he said to the maid, "Here, take his stockings; they have been wet; he has caught cold, to be sure: and that might occasion his death." On that she examined the stockings, and there was no mark or appearance of their having been wet. In answer to some further questions, she denied that she or any of the family had ever declined eating of the same dishes that Sir Theodosius did. Mr. Donellan, indeed, had recommended to her not to drink out of the same cup, because he was affected with a certain disorder; nor to touch the bread he did, because there might be arsenic about his fingers, as he used that poison when he was fishing.

Catherine Amos corroborated the testimony of her mistress, and said, that she was called upstairs to the room where Sir Theodosius lay, at the time when the surgeons were engaged in opening the body, and she heard Mr. Donellan say "that there was nothing the matter; and that it was a blood-vessel which broke, which had occasioned the death of his brother-in-law." About a fortnight afterwards Mr. Donellan brought her a still, which had been recently washed, and he desired her to put it into the oven to dry, in order that it might not rust.

Mr. Kerr, surgeon of Northampton deposed, that he attended Sir Theo-

dosius when he was at Mr. Jones's. His disorder was so slight that he did not think it a subject of medicine at all. He ordered him some lotion to wash with, and dissuaded him from the use of medicine.

Two days afterwards, Sir William in consequence of the rumors which had reached him of the manner of his ward's death, and that suspicions were entertained that he had died from the effect of poison, wrote a letter to the prisoner, requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted. He accordingly sent for them, but did not exhibit Sir William Wheeler's letter alluding to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary sudden death, and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination, on the ground that it might be attended with personal danger. On the following day, a medical man, who had heard of their refusal to examine the body, offered to do so; but the prisoner declined his offer, on the ground that he had not been directed to send for him. On the same day the prisoner wrote to Sir William a letter, in which he stated that the medical men had fully satisfied the family, and endeavored to account for the event by the ailment under which the deceased had been suffering; but he did not state that they had not made the examination. Three or four days afterwards, Sir William, having been informed that the body had not been examined, wrote to the prisoner insisting that it should be done; which, however, he prevented by various disingenuous contrivances, and the body was interred without examination.

Dr. Rattray, of Coventry, deposed, that in consequence of a request

from the coroner, who desired him to bring Mr. Wilmer with him, in order to open the body of Sir Theodosius Boughton, they went together and met Mr. Bucknell, Mr. Powell, and Mr. Snow, in Newbold churchyard on the eleventh day after death. Mr. Bucknell opened the body. The witness then proceeded to describe the external appearances of the body, and its appearances in the dissecting. He was asked whether, as he had heard the evidence of Mr. Powell and Lady Boughton, he could, from that evidence, totally independent of the appearances he had described, form a judgment as to the cause of the death of Sir Theodosius. He answered, that, exclusive of these appearances, he was of opinion, from the symptoms that followed the taking of the draught, that it was poison, and the certain cause of his death. Being desired to smell at the bottle, and asked what was the noxious medicine in it, he said it was a distillation of laurel-leaves, called laurel-water. Here he entered into a detail of several experiments on animals, tending to show the instantaneous and mortal effects of the laurel-water. He knew nothing in medicine that corresponded in smell with that mixture, which was like that of bitter almonds. He further said that the quantity of laurel-water contained in the bottle shown to him was sufficient to be the death of any human creature; and that the appearances of the body confirmed him in his opinion that the deceased was poisoned, so far as, upon the viewing a body so long after the death of the subject, one could be allowed to form a judgment upon such appearances.

Mr. Wilmer and Dr. Parsons, professor of anatomy at Oxford, confirmed the evidence of Dr. Rattray.

Dr. Ashe, of Birmingham, was of opinion, from the symptoms described, that the deceased died by poison. If the laurel-water were distilled strong enough to collect

the essential oil, a teaspoonful of it would destroy animal life in a few seconds; and he believed as strong a poison might be made from bitter almonds.

Dr. Hunter gave his opinion to the contrary.

Mary Lymnes deposed, that she had been servant to Lady Boughton. Mr. Donellan was in the habit of distilling roses occasionally, and he kept his still in an apartment which was called his room, and in which he slept when Mrs. Donellan lay in.

Francis Amos, gardener to Lady Boughton, deposed, that he was with Sir Theodosius the whole time he was fishing, the night before he died. Mr. Donellan was not there. Two or three days after Sir Theodosius died, he brought him a still to clean; it was full of wet lime. He said he used the lime to kill fleas. The witness used to gather lavender for him to distill. In the garden there were laurels, bays, and laurustinus.

William Crofts, one of the coroner's jury, deposed, that on the examination of Lady Boughton, when she said that "Captain Donellan rinsed the bottle," he saw the captain catch her by the gown, and give her a twitch.

John Darbyshire deposed, that he had been a prisoner in Warwick jail for debt; that Mr. Donellan and he had a bed in the same room for a month or five weeks. He remembered to have had a conversation with him about Sir Theodosius being poisoned. On his asking him whether the body was poisoned or not, he said, "There was no doubt of it." The witness said, "For God's sake, captain, who could do it?" He answered, "It was amongst themselves; he had no hand in it." The witness asked, "Whom he meant by themselves?" He said, "Sir Theodosius himself, Lady Boughton, the footman, and the apothecary." The witness re-

plied, "Sure, Sir Theodosius could not do it himself!" He said he did not think he did — he could not believe he would. The witness answered, "the apothecary could hardly do it — he would lose a good patient; the footman could have no interest in it; and it was unnatural to suppose that Lady Boughton would do it." He then said, "how covetous Lady Boughton was! she had received an anonymous letter the day after Sir Theodosius's death, charging her plump with poisoning him; that she called him and read it to him, and she trembled; she desired he would not let his wife know of that letter, and asked him if he would give up his right to the personal estate, and to some estates of about two hundred pounds a year, belonging to the family." The conversation was about a month after the captain came into the jail. At other times he said, "that it was impossible he could do a thing that never was in his power."

This being the chief evidence, the prisoner in his defense pleaded a total ignorance of the fact, and several respectable characters bore testimony to his integrity. The jury, however, found him guilty, and he received sentence of death.

At seven o'clock on the next day, the 2d of April, 1781, he was . . . launched into eternity. When the body had hung the usual time it was put into a black coffin, and conveyed to the Town Hall to be dissected.

It is almost needless to inform our readers, that the poison with which the unfortunate Sir Theodosius was murdered was prussic acid, at that time only recently introduced and little known.

<sup>1</sup>The leading point in every case of this sort, is — did the deceased die of poison? For, if he did not, there is an end of the whole. Where there was no poison, there was no poisoner. But this was altogether a question to be decided by the

<sup>1</sup> [From S. M. Phillippo, *Famous Cases of Circumstantial Evidence*, Preface.]



opinion of medical men. Four physicians inspected the body, on dissection, the eleventh day after the death. They gave their opinion to the jury, and described the circumstances on which that opinion was founded; those four said, they believed him to have died of poison. The circumstances on which they had given their opinion, were stated, at the trial, to Doctor John Hunter, the most eminent physician of the age. He declared he could not discover, in any of those circumstances, nor in all of them united, any sign of the deceased having died from poison, nor any symptoms beyond those incident to a man dying suddenly.

Q. From the court to Mr. Hunter. Then, in your judgment, upon the appearance the gentlemen have described, no inference can be drawn from thence that Sir Theodosius Boughton died of poison? A. Certainly not: it does not give the least suspicion.

In questions of science, and above all, in those of medical science, the faith to be reposed in any opinion, will be regulated by the professional eminence of the person giving it. Doctor John Hunter

stood, at that time, at the very head of his profession; his opinion gave the law to that profession, both in England and in every country in Europe. Had the profession been to estimate his opinion, and not the jury, a very different verdict would have been given. The case referred peculiarly to Doctor Hunter's line of study,—that of dissection, and the appearances incident to a body on sudden and convulsive death. He pronounced, that the dissection had been irregularly made, and in a way not to afford the true criterion to judge by. And, where the process is irregular, when the experiment is defective, the conclusion must always be vague and doubtful.

The gentlemen composing the jury did not perhaps know the eminence of Mr. Hunter's character; nor, consequently, the weight due to his opinion. But the judge, on the bench, no doubt knew this; and in balancing the evidence, and in summing up, it was clearly his duty to have stated the great weight to be attached to Mr. Hunter's observations. He stated nothing of all this; but took them numerically, "four medical men to one."

**380. LORD SACKVILLE'S CASE.** (P. BURKE. *Celebrated Naval and Military Trials*. 1866, p. 93.)

In the reign of George II it became quite a fashion for both king and people to run down to degradation, and even to death, any commander who should be unsuccessful through even a mere fault of judgment or misapprehension of the circumstances under which he might be acting. Admiral Byng was a sad and shameful instance of this kind of treatment towards men who were honorably doing their best in the public service. Another example is afforded in General Lord George Sackville. . . . He became a Lieut. General of the Ordnance in 1757, and so high had his reputation risen, that in 1758 he was appointed to succeed Charles, second Duke of Marlborough, a distinguished military leader, as commander in chief of the British forces in Germany, then acting under Prince Ferdinand of Brunswick.

This brings us to the Battle of Minden. England, and, indeed, almost all Europe, were at the time fiercely engaged throughout the globe in that memorable war. . . . And latterly England confined herself, in the European part of the contest, to sending British troops as auxiliaries to her allies. These troops were commanded in chief, in 1758 and 1759 as stated, by Lord George Sackville, but, somehow or other, he could not approve of or agree with his generalissimo, Prince Ferdinand of Brunswick, George II's relative, and Prince Ferdinand in consequence owed him a spite. With the famous Lieutenant General the Marquis of Granby, who acted under him, Lord George was also not on the best of terms. Amid such a state of feeling among the commanders of the allies, the Battle of Minden was fought and won by them against the French, under Marshal de Contades, on the 1st August, 1759.

The action, which was a tre-

mendous struggle, commenced at five in the morning and raged with varied success during the day, but it is to the latter portion of the contest that the reader's attention should, as far as Lord George Sackville was concerned, be directed. After much firing on both sides, the allied army, advancing in eight columns, occupied the ground between Halen and Hemman, and the space between the last village and Dodenhausen was filled with Vangenheim's corps. Against this force the enemy directed their principal effort on the left; but the Duke de Broglie experienced a severe check from a battery of thirty cannon prepared by the Count de Buckeburg, Grand Master of the Artillery, which, under his directions, were fired with admirable effect. Towards the right of the allies, six regiments of English infantry and two battalions of Hanoverian guards had to sustain the charge of the French carabineers and gendarmerie. Such, however, were their firmness and courage, that every corps of cavalry, as well as infantry, that assailed them on the left and in the center not only failed of piercing their ranks, but was itself absolutely broken.

The cavalry on the right had no opportunity of engaging. They were destined to support the infantry of the third line, and consisted of the British and Hanoverian horse, commanded by Lord George Sackville, whose second was the Marquis of Granby. They had been posed at a considerable distance from the first line of infantry, divided from it by a scanty wood that bordered on a heath. During the action they were ordered up, but through some error, and this was the offense charged on Lord George Sackville, did not arrive in time to take part in the struggle. Originally it was not intended that

they should be engaged, and there was no occasion for their services. About noon the French gave way, and withdrew from the field of battle. They were pursued to the ramparts of Minden, having lost a great number of men, with forty-three large cannon and many colors and standards. The loss of the allies was much less severe. On the following day the garrison of Minden surrendered at discretion, when many French officers who had been wounded in the engagement fell into the hands of the victors. Immediately after the victory, Prince Ferdinand published orders relative to the troops under him, and by confining himself to complimenting the Marquis of Granby, clearly implied a severe reflection on that nobleman's superior in command, Lord George Sackville; and the rumor flew to England at once that the complete rout of the French was prevented by Lord George, through cowardice or disobedience, not charging at the opportune moment with the cavalry under his command. Lord George was furious at the imputation. He flung up his appointments and demanded a court-martial. . . .

The court-martial thus earnestly demanded by Lord George was held at the Horse Guards at the end of March and beginning of April, 1760. . . . The charge against Lord George was: "That he, being a lieutenant general in His Majesty's army in Germany, under the command of Prince Ferdinand of Brunswick, and being by his instructions (which were read in court) directed to obey the orders of the said Prince Ferdinand, did, notwithstanding all this, on August 1, 1759, disobey the orders that were sent to him by his Serene Highness." The deputy judge-advocate, Mr. Gould, in a short speech, explained the nature of the charge, and observed that by his lordship's not advancing with the cavalry, agreeably to repeated orders sent him

by three aides-de-camp, a signal opportunity was left of ruining the French army, and the cavalry was thereby prevented from gathering the laurels which the infantry had prepared.

The evidence which bore most upon the charge was as follows: Captain Winchenrode, Prince Ferdinand's Prussian aide-de-camp, deposed that he was sent early in the morning with orders from the Prince to Lord George Sackville to march to the left with the cavalry, in order to sustain the infantry. At the end of the second line he saw Lord Granby, of whom he inquired where Lord George was, saying that he was going with orders to him. His lordship answered, "At the head of the first line," where, accordingly, the deponent found him. He delivered to him the Prince's orders in French and afterwards repeated them in French; upon which his lordship said he did not understand them, and asked him twice how it was to be done. The deponent then told him, in English, that he was to march to the left through a little wood (to which he pointed) after which he would come on a heath, where he was to form, and from thence he might see our infantry. After this, the deponent left him. Being asked, at the desire of Lord George, whether it did not seem, by our dispositions, that the enemy's cavalry were expected to have been on their flanks, and their infantry in their center, he replied that he knew nothing of that, nor could pretend to form a judgment either of their dispositions or ours; all he knew was, that he was sent with orders to his lordship.

Lieutenant Colonel Ligonier (brother of the famous General John Earl Ligonier) deposed that he carried orders from the Prince to Lord George, to march to the left with the cavalry, in order to sustain the infantry and to form a third line behind them on the plain. He

livered them accordingly to his lordship, and told him that he was to march to the left through the wood. Lord George asked him who was to be their guide, and if he would undertake to lead the line. He answered that he could not promise, but would endeavor to do his best. His lordship then ordered swords to be drawn, and bid them march; and soon after came up Colonel Fitzroy, with orders from the Prince to march up immediately with the British cavalry. On which Lord George, turning to the deponent, said, "Only in numbers, my lord, but their destination is the same; that is to the left." Soon after his lordship and Colonel Fitzroy rode away together. Being asked, at Lord George's desire, if he did not insist on his orders being obeyed, he answered, "Yes," peremptorily.

Lieutenant Colonel Fitzroy deposed that the reason of his being sent to Lord George was, that the Duke of Richmond had been reconnoitering, and having observed to the Prince that the enemy's cavalry were in disorder, he said, "*Voici le beau moment pour la cavalerie,*" and bid the deponent go with orders to Lord George Sackville, to march up as fast as possible with the British cavalry. He delivered them accordingly, when his lordship bid him repeat them, and speak slowly and distinctly. He did so, when his lordship told him that his orders disagreed with those just brought him by Colonel Ligonier, and added, that the Prince could never intend to break the line. He insisted on his having been exact in delivering the orders just as he received them. On which Lord George said he would go to the Prince himself, and away they went together. Being asked "What pace?" answered, "A half gallop"; but that soon after they set out, Lord George, stopping to speak to Captain Smith, his aide-de-camp, the deponent then pushed on full gallop, and got to the Prince time enough to make his report

before his lordship came up. When he told his highness that Lord George was coming himself, he expressed his surprise strongly, not by words, but actions. What passed between the Prince and Lord George, he did not hear. Being asked if he carried afterwards an order to Lord George Granby, he answered, yes, and the occasion of it was this: he was with the Prince at Captain Philips's battery, when his highness seeing the enemy's cavalry in great disorder, said that he thought our cavalry might, even then, be of service. On which the deponent asked if he should go and fetch them. His highness replied, "Yes, make haste, and deliver the order to Lord Granby, for I know he will obey me." He went accordingly, and delivered the order, as directed, to Lord Granby, whose wing, he observed, was farther advanced than the other, which his lordship also mentioned to him. He asked the deponent why he did not deliver his orders to Lord George Sackville. He replied that as Lord George had disobeyed a former order which he carried, he had now the Prince's direction to deliver this order to him (Lord Granby) — upon which his lordship immediately put the second line in motion. Being asked, by Lord George, whether he had ever reconnoitered the wood, and whether it was close or open, he replied, that he looked at it as he passed through, and the part through which he went was very open; and, as to the breadth, two squad might march in front. Being asked whether, if our infantry had been broken by the enemy, the consequence would not have been very fatal, he replied, "Undoubtedly, as the action was on a plain, and there was no cavalry to cover them while they rallied."

Lieut. Colonel Sloper (of Bland's Dragoons) deposed that on August 1, about four in the morning, Captain Pentz came to his tent,

with orders from the Prince for the men to mount; he added, "In order for action." The deponent himself went around the regiment, and found the men lying down in their tents, booted, and the horses saddled, as they had been ever since one o'clock, by an order issued the night before. In about half an hour after they were drawn out Lord George Sackville came to the head of Bland's, where the deponent was, and bid them march. They had not gone far before Captain Winchenrode, Prince Ferdinand's aide-de-camp, came up and told his lordship, in French, that it was the Prince's orders that he should march to the left and sustain the infantry on the plain. He repeated it in French. Lord George replied, "Mais comment, mais comment?" The captain then said in English, waving his hand, that he was to march through those trees (that was his expression), on the left, and then he would come on a heath, where he would see our infantry and the enemy. Winchenrode then went away, and Lord George, saying that he could not understand the orders, the deponent said that it was clear to him that this was to be done by the left of the right wing of cavalry. For about a quarter of an hour after this he did not see his lordship, and they still remained where they were; till at last Lord George came up, and said to him, "Colonel, move your regiment." He replied, "To the left, my lord?" His lordship answered, "No, straight forward." Soon after Colonel Ligonier came to Lord George, with orders from the Prince to march immediately with the cavalry to sustain the infantry on the plain. (The deponent then desired to know if he must inform the court what he said to Colonel Ligonier, and being told, if it related to Lord George, he must, he then proceeded.) The deponent then said to Colonel Ligonier, "For God's sake, sir, repeat your orders, that that man

(meaning Lord George Sackville) may not pretend he does not understand them, for it is now near half an hour since we received orders to march, and yet we are still here. [He was sorry (he said) that his oath obliged him to mention what he also added.] For you see, sir, the condition he is in." Colonel Fitzroy then came up, but what he said to Lord George he did not hear, only his lordship then turning to Colonel Ligonier, said, "Sir, your orders are contradictory." He replied, "In numbers only; not in destination." Soon after his lordship and Colonel Fitzroy rode away together, and in about a quarter of an hour more the cavalry moved. Being asked to explain what he meant by those words, "You see, sir, the condition he is in," he replied, that his lordship seemed to him to be greatly alarmed; that when he gave him the orders to march the regiment, he was in the utmost confusion, as appeared by his ordering them to march straight forward, when the original orders were to go to the left; Colonel Ligonier's orders were to go to the left; and when the cavalry did move, it moved to the left.

Prince Ferdinand's Prussian aide-de-camp deposed that on Lord George's not bringing up the cavalry on Colonel Fitzroy's order, the Prince, being very impatient, directed him to go and hasten Lord George. That on his way, Colonel Fitzroy passed him at a distance, and soon after he saw his lordship coming himself. On which he hastened back to inform his highness that Lord George was coming to take his orders from his own mouth, rather than from him; but that before he could speak, the Prince cried out, "What, will he not obey me?"

The Marquis of Granby (a celebrated commander, son of John, third Duke of Portland, and ancestor of the present duke) deposed to the same effect as Captain Winchenrode in regard to his seeing him

both in going and returning from Lord George Sackville.

Lord George Sackville made an eloquent speech in his own behalf on the nature of the evidence that had been brought against him. The substance of the defense was as follows: Orders were given the night before the battle for the troops to be in readiness at one the next morning; the horses of the cavalry to be then saddled, but not to strike tents or march till further orders. These orders having been frequently given for a fortnight before, were not alone sufficient to apprise Lord George of an engagement next morning. The first notice that Lord George, Lord Granby, and other general officers had of an attack was from the firing of cannon between five and six. Lord George immediately arose, being waked by the sound, and rode from the village where he was quartered to the head of the cavalry, which was then mounted, and he was there before any other general officer of the division; that he marched them, although no orders to march had yet reached them, toward a windmill in front. When he had advanced a considerable distance, he received an order to halt and wait until he should receive further orders. While he remained on or near the ground, the artillery had also marched from its ground, though neither had received any orders; and Lord George imagining that orders to the artillery had been forgotten in the hurry usual upon a surprise, he ordered it to advance in front, where it was of signal service. Captain Winchenrode soon after brought him an order to form a line as a third line to support the infantry, and advance. He said nothing about going to the left, between trees, or coming out upon a heath, nor told him where the infantry to be sustained were to be found, but only repeated his orders twice in French which Lord George requested him to do,

not from any difficulty he found in comprehending the general intention of them, but because they were at first expressed indistinctly through hurry. Lord George supposing that to advance was to go forward, immediately began to execute these orders, by sending an officer to a Saxe-Gotha regiment of foot that obstructed his way in front, to cause it to remove out of his way, thinking it better so to do than to cause our artillery, which obstructed the only other way he could have advanced, to halt, dispatching at the same time a second officer where the infantry he was to sustain was posted, and a third to reconnoiter the situation of the enemy. While this was doing, Colonel Ligonier came up with an order to advance with the cavalry in order to profit of a disorder which appeared in the cavalry of the enemy; and that neither did he mention, or at least, was not heard to mention, any movement to the left. The Saxe-Gotha regiment being by this time removed from the front, Lord George, in obedience to the concurrent orders of Captain Winchenrode and Colonel Ligonier, as he understood them, and as they were understood by his witnesses, ordered the troops to advance straight forward. This could not be more than eight minutes after he received the order that had been brought by Captain Winchenrode, because Captain Winchenrode, as he was riding back from Lord George, met Colonel Fitzroy riding to him very fast; and when Colonel Fitzroy arrived, the troops were in motion. It appears from all the witnesses that they could not be put in motion in much less than eight minutes, as five minutes were given even by the witnesses for the prosecution of the Saxe-Gotha regiment to remove out of the way. Almost immediately after the troops were in motion, Colonel Fitzroy came up and brought the first orders he heard for moving to the left, at

the same time limiting the movement to the British cavalry. Then, being in doubt what to do, he halted; the order that arrived last, by Colonel Fitzroy, not superseding the former by Colonel Ligonier; as Lord George and those about him understood, both from Fitzroy and Ligonier, that they brought the same order, having received it at the same time, and brought it at different times by having taken different routes. Not being able to agree, each earnestly pressing the execution of his own orders, Lord George took the resolution to go to the prince, who was not far distant. Colonel Ligonier went forward, and that as Lord George was riding on with Colonel Fitzroy, he perceived the wood on the left more open than he had thought it, which inclined him to think it possible the Prince might have ordered him to the left; and Colonel Fitzroy still vehemently pressing the execution of the order he brought, he sent Captain Smith with orders for the British cavalry to move to the left; the motion to the left and the limitation of the movement to the British being connected in the same order, and both peculiar to that brought by Colonel Fitzroy. By this means scarcely any delay was made, even by the differences of the orders brought by the two aides-de-camp, Captain Smith not having advanced above two hundred yards beyond the left of the British cavalry; the time, therefore, could only be what he took up in galloping twice that space. This period included all the time in which Lord George is supposed to have disobeyed orders by an unnecessary delay.

Numerous witnesses were called in support of this statement — viz. Lieut. Colonel Hotham, Captain Smith, and Captain Lloyd, Lord George's aides-de-camp, Lieut. Colonel Preston of the Greys, Captain William, R.A., Captain McBean of the train, Captain Hugo, Lord George's German aide-de-camp,

Captain Brome, R.A., and the Rev. Mr. Hotham, chaplain to the staff. Their evidence bore out the defense, and among their testimony the most important was that of Lieut. Colonel Hotham and Captain Smith.

Lieut. Colonel Hotham deposed that the orders which he received on July 29, for generals to reconnoiter the overtures leading from the camps to the plains of Minden, and on the 31st, for the horses to be saddled, etc., at one the next morning, were communicated to, and obeyed by, his lordship, and that such orders as the last had been frequently issued during the fortnight before. Being asked (as were all the following witnesses) if he perceived any difference in Lord George's looks or behavior that day from what was usual, he answered (as did the rest), "None in the least."

Captain Smith deposed that he and Colonel Watson reconnoitered the overtures by his lordship's orders, on the 30th; and then Lord George himself went as far as he could, consistent with his picket-duty, being lieutenant general of the day. By orders from the Prince, the cavalry was first formed into squadrons, and then into line. That while they were forming he was on a rising ground, from whence he observed, that by the time four or five squadrons were formed, Lord George marched them, which occasioned disorder in the rear, they not being able to keep up, which he went and informed his lordship of, who upon that made them halt; and he (the deponent) returned to his post. Soon after they moved again, when a Hanoverian officer, whom he knew, came up to him and said that they marched so fast in front that they could not keep up, and that their horses would be blown, etc., which the deponent went again and told Lord George of, who then said that he would halt no more, but that he would march slow, and that then the rear, when

it was formed, might soon overtake him, but desired them not to hurry. The place where they were forming the line, he observed, was not wide enough, but riding forward, he observed that there was room enough a little farther, which he mentioned to his lordship, who then ordered them to move on, and the line was soon well formed.

As to alteration in his lordship's looks or behavior that day, he was sure there was none; and that he would have gone to death if it had been needful.

The court-martial pronounced the following sentence: "This court, upon due consideration of the whole matter before them, is of opinion that Lord George Sackville is guilty of having disobeyed the orders of Prince Ferdinand of Brunswick, whom he was by his commission

and instruction directed to obey, as commander in chief, according to the rules of war; and it is the farther opinion of the court, that the said Lord George Sackville is, and he is hereby adjudged, unfit to serve His Majesty in any military capacity whatever." . . .

Lord George outlived his disgrace, and rose to high position and power again. . . . In a few years after that George III restored him to favor and to his seat in the Privy Council, and he was, in Lord North's Administration, appointed American Secretary of State, and as such, strongly evinced his hostility to American independence. He held office from 1755 to 1782, when, on retiring, he was created in the latter year Baron Bolebrooke and Viscount Sackville.



381. **ALFRED SCHWITOFSKY'S CASE.** (FRANK MARSHALL. Fair Play. 1912. Vol. I, p. 13.)

Is it possible that in the city of New York, in the twentieth century, a man tried before one of the fairest and ablest judges by repute on the criminal bench, and defended by counsel assigned and indorsed by that judge, may be convicted of a crime he did not commit; that in spite of all safeguards of trial by jury, because this man has served one term for crime, though he has since led an honest life, he may be doomed to spend the best years of his maturity behind prison walls on evidence procured by unscrupulous enemies?

If the story is true (and it may be proved, in part at least) that is told by Alfred Schwitofsky, who is now serving a sentence of twenty years in Clinton prison, all his misfortunes since he expiated the one crime he admits having committed are primarily due to enemies in the police department.

Among several letters called forth by an article in the *New York Herald* last June, dealing with the shysters of the Tombs, or City Prison, I received one from Schwitofsky, who was then confined in the Tombs awaiting his removal to Sing Sing, whence he was afterward transferred to Clinton prison. In this letter he declared himself to be a victim of persecution by the police and of the negligence of his lawyers. "I am convicted and sentenced to 20 years imprisonment," he wrote, "and God knows that I go to prison an innocent man." The letter closed with a pathetic appeal to me to visit him in the Tombs, and hear his story. Now there is scarcely a prisoner in the Tombs (or any other prison in this or any other country, for that matter) who, given the remotest chance to stay execution of sentence or secure a new trial, will not proclaim to the last that he is guiltless of any crime with which he may be charged, even

in the face of convincing evidence against him, in the hope that some fortunate accident may bring about betterment of his condition. Hence it was not with any serious expectation that I would find an innocent man in the coil of the law that I visited my correspondent.

I found Schwitofsky to be a little bit of a man, only five feet and one half inch tall, of pronounced Hebraic type. He speaks English with a foreign accent, for though he was born in the United States he was taken to Austria, the home of his parents, when only two years of age. He is an electrician by profession and a man of intelligence and education, who speaks several modern languages and is capable of a Latin quotation on occasion. While he admits the commission of a crime in 1903, and that, owing to circumstances that he was not always able to control, his associations in New York have not been of the best, he claims that he has kept within the law since he served his first term of punishment.

I found Schwitofsky in a pitifully neurotic condition, as he was indeed on the occasions of my subsequent visits. His emotion was such that his words ran over one another alternately with periods of stammering, while his hands trembled with increasing violence as he told the story, that was frequently interrupted by tears, of his alleged wrongs and their culmination. As he had spent the best part of the last eight years in prisons and hospitals, and was contemplating 20 more years like them, his agitation may be considered excusable.

Schwitofsky had been last arrested on the night of the first of last February. He had been locked up at police headquarters overnight, and the following day was charged in the Fifty-seventh Street police court with "unlawful entry"

before City Magistrate Keyran J. O'Connor, who committed him to the Tombs to await trial in the Court of Special Sessions. A day or two later the case had been taken before the district attorney, where the charge against the prisoner had been changed to burglary in the second degree and felonious assault. As only misdemeanors are tried in Special Sessions, and as Schwitofsky was now indicted for felony, his place of trial had been changed to the Court of General Sessions.

He had first been arraigned before Judge Warren W. Foster, who had assigned former Assistant District Attorney William D. Bosler to defend him at his trial; and, the case being afterward transferred to Judge Thomas C. O'Sullivan and Mr. Bosler falling ill, the latter judge had named William H. Carpenter and William G. Keir for the defense. Both Mr. Bosler and Mr. Carpenter had reported, the former to Judge Foster and the latter to Judge O'Sullivan, that they doubted Schwitofsky's sanity. In consequence Judge Foster had asked Dr. Frank A. McGuire, the Tombs physician, with Dr. Goldstein and Mr. Kimball, to make an examination as to the mental condition of the prisoner; and, when the case had come before him, Judge O'Sullivan had appointed a regular commission in insanity to pass upon the question. Both the formal and the informal inquiry had resulted in Schwitofsky being declared sane. In the early part of June he had finally been tried before Judge O'Sullivan, defended by Messrs. Carpenter and Keir; found guilty, and sentenced. . . .

This is the story of the charge as it finally unraveled itself: On Wednesday, the eighteenth of last January, a ladies' tailor named Theodore W. Dale, residing and doing business at 71 West Forty-fifth Street, was called up on the telephone and informed (by officers of the company, as he supposed) that a man would be sent to

make some slight repairs to his telephone early the following morning. On Thursday, about 9.30 o'clock in the forenoon, a man called at 71 West Forty-fifth Street with what appeared to be a bag of tools; announced himself as coming from the telephone company, and was admitted. He had been accompanied almost to the door of the house by a good-looking and well-dressed youth of twenty-two, named Leo Gelsky, a recent graduate of the House of Refuge — *not* one of the young men who reflect credit upon the training recently received at that institution.

As to just what occurred in Dale's house immediately after the presumed workman entered, there is some doubt. About ten minutes afterward, however, the alleged artisan rushed out of the house, flourishing a pistol and followed by the tailor — upon whom as he ran the fugitive visited verbal indignities in the Rabelaisian manner. Passers-by in the street took up the pursuit, and halfway between the tailor's place and Fifth Avenue the man was grappled by a stalwart chauffeur named Frank Harold, then taxicab starter for the Hotel Webster on the south side of the thoroughfare. Harold took the pistol away from the man, and then by reason of certain animadversions on the character of the pursuing tailor allowed his captive to go, when he and his companion, Gelsky, vanished.

In the struggle for the possession of the pistol Harold had scratched the back of the right wrist of the man from whom he took the weapon so severely that the chauffeur afterward found minute particles of the other's skin under his finger nails. This fact should be borne in mind as having a most important bearing upon the guilt or innocence of Schwitofsky. The man who invaded the tailor's shop on the morning of January 19th, and committed the crime for which Schwitofsky was punished, still bears on his

right wrist the traces of his encounter with Frank Harold.

Dale, on returning to his house that morning, at once telephoned to the East Fifty-fourth Street police station, and Detective Edward J. Cousin was sent to Forty-fifth Street. He was, of course, too late to make an arrest, but Harold gave him the pistol the fake workingman had carried, which had contained only two *blank* cartridges — a fact also to be remembered, in view of the circumstance that Schwitofsky was convicted of felonious assault.

The matter of the visit of the bogus telephone repairer to 71 West Forty-fifth Street was reported to the detective bureau at police headquarters the same day, and Lieutenants William Browne, John F. Talt, Edward Dungate, and Patrick Donnelly were assigned to the case. They got Gelsky ten days later, he having sent a messenger to Dale's house with a note demanding one hundred dollars, which the youth insists the tailor had agreed to pay him as remuneration for injuries sustained at his hands. Talt made the arrest, following the messenger when he left Dale's house, and finding Gelsky waiting for him at the corner of Fifth Avenue.

On information furnished by Gelsky, Schwitofsky was arrested and identified by him two days afterward as the man who, representing himself to be a telephone repairer, had obtained admission to Dale's place on January 19th and escaped at the point of his pistol. Gelsky was arraigned in the West Fifty-fourth Street police court on the day of his arrest on a charge of attempted blackmail, to which he afterward pleaded guilty before Judge O'Sullivan (who later tried and sentenced Schwitofsky) in General Sessions, and was committed to the State Reformatory at Elmira.

Schwitofsky's story, told to me from behind the bars of his cell, was that he had never seen Gelsky to know him in his life, though he had learned since his arrest that both had

lived at the Mills Hotel in Rivington Street at the same time last winter. He assured me that the first time he ever heard of the Dale case was when he was arrested in his bed in the Mills Hotel on the night of February 1st by Detectives Browne and Donnelly, and charged with the offense of illegal entry to the tailor's house. When the detectives told him what he was arrested for he insisted on being confronted with Dale immediately, and was taken by them to 71 West Forty-fifth Street, although it was nearly midnight. On the way they had stopped at the taxicab starter's box in front of the Hotel Webster, where (for what reason Schwitofsky says he did not then know) he was made to show the backs of his hands and wrists to the boss chauffeur. He says that this man examined his wrists carefully, and then shook his head. Schwitofsky was then taken into Dale's house, where the tailor being roused from sleep, took one glance at him under a gas jet and said, "That is the man!"

There were no traces of scratches on Schwitofsky's hands or wrists that night, although it was only twelve days from the time that Frank Harold's nails had dug the skin from the back of the wrist of the man who had unlawfully entered Dale's house on January 19. A microscopic examination in Clinton prison in November by Dr. Julius B. Ransom of Dannemora, a medical practitioner of thirty years' standing, showed that not so much as the scarfskin of either of the prisoner's wrists had been penetrated for at least five years. At his trial, however, two deep scars on the front of Schwitofsky's left wrist, where he had severed an artery in his attempt to commit suicide in the Tombs three years before, were shown to the jury as the marks of the chauffeur's finger nails; and, in spite of the prisoner's protests Judge O'Sullivan refused to permit him to bring evidence to show how he actually came by those scars.

The one crime that Schwitofsky admits having committed was larceny, for which he was sentenced to five years in the Eastern Penitentiary in Philadelphia. There is, however, a previous crime recorded against him, he told me, of which he declares he was not guilty. He had, he said, purchased some wearing apparel offered for sale by a peddler in a cafe in Hoboken, for a young woman in his company, and he had been apprehended in a dance hall immediately afterward and charged with their theft, being subsequently fined though he had ten witnesses in court to prove his purchase of the articles.

Schwitofsky told me that he had been led into the commission of his one crime by evil companions, after dissipating in stock gambling and horse racing a fortune of about \$25,000 that had been left him by his father in 1899, soon after his arrival in this country. He was twenty-six years of age when he first entered prison; and, coming out at the age of thirty with a full knowledge of what the continuation of his earlier follies would mean, he asserts that he registered a solemn mental vow to live down his past and create for himself an honorable career. He has spent most of the ensuing four and a half years in prison, but there is no proof of a crime with which he has been charged since the expiration of his first sentence that is aloof from the possibility of police machination.

On being discharged from the Eastern Penitentiary in the summer of 1907, Schwitofsky went to Gloversville in this State, where he worked at his trade of electrician, coming to New York in October with something like \$100 in cash and \$257 on deposit in the Mechanics Bank of Gloversville, for he had worked overtime and saved his money. He was recognized as an ex-convict a day or two after his arrival, and "tipped off" to Police Lieutenants William Kinsler and William F. Duggan, then connected

with the central bureau of the New York Police Department and at present doing precinct duty in Brooklyn, who were at that time assigned to detective work in and about the lower end of Second Avenue. These detectives arrested Schwitofsky as a suspicious person before he had been in New York a week. He was taken to police headquarters overnight; "lined up" in the morning with the previous twenty-four-hour catch of thieves and suspects, and orders were given to the assembled detectives of the central office squad to arrest him thereafter on sight. He was discharged on being arraigned in Jefferson Market police court, but was a marked man from that time.

Knowing that his reputation as an ex-convict would confront him wherever he might go, Schwitofsky determined to fight his battle in New York. He invested part of his savings in a restaurant at 155 Allen Street, therefore; and, whether Kinsler and Duggan were aware that he was in business or not (they say they were not; he says they were), they arrested him again and again as a suspicious person, and locked him up overnight at police headquarters, to be "lined up" in the morning and discharged. In December he was arrested on a charge of "unlawful entry" in a house to which he had gone to collect a bill from a customer; was held for trial in Special Sessions and discharged several weeks later on the evidence of the customer. In the meantime his partner had sold out the restaurant and disappeared with the proceeds.

Finding it impossible to live unmolested in a part of town where Kinsler and Duggan swayed police power, Schwitofsky says that he opened a delicatessen store and lunch room at 242 East One Hundred Seventeenth Street in partnership with a woman of his own race, the lease being taken in her name, and he occupying a room in the same house. It was just about

this time that a series of burglaries were occurring in Harlem, and Kinsler and Duggan were detailed to duty in that part of town at the head of a squad of four more detectives. On March 7th Kinsler and Duggan as the head of the squad arrested Schwitofsky, charging him with carrying concealed weapons and burglars' tools, and with having stolen property in his possession. He was a widower with one child, which died while he was awaiting trial in the Tombs, whereupon he attempted suicide by cutting his throat and severing the arteries of his left wrist. Recovering in the hospital, he was sent to the asylum for the criminal insane at Matteawan where he spent more than two years.

Schwitofsky claims that his arrest in Harlem was also a police "frame-up." His story is that he had been to the Bowery on the night of his arrest, where he had purchased a pistol for protection in his store and a putty knife and a pair of pliers for use about the premises, all of which had been tied up in a parcel when Kinsler and Duggan arrested him. These represented the burglars' tools and the concealed weapons. The stolen property consisted in two cheap stick-pins, one of which he wore in his cravat and the other in his muffler, and which had been presented to him, he said. There are enough discrepancies in the various reports made by Kinsler and Duggan on Schwitofsky's arrest in Harlem to warrant disbelief in the accuracy of their story, particularly as it may be proved by Deputy Warden Hanlon of the Tombs that Duggan made an attempt to have the prisoner falsely identified by one of the witnesses in the case. Indeed, Police Commissioner Waldo, to whom I made a written report of these discrepancies last October, asked me to take up the matter with the District Attorney. It should be borne in mind that the Commissioner did everything in his power to assist me in getting at the truth with

regard to Schwitofsky's numerous arrests.

Being discharged from Matteawan as sane on June 6th, 1910, Schwitofsky was brought back to New York to be tried on the stolen property and burglars' tools charges. "Again in the Tombs," he told me, "I found that my long stay in Matteawan had resulted in the complete dispersal of my defense. Dr. Radin, the former Jewish chaplain of the prison, who had made a personal investigation of my case, had been dead more than a year. The woman with whom I had been in partnership had sold out our business and gone away two years before, and was not to be found. She had placed in Dr. Radin's hands the proof that the stick-pins found in my possession when I was arrested had been purchased through witnesses who had been in the store at the time. With my defense gone my chances seemed black, and when the assistant district attorney in charge of my case offered to ask the judge to suspend sentence provided that I pleaded guilty I consented to do so. I knew what it meant to have another crime on my record, but I feared that the alternative would be almost certain conviction, and I longed for freedom."

Sentence was suspended in Schwitofsky's case in August, 1910. He tells a complete story of his life from that period, giving names and addresses in the instances where he found employment, until the time of his arrest the following February, the day after he went to work for the Interborough Rapid Transit Company. His story has been corroborated since his arrest in every important particular, although he is unable to prove an alibi for the morning of January 19th, when Dale's shop was invaded.

One of the various occupations Schwitofsky engaged in during his struggle for a livelihood between arrests was that of private detective in the employ of Isaac Silverman, head of the Fidelity Secret

Service Bureau. In this position he says that he discovered that his old enemies, Kinsler and Duggan, were taking pay from Silverman for work they were surreptitiously doing in connection with the cloak makers' strike that was then in progress. It was his threat to expose them, Schwitofsky asserts, that brought about his present predicament.

The circumstance that Schwitofsky's wrists did not bear the marks of Harold's finger nails was conclusive proof to my mind — without the additional evidence I found later — that he was not the man who created the disturbance in the tailor's shop and in Forty-fifth Street on the morning of January 19th. On making inquiries I learned that there were at least four men in a position to form accurate opinions, who had grave doubts as to Schwitofsky's guilt. These four were Dr. Goldstein, the Jewish chaplain, Mr. Kimball of the Prison Association, Mr. Strisik, the lawyer for the Austrian Consulate, and Mr. Hanley, the deputy warden of the Tombs. Dr. Goldstein, indeed, had received a letter from Gelsky, on whose information Schwitofsky had been arrested, written two weeks after that occurrence, in which the informer confessed that, under coercion by detectives, he had identified the wrong man as the bogus telephone repairer whom he had accompanied to Dale's house on the occasion of the scrimmage in the street.

The only possible connection between Kinsler and Duggan and the arrest of Schwitofsky in the Dale matter seems to be through Detective Talt. According to Schwitofsky, Talt met him in the street soon after he had declared his intention to notify police headquarters of the relations of his two enemies with Silverman, and threatened them with vengeance on their behalf, and it is Talt who is accused by Gelsky of coercing him into falsely identifying Schwitofsky as the Dale burglar. Talt denies both

accusations. Schwitofsky asserts positively that he caught a glimpse of Duggan on the opposite side of Rivington Street, when Browne and Donnelly arrested him and took him away from the Mills Hotel on the night of February 1st. Duggan was a witness at Schwitofsky's trial, on which occasion he swore to the jury that he knew the prisoner to be a professional burglar.

Dr. Goldstein had been so much impressed by the discrepancies in the stories told by Schwitofsky's accusers that he had written a personal letter to Judge O'Sullivan before the trial, asking him to give the case unusual attention. Mr. Kimball and Warden Hanley did not believe that Schwitofsky was the Dale burglar, because they knew of his efforts to make an honest living between the suspension of his sentence by Judge Swann in August, 1910, and his arrest the following February. The little electrician had made a point of calling, sometimes as often as twice a week, on the agent of the Prison Association in the Criminal Courts building and on the deputy warden of the Tombs, to let them know how he was getting on.

"I never knew such a change in a man as appeared in Schwitofsky from the time he was half crazy with anxiety and suspense in the Tombs, and afterward when he was a free man for a few months and was for a time in business for himself," says Mr. Kimball. "He would fairly beam with pleasure when he came into my office to tell me of a contract he had secured, or of a purchase of tools. If he was 'leading a double life,' and working ten or twelve hours a day as a cover for burglary at night, he is the first crook to do so in my experience."

Mr. Hanley had definite information that made him believe that Schwitofsky could not always be sure of a square deal from the police, that went back to his arrest in Harlem in 1908, as has been mentioned. The deputy warden had

made a memorandum of this circumstance in the identification book at the Tombs, and is prepared to produce the book in court and give his evidence, should the occasion arise. All things considered, I felt justified in laying before Judge O'Sullivan the information I had gathered with regard to Schwitofsky. I found that the judge was cognizant of all the circumstances, if not of their bearing on each other.

"Schwitofsky was found guilty after a fair and impartial trial," O'Sullivan told me, "and the sentence of 20 years is the lightest I could impose upon him."

Inspection of the papers in the Schwitofsky case in the clerk's office of the Court of General Sessions showed that the prisoner had himself brought certain conditions to the attention of the judge. I found two of his letters on file, in which he set forth the fact that his lawyers had not given proper attention to the case, and that the scars on his wrists that had helped to bring about his conviction were of long standing.

Unable to rid myself of the conviction that if two and two make four, the Dale burglar bore marks of his encounter with Harold, which were conspicuously missing from the wrists of Schwitofsky, I laid the matter before Police Commissioner Rhinelander Waldo. Mr. Waldo at once sent for Second Deputy Commissioner George S. Dougherty, who had only recently come into the department from the celebrated Pinkerton Agency and was then in charge of the detective bureau at police headquarters, and directed him to make a thorough investigation into all the circumstances surrounding Schwitofsky's arrest. A week later Dougherty had been unable to find any irregularities in the arrest and conviction of the little electrician, and Commissioner Waldo took the matter out of his hands and put it into those of Acting Captain August Kuhne, then at the head of the Brooklyn detective bureau, now

a full captain and in charge of the 166th precinct. Kuhne studied the matter for several days, and reported that Schwitofsky was guilty of the crimes charged and justly convicted. Neither Dougherty, Kuhne, nor any of their subordinates employed on the case, could see anything in my contention that, admitting the conditions set forth at Schwitofsky's trial, the Dale burglar *must* carry on his wrists marks of his encounter with the chauffeur.

Visiting Gelsky in the Elmira Reformatory, I had a half-hour talk with him in the presence of the head keeper of the institution, John D. Driscoll. Gelsky told a coherent story of his arrest and of being beaten and kicked by Detective Talt in the Fifty-seventh Street prison, in an effort that was successful to make him falsely identify Schwitofsky as the man who had accompanied him to Forty-fifth Street on the morning of January 19th and entered the tailor's shop. Gelsky declared that the real Dale burglar had left New York before Schwitofsky's arrest, and he voluntarily went on to relate that the fellow's left arm and wrist had been marked by huge "weals," made by a pistol he had in his sleeve during a struggle with a chauffeur.

When Gelsky had been taken back to his cell, I asked Driscoll what he thought of the boy's story.

"He's a tough citizen all right," replied the head keeper, who has made a scientific study of juvenile delinquents, "but he was telling the truth that time."

Frank Harold, the chauffeur who stopped the Dale burglar and took the pistol away from him, scratching the other's wrists during the struggle, and whom I found acting as taxicab starter at the Union League Club, corroborated the story already told of the events in Forty-fifth Street on the morning of January 19th. "I let the man go," he said, "because of what he told me about Dale. After he had gone I opened

the revolver and found two blank cartridges in the chambers. I took them out, and when Detective Cousin came along half an hour later I gave him the pistol and the cartridges separately, and he took them away.

"I have often wondered why I was not called as a witness at Schwitofsky's trial," Harold remarked. "I spoke about the matter several times to Detective Browne, whom I used to see along Broadway before the trial, and expected to be subpoenaed."

Detective Cousin corroborates Harold's story about the pistol and the blank cartridges, and says that he handed them separately to the property clerk at police headquarters. Schwitofsky was indicted for making threats with a *loaded* pistol, however, which constituted assault in the first degree. No evidence was offered on this point at the trial, except that Dale in the course of his testimony said that he saw cartridges in the pistol when it was pointed at him.

I cited Schwitofsky's case to a veteran journalist, who has the reputation of knowing more about the inner workings of the police force than most of the men connected with the department. "Many detectives," he told me, "would consider themselves as acting quite within their sphere of duty in arresting your man whenever they came across him. He was an ex-convict, and doubtless a professional criminal in the minds of Kinsler and Duggan.

"As to the arrest in Harlem being a 'frame up,' that is quite possible. The detectives were out for a record, and if they could put a professional criminal behind the bars, and at the same time gain reputé for themselves, they would probably consider that they were doing a public service in laying the criminal by the heels, regardless of the method of doing it. The same proposition goes with the Dale burglary, but under different conditions. Four detectives in this instance devote ten days to the apprehension of Gelsky and his partner. They get Gelsky, and he tells them

that the other offender is beyond their reach. It is not to their credit that he has escaped, and at least one of them knows of an ex-convict, whom we will say he believes to be a dangerous man, who is at large in the community and who has threatened to disgrace two brother detectives. Why not put up a job on the ex-convict, thus not only obtaining credit for the arrest of the Dale burglar, but getting a dangerous criminal out of the way — and incidentally preventing his informing on their brethren?"

Schwitofsky was convicted in the Dale case largely on the evidence of the tailor and his three female servants, who testified that he was the man each of them saw for a few minutes in a semidark hall, and afterward running and fighting in the street — and recognized ten days afterward. . . . Had the real criminal been captured and convicted of the offense actually committed at Dale's house on January 19th, he would probably, as a first offender, have been committed to the State Reformatory at Elmira for a thirteen-month term. Schwitofsky, by reason of his previous record, a part of which at least was manufactured for him, receives what is practically a life sentence, for he is of frail physique and cannot live long in prison.

Mr. Rosenberg argued the motion for a new trial on Tuesday January 2d before Judge O'Sullivan. The motion was opposed by Assistant District Attorney McCormick, whom I had shown the evidence disproving Schwitofsky's guilt some time before, and who had been so much impressed by it then that he told me he would make no objection to the granting of a new trial. Judge O'Sullivan was disinclined to grant Mr. Rosenberg's motion, on the ground that the new evidence might have been produced at the original trial. He finally accepted Mr. Rosenberg's brief, however, and gave Mr. McCormick a week to submit one in opposition.



382. **MOUDY v. SNIDER.** (1895. ILLINOIS APPELLATE COURT. 64 Ill. App. 65.) . . .

. . . Mr. Presiding Justice **PLEASANTS** delivered the opinion of the Court. — This action, commenced by appellee on March 14, 1894, was tried on the 5th of the following December, and resulted in a verdict and judgment for plaintiff for \$111.70. Defendant appealed. The declaration was in assumpsit on indebitatus counts for money had and received, money loaned, work and labor, and interest, and the pleas were non-assumpsit, payment, set-off, and accord and satisfaction. The claim was for money due plaintiff on a note he left with the defendant in January, 1893, which he collected on March 7, 1894, and refused to pay over the proceeds on plaintiff's demand. It is conceded that the judgment is correct, unless the defendant by a preponderance of the evidence proved the set-off claimed, which was \$100 and interest from August 2, 1892.

Appellant was a farmer living in Champaign county. Appellee was a farm laborer and well borer, and worked for appellant at different times for different periods ranging from days to months. They were on very friendly terms. On August 1, 1892, appellee came to appellant's house to assist him in haying. He finished his job and left in the evening of the next day. Appellant testified that on July 30th he drew from Ford County Bank at Paxton \$125 in three bills of \$100, \$20, and \$5; spent the smaller bills, excepting some change, in Paxton, on that day, and took home the residue in his pocket book — the \$100 bill on one side and the change on the other; that in the afternoon of August 2d, while appellee and he were working alone in the haymow, he wrapped his knife, watch, and pocket book, closed, in his handkerchief, and so placed them under one of the braces in the mow. At quitting time in the evening he went to get them,

found the pocketbook unclasped on the side containing the change — which seemed to be all there — and put it in his pocket. While at the supper table, but after appellee had eaten and gone, the question how it came to be so unclasped suddenly arose in his mind, and on taking it out of his pocket and looking on the other side found it empty. He went to the barn to look for the money, but did not find it.

He at once suspected appellee, because he was the only other person in the mow that afternoon (except a young girl who worked there and came up for fifteen or twenty minutes "to talk a little and gas"). But he said nothing about it to anybody, thinking he would hear of appellee's using it. He hired him for two months of the following winter for the purpose of watching him, and treated him as before, but discovered nothing to confirm his suspicion. Appellee appeared to be friendly as he had ever been. It was during that period of his employment that the appellee left with him \$55 in money, one note for \$110 and another for \$90, and had a balance due him on a horse trade of \$5. In February, 1894, appellant first heard that soon after the money was missed, appellee was seen by several persons at different times to have in his possession a \$100 bill, and thereupon charged him with having taken it from his (appellant's) pocketbook; which appellee defiantly denied. After several talks between them appellant returned the money and uncollected note, and paid him the balance due on the horse trade and a part of the proceeds of the note he had collected, but retained the amount of the missing bill and interest thereon from the day it was missed; and refusing to pay that, this suit was brought. The only ultimate question of fact in the case

was whether appellee got the \$100 bill as charged; upon which the burden of proof to establish the affirmative was upon appellant.

Not one of the circumstances relied on, except that of his being with appellant in the haymow, so far as they were claimed to be significant, was certainly shown, even by the witnesses for appellant, and were all (except the one stated) positively denied by appellee, whose denial was more or less supported by reasonable probabilities and natural inference from their testimony.

Three witnesses testified to as many occasions on which he exhibited a paper that looked like a \$100 bill. — The first was on August 17th, 1892, a fortnight after the one in question was missed. It was on a farm only three or four miles from that of appellant, where they were assisting in threshing. He and Snider were pitching in the field. He says Snider had some paper money there, among which was a \$100 bill; that it was not an advertisement, but genuine money; that he looked at it and had it in his hands; just looked over it as Snider showed it to him, as he would any other money, and that it was genuine money, at least he would take it for that. He did not say he looked at the back of it. He couldn't tell what bank it was on, nor whether it was a bank bill, a greenback, or a gold or silver certificate. He told Snider at the time that he was a fool for carrying his money around in that way. — The next was about the same time, between the 10th and 21st of the month, at a camp meeting in Sugar Grove, nine and a half miles southeast of Paxton. The witness was running a huckster's stand there. He says that Snider, whom he had known very well for seven or eight years, came up to his stand and pulling out what he took to be a \$100 bill said he wanted to smoke and wanted witness to change the bill. Snider laid it out flat. Witness did

not have it in his hands nor see its back; couldn't tell "what issue or what sort of an issue it was," but from what he saw he took it to be a good bill. — The third occasion was on Monday, the 27th of the same month. The witness (Martin) was in a buggy, going northwest to Paxton, and when within a mile and a half or two miles of it, met Snider going in the opposite direction in a wagon with well tools on it. He had been to town. When they met they stopped and had some talk about how they were getting along and how much money they were making. They had been well acquainted for eight or nine years, worked and been much together. Witness had been interested in the huckster stand above referred to and was telling how much they had made on it. Snider doubted it and said, "I will bet you a \$100, you didn't make near that much." Witness replied in a joking way, "Oh, well, you haven't got a \$100"; to which Snider answered, "I will just show you that I have," and pulled out and showed witness what to him appeared, and he believed to be, a \$100 bill. It was folded up when he took it out of his pocket, but he unfolded it and showed both sides of it. The witness said, "Of course I thought it strange that Snider had a \$100 bill loose in his pocket, but didn't think very much about it."

Mr. Shaw, cashier of the First National Bank at Paxton, testified that he knew appellee by sight; that on the 27th day of August, 1892, he received from him at the bank a deposit of \$115; that he "presumed" it was in bills of different denominations, and was "of the impression" that he had one large bill, a \$100 bill, but "would not be positive about that." He said, "to the best of my recollection he had some two or three or four bills, and I think one was for \$100. . . . I don't know that I was particularly impressed at the time. It was a common thing to happen.

. . . We have a large number of depositors, five or six hundred. . . . I can only say that part of this deposit was a \$100 bill, as my best impression." He could not say how many people made deposits that day; supposed the usual number; nor tell who deposited on that day, or within a week of it, but by the books, nor testify as to the denomination of the bills deposited unless it was specified in the deposit slip, or was an unusual amount, or there was some special circumstance to make him remember it. His attention was first called to it by appellant, and only about a week before the trial, which was considerably more than two years after the transaction.

It is worthy of notice that the deposit was made on the same day that appellee, going away from Paxton with tools for well boring, met his friend, the witness Martin, and showed him what he took to be a \$100 bill. Martin said their talk was brief; that appellee was working for some one and seemed to be in a hurry to go on. The time of day at which the deposit was made or the meeting took place was not shown, but the strong probability from the circumstances is that the deposit was made before appellee left Paxton. Banks usually closed long before the day's work of a farm laborer or a well borer ended. He would hardly have gone on to the place of his job, quit work during working hours and returned to Paxton before the bank closed. It is not pretended that there were more than one \$100 bill, or one likeness of it in evidence. If he had previously deposited such bill, he couldn't have shown it to Martin, and if he had such, it was altogether probable he would have deposited it with the others, rather than carry it about loose in his pocket. Hence the almost irresistible conclusions are that he did not deposit it, and also that what he did show to Martin was not such; and if not, then it is

equally probable that what he showed to the other witnesses was not a genuine bill. Appellee, who alone certainly knew the facts, positively testified, that although he saw the handkerchief placed as stated, he did not touch it; did not deposit nor show to anybody a genuine \$100 bill, and never had one; that what he had and showed was not a bank bill, nor paper really representing money of any kind, nor a counterfeit of any, but an advertisement, such as is often seen, in the likeness of such, and so clear an imitation as might deceive anybody who only looked at it, without handling or examining it; that he had carried it in his pocket a long time, forgotten of whom or how he obtained it, paid no particular attention to it and couldn't describe it at all minutely; had shown it occasionally to the young men in the neighborhood, for their astonishment and his own amusement, so handling and exhibiting it as to prevent their "catching on," and finally gave it to Eddie Henry, a grandson of Mr. and Mrs. Strayner, with whom he (appellee) made his home during much of the time. They testified that they saw it — she in his possession at several times in the summer of 1892, and both in that of the little boy, who also testified that appellee gave it to him and that after keeping it a week or so he lost it.

The actual possession by appellee of a genuine \$100 bill, after appellant's was missed, was the vital question in the case. Is it at all strange that the jury found the fact not proved by this evidence? It did not appear that appellant ever saw it after he put it in his pocketbook, nor to what extent, if any, it was exposed to loss before he missed it. If appellee took it he must have done so almost under the eyes of its owner, with whom he was working, in a little space, all the afternoon. His opportunity was hardly as good as that of the

gassing girl in his employ, who was free to roam all about the mow unnoticed, while appellee could not well be out of his sight long enough to disturb the handkerchief, take out the money, wrap and replace the pocketbook, knife, and watch just as he found them, without discovery. If he had any reason to suppose there was money there, he knew the owner would very soon miss what was taken, and might before they left the mow. They worked on together until appellant got his handkerchief and they went to supper. Appellant says there was nothing strange in appellee's leaving as he did, nor had he any recollection afterward of anything in his conduct or manner during the afternoon to excite suspicion. He knew that appellee was going that evening to George Thompson's to work. He had been working for the farmers in the neighborhood many years. He continued to do so up to the time of the trial. Yet it is claimed that within a few days after the theft, so peculiar in its circumstances, and that exposed him to imprisonment for ten years, he was showing the stolen property, of such unusual character as to attract notice and cause remark, to the young men about there, carrying it loose in his pocket, offering it at a camp meeting in payment for a cigar, and finally depositing it in its original form in a bank where the owner was likely to do business. Such circumstances were highly improbable in themselves, even upon the supposition of his guilt. The alleged fact of his taking the money was positively denied, and the circumstances tending to prove it were not unreasonably explained.

When first charged with it, and the name of a person was given as one who had seen such a bill in his possession — the only one given before the trial — he promptly proposed to go with appellant to see him. After some delay on appellant's part, they did go, and appellant was al-

lowed to see him alone while appellee remained outside. Their accounts of the interview, as reported by appellant when he came out, differ, but the fact is, that he did not produce the party as a witness on the trial, although he resided in Paxton.

Two other circumstances were brought into the case on the part of appellant which may deserve a brief notice. One was that appellee had once taken some money of George Thompson, without his special authority or knowledge. This was admitted, and, in our opinion, fairly explained; and if it had not been, was incompetent as evidence.

The other was that a week before the trial, in the course of a conversation with a witness who lived a half mile from him and knew him well, in the presence of Miss Strayner, in which, among other things, they talked about counterfeit money, appellee expressed a wish that he had a counterfeit \$100, and asked the witness if he could get one for him, but did not state what for, particularly, but for a purpose. They both knew this suit was pending and what it was about. The inference drawn is, that he wanted it to produce on the trial and claim it was what appellant's witnesses saw. But for that purpose it would serve no better than his advertisement. He was, doubtless, already committed to the advertisement theory. How could he want to produce a counterfeit bill, if he got one, for any such purpose, with these witnesses ready to prove how lately he got it? But his advertisement had been lost and he couldn't procure another. He might properly want a counterfeit to test the ability of appellant's witnesses to distinguish a counterfeit from a genuine bill, with no better opportunity for examination than they had, and to show, if he could, that his advertisement was as good an imitation of a genuine bill. We think the inference sought to be drawn far-fetched and unreasonable.

Appellee was asked where he got the money he deposited in the bank, and answered that after so long a time—over two years—he could not state positively. But he had been at work most of his time, economical and saving in his habits, and received it from a number of persons who had owed him for work or for loans. He named eight or nine, from three or four of whom he got money that he believed went to make up the \$115 deposited. In support of the motion the affidavits of four or five of these named were submitted, showing how much the affiants, respectively, had paid him, and when; two of whom fixed the time of their payments at a date shortly after that of the deposit, and two others at a considerable time before—one, of an amount not exceeding ten dollars, as early as the year 1889. But he was

shown to have been industrious and saving of his money—having little occasion to spend it except for his clothes. He did not use tobacco nor drink liquor. These affidavits do not tend to impeach his veracity, but rather to show it; nor even his memory. Who could say positively, two years and four months after a deposit of \$115 in several bills of no uncommon denomination, just when, where, of whom, and for what he obtained them? Appellee fully admitted that he couldn't. . . .

This statement of the evidence shows that the question involved was eminently one to be finally determined by a jury, and that there was quite enough to support their finding. . . . We find no material error in the record to the prejudice of appellant, and the judgment will be affirmed.

**383. O'BANNON v. VIGUS.** (1891. ILLINOIS APPELLATE COURT. 48 Ill. App. 84.) . . .

*Appellant's Statement of the Case.*—Eliza Vigus, the mother of appellee, D. L. Vigus, on the 23rd day of May, 1872, took out a policy in the Protection Life Insurance Company, of Chicago, for \$5000, payable to appellee. She died on the 12th of October, 1874. Proofs of loss were duly made to the company. At the request of appellee, R. W. O'Bannon (now deceased) went to Chicago early in January, 1875, to collect the amount of the policy. In two or three days he returned, and brought with him a note and check for \$1000 each, dated January 5, 1875. They were accepted by appellee, and on the same date he gave a receipt to the company in full payment of the policy. O'Bannon died on the 13th of November, 1883, and appellant was appointed his executrix. On the 19th of June, 1884, appellee filed his claim against the estate as follows: "Estate of R. W. O'Bannon, deceased. — To Darius L. Vigus, Dr. — To the sum of \$3000, collected and received by said O'Bannon, to the use of said Vigus, of the Protection Life Insurance Company, of Chicago, on policy No. 4266, on the life of Eliza Vigus, now deceased, on, to wit, the 4th day of March, A.D. 1875, with interest thereon at the rate of 6 per cent per annum. Said money having been collected by said O'Bannon while acting as claimant's agent; the collection of which sum was by said O'Bannon fraudulently concealed from the claimant during the lifetime of said O'Bannon."

The policy was for \$5000. Two thousand dollars were collected by O'Bannon and paid to Vigus. As to this there is no dispute. The contention is as to the \$3000. The evidence offered to show the liability of the estate was the following receipt on the back of the policy: "Received of the Protection Life

Insurance Company five thousand dollars, being amount in full of the within policy. (Signed) D. L. Vigus. By R. W. O'Bannon." This receipt was without date. It was written by Terpenny, the bookkeeper of the company, except the words, "five thousand," and the signature. He said: "O'Bannon was in the office of the company when he wrote the receipt." It is claimed that the receipt was false, the words five thousand dollars having been filled in after it was signed by O'Bannon. . . .

*OPINION OF THE COURT.*—On the night of Sunday, January 5, 1873, R. W. O'Bannon went from Raymond, in Montgomery County, to Chicago, as the agent of appellee, to collect what he could on a policy of the Protection Life Insurance Company for \$5000 upon his mother's life for his benefit. On the night of Tuesday, the 5th, he returned, reported to him a compromise and settlement, subject to his approval, with A. W. Edwards, secretary and manager of the company, for \$2000, as the best he was able to make, and advised him to accept it. At the same time he tendered the company's check of January 5, for \$1000, and its note, at sixty days, of the same date, for a like sum, both payable to his order. After hesitation and discussion, appellee accepted them, and signed a receipt of the same date, which had been prepared by Edwards, in full of the policy, but without stating the amount; which was returned to the company on Friday, the 8th. Appellee never received anything more on the policy, but the further sum of \$3000 was afterward assessed and collected by the company on account of this loss, and paid to somebody, on its check of March 4th made payable to his order. This check was drawn by Mr. Terpenny, the

bookkeeper, by direction of Edwards, and delivered to him; was paid some time in June, and on its return by the bank was placed by Terpenney with the other papers in the case in the company's vault, to which Edwards had access. No further trace of it appears.

In 1877 the company failed. Edwards removed to Dakota in 1879. His deposition was taken, and he strangely denied all recollection of the check settlement or claim. Terpenney, who continued in the service of the receiver or assignee after the failure, looked for it carefully, and found all the other papers relating to the case together in their proper place, but this check was gone and has never been traced. The check for \$1000 given to Vigus, and the check given the bank cashier to pay the note, were signed by Hillard, as president, and Edwards as secretary, according to the custom. The one for \$3000 was signed by Edwards, as secretary, but by whom else or how it was indorsed Terpenney did not recollect, nor was it otherwise shown. In his search for it in July, 1883, he found among the papers the policy in question, with a receipt indorsed thereon, purporting to be for "five thousand dollars, being amount in full of the within policy," without date, and all in his own handwriting except the words "five thousand," which were in that of Edwards, and the signature, which was "D. Vigus, by R. W. O'Bannon," and in the handwriting of the latter. In October following he casually informed appellee of this receipt, and thereupon an action on the case was instituted against Edwards.

O'Bannon was then on his deathbed, and died on the 15th of the next month. Appellee afterward dismissed his suit against Edwards, and on the 30th of June, 1884, filed this claim in the County Court against the estate of O'Bannon for the amount of the missing check and interest from its

date — alleging that O'Bannon had collected it as his agent and fraudulently concealed the fact. There the claim was disallowed. The case has been three times tried in the Circuit Court and brought here on appeal from its judgments. The first was for the defendant, which was affirmed on the merits (19 App. 241), but the Supreme Court reversed it and ours. (118 Ill. 334.)

On the second trial some changes of more or less importance were made by some of the witnesses in their statements on the first, and some new evidence introduced on each side; and the judgment was for plaintiff, Vigus. We thought these changes and additions weakened his case and positively strengthened the defense. His case rested, as before, on O'Bannon's receipt as it then appeared on the policy, his alleged admission to Miller in the spring of 1875, and statement made on his return from Chicago about the cancer letters. We discredited all this evidence; the receipt, because the words "five thousand" were inserted without his authority where it was blank when he signed it; and the admission and statements, because the testimony tending to prove them was unreliable and improbable in itself, inconsistent with better attested facts, supported only by assumptions which were themselves unsupported and more rationally explained by the supposition that they were misunderstood. Thus, if the admission to Miller, as stated by him, was embodied in a request that was in the highest degree insulting to a man of honor and yet was not resented nor disclosed until O'Bannon was dead and this claim had been disallowed by the County Court, was not true in fact, and would expose his own estate to loss and his reputation to ruin, reason and charity would force the belief that it was not so intended by O'Bannon, and never so understood

by Miller until he heard of the surprising receipt on the policy, but always before as having been in substance the same that had been made to Vigus and others before and about that time, namely, that he had settled the claim of Vigus upon a five-thousand-dollar policy, and not that he had collected \$5000 upon the policy. So also, of the alleged statement about the cancer letters or letter; if it was improbable on its face, untrue in fact, needless or rather hurtful and hindering to the purpose supposed to be in view, likely to lead to injury, easy to be disproved, with consequences certainly ruinous to himself and disgraceful to his family, every fair mind would naturally look for some explanation which should make it more probable that the witnesses were mistaken than that he made or intended to make such a statement. All of this was true and proved of the statement alleged, and an explanation was suggested, which has not been shown nor attempted to be shown to be inadmissible.

On the other hand, the clear weight of the evidence seemed to show that on January 5, 1875, O'Bannon in good faith finally settled the claim in question for the check and note of \$1000 each, that he delivered to appellee, and no more, subject to his ratification. For it established the following facts: Proof of death of the insured was submitted to the company November 28, 1874. By the terms of the policy it had ninety days from that date within which to pay the loss. Appellee wanted money, for a special purpose, as soon as he could get it. He began at once to importune the company for it. Edwards paid no attention to his letters. For some reason he soon came to expect he would have to submit to a compromise, if he got anything. His mother had been treated for cancer existing before the policy, which had lapsed, was reinstated,

though it does not appear that O'Bannon knew or had any intimation of it before he went to Chicago on this business. He went on short notice, in place of his son who had been first engaged, because of his long and friendly acquaintance with Edwards. He went expecting to compromise, and authorized to do so on the best terms he could get. At what time on the morning of the 4th he arrived at Chicago, or how soon afterward he saw Edwards was not shown. Doubtless he saw him on that day, but not at his office. They discussed the claim, probably at considerable length. Edwards told him the company had information that when the policy was reinstated Mrs. Vigus was not a fit subject for insurance, and particularly, at least, that she had been injured by a fall on the street at Litchfield for which she had recovered damages against the city. It did not appear that in that interview anything was said about cancer, unless from statements of O'Bannon on his return. Finally, however, Edwards made him as low an offer as \$2000, and no more. O'Bannon hesitated to accept it, and they separated without a settlement on that day. Up to this time, surely, it cannot be pretended that their action was not natural, businesslike, in good faith, and at arm's length. On the next day O'Bannon appeared at the office of Edwards, which was occupied by Terpenny also, whose desk was only about ten feet from that of the secretary, and while there Terpenny, by direction of Edwards, drew or filled up and delivered to him the note and check for \$1000 each and the receipt on the policy with a blank space for the amount, and Edwards prepared the receipt in full for appellee to sign if he would. Whether the note and check were printed and already or ever afterward signed by the president or vice president, does not appear; but they were duly paid. The



policy was left with Edwards, and O'Bannon, with the note, check, and receipt to be signed by appellee, took the evening train for Raymond. Terpenny made an entry on the books of the company, of the same date, showing that the note was given for the "balance due," all that remained to be paid on the policy. There was no evidence tending to prove that O'Bannon ever afterward had any communication with any agent of the insurance company or of the bank, or knew of the filling of the blank in his receipt or of the existence of the \$3000 check, except his alleged admission to Miller, and the fact (if it was a fact, of which there was some evidence) that he went again to Chicago at some time in the following spring, which in our judgment was fairly overcome by the two receipts in full, the book entry and the other facts stated. If a final settlement could be proved by circumstances, these, not otherwise explained, would prove it. All of them having so appeared on the first trial, we found it was then and thus made; and that fact alone, if such was the fact, would of itself effectually dispose of the alleged admission, and make wholly immaterial in this action, whatever lies O'Bannon might have told to justify his settlement or induce its ratification.

Feeling the force of these circumstances, appellee introduced as a new witness on the second trial, Martin Ryan, the actuary of the company, who testified, that about the 1st of January, 1875, Edwards, at his office, introduced him to O'Bannon; that they proceeded to talk about this claim; that O'Bannon urged its "settlement," and Edwards "seemed disposed to favor him, but said it had not been assessed for yet; O'Bannon desired some money immediately, on that occasion; Edwards agreed to give \$1000 down or a check for \$1000, and a draft or note at sixty days —

I think it was for another \$1000 — *and the balance when the claim was assessed for and collected;*" that Edwards then handed to witness the proofs of loss and told him to see that it got into the next assessment (without stating the amount), to be sent out early in February, and then directed the bookkeeper to draw up the check and note for \$1000 each, which the bookkeeper apparently proceeded to do. The case of plaintiff and the reputation of Edwards were in urgent need of some such evidence as this statement that he then agreed to pay on this policy \$3000, in addition to the note and check then given, when the claim was assessed for and collected. But it could not be made to fit the facts. It was conceded upon the uncontradicted testimony of Charles A. Walker, the attorney of the company, who was also a new witness on the part of the defense, that no longer than the day before, after some discussion in his office, which was in the same building, and just over that of Edwards, O'Bannon and Edwards, in his presence, absolutely agreed on a compromise and settlement of the claim for \$2000, which Edwards had first offered; that O'Bannon seemed well pleased with that agreement, having been satisfied by Walker that the claim would be resisted if pushed, and that \$2000 paid would probably be better for appellee than a judgment for the full amount; and that upon coming to the agreement O'Bannon and Edwards went downstairs together. We believed then, and think we can now show more clearly, that the meeting spoken of by Ryan took place immediately upon the agreement to compromise spoken of by Walker; that they went directly from his office to that of Edwards, and that the conversation between them there had no reference whatever to the amount, because that had just been agreed on, but solely to the time and manner of its pay-

ment, which had not been settled upstairs. Even according to Ryan, O'Bannon wanted some money immediately, and the disposition of Edwards to favor him was shown by his consent to give \$1000 in cash, and a note, on which money could be immediately raised, for the residue.

But upon the contention of counsel as to the *time* of the agreement on the amount, we said in the former opinion: "We are asked to believe that this secretary, who, notwithstanding his friendship for O'Bannon, on Monday, for the substantial reasons stated, in the presence and with the concurrence of the company's attorney, committed himself to a peremptory refusal to pay more than \$2000, and actually got an agreement to settle for that amount, with which O'Bannon seemed well pleased, on Tuesday, without any new light on the subject, and without the knowledge of the attorney, was entertaining a proposition from O'Bannon to settle, and was so 'disposed to favor him' that he would have paid the full amount right down except that it had not been assessed and collected, and actually paid \$1000 down, gave the company's note at sixty days for another thousand, and a *verbal* promise to pay \$3000 more, to which all claim had been abandoned, as soon as it should be assessed and collected, and gave directions to have it assessed and collected as soon as possible. Considering, further, that nothing was yet due, that the financial condition of the company was not such as to justify any needless liberality in the settlement of claims against it, and that the book-keeper at the adjoining desk, who was probably within hearing of the whole arrangement, when he did 'proceed to draw up the papers,' proceeded further to enter the transaction on his books as a settlement for \$2000 and no more, the statement that the secretary then agreed to pay the further large sum of \$3000

seems but little less than monstrous." This agreement to settle for \$2000, proved by the circumstances and by the direct testimony of Walker, and now conceded, was made in good faith; for if the parties had then conspired to get from the company \$5000, it is morally certain that they would not have made Walker a witness to their agreement on \$2000. And unless that agreement was abandoned and a new one made before the note and check were delivered, then it was also executed in good faith. The evidence proved to our satisfaction that there was no such change in the agreement.

To the reasons suggested in the above quotation, no answer has been attempted. The papers executed were in accordance with the agreement. There was no time after it was made and before the delivery of the papers, sufficient for the concoction of such a conspiracy as is charged, or any material change in the terms of settlement so agreed on, nor any afterward, and before O'Bannon returned to Raymond; for, upon receipt of the papers, he left the office, and there is no evidence or reason for the belief that in the meantime he had any meeting or communication with Edwards; and if he did, it would seem to be the height of assumption and presumption to suppose that he would have broached or Edwards dared to suggest to him the idea of such a conspiracy. Nothing in his conduct or reputation or relations to Edwards or to appellee appears to warrant, but everything to forbid it. His life for nearly nine years afterward, at Raymond and Litchfield, was a continuous and emphatic denial of it.

The fact of a bona fide, executed settlement for \$2000 being thus established, it follows that he could not have intended to admit to Miller or anybody, at any time, that he collected or received \$5000; and that the question of false representa-

tion as to the cancer letter — if any such was made, which we do not believe — is immaterial. For the reasons thus indicated, and others more fully set forth in the opinion filed (32 App. 483-487), this second judgment was reversed and the cause remanded. Having seen no reason to retract or modify the expression of our views of the law or the evidence as to any material point presented by the record then before us, we might here have simply referred to it, for those we still entertain, so far as applicable. But out of respect to counsel and their elaborate argument, if not also in justice to ourselves, we have repeated them, condensed, and somewhat rearranged in their order, as a better introduction to what is now to be said on the bearing of the new evidence.

The points now urged as against the conclusion of the court on the former record are, (1) that there is not nor ever was, any evidence that the receipt on the policy was drawn or signed on January 5, 1875; (2) that the agreement in Walker's office to settle for \$2000, was made on the morning of the 4th, and a new one for \$5000 on the 5th, when the note and check were given; and (3) that the new testimony of Mr. and Mrs. Hill fully proved O'Bannon's admission that he collected \$5000. It is said the legal presumption is, that he signed the receipt as it now appears, and the inevitable conclusion from that fact and the testimony respecting his admission, is that he did collect that sum.

(1) It is true of the receipt that Terpenney did not and would not give the date of its preparation, doubtless for the reason, and only for the reason, that it bore none on its face; for the occasion fixed the time just as certainly, and he had testified before, and not less than five times on the last trial, that he wrote it while O'Bannon was in the office, and further, that he never saw him there, but the one time. To

this there was no contradiction, and, in connection with other facts, it is conclusive. . . . Having then received the check and note, then was the proper time to receipt for them. There was every reason why he should and none why he should not. Edwards was an experienced man, acting for the company. Such men do not make such payments without taking receipts. It was especially proper in this case, because O'Bannon was but an agent and his principal might not ratify the arrangement. His right to refuse was expressly reserved. No other receipt than the one so indorsed is claimed to have been given by him at any time. We think it has already been sufficiently shown why the statement of Ryan on the second trial, that Edwards agreed to pay the further sum of \$3000 when assessed and collected, ought not to have been believed; but his statement on the last, and the new evidence for appellant, call for some further observations in regard to it. On the second trial the testimony of Walker preceded his. He now says he thinks he did not read it before he testified, but that he had some conversation with appellee and Mr. Truitt, his attorney, and they told him, in a general way, about it. Walker had said he had been under the "impression" that the meeting in his office, when the agreement to settle for \$2000 was made, was on a *Monday* morning, in the latter part of December, 1874, or first part of January, 1875. A good many years had since passed. He said: "Of course it is simply an impression that has got on my mind. I don't know why I have got the impression." It appearing that the 4th of January, 1875, was on a *Monday*, and that the note and check and receipt for Vigus to sign, and the entry on the book that the note was given for the "balance due on policy 4266," were all under date of January 5th, and that O'Bannon had said he made the settlement on

the second day he was in Chicago, it was seen that appellee's claim was to be upheld only by the slender thread of Walker's unaccountable "impressions," upon the basis of some proof that when the settlement was actually made, there was an equally unaccountable *verbal* agreement to pay \$3000, supplementing two written obligations for \$1000 each. And Ryan, whose devotion to Edwards was shown, furnished the proof of such a sudden, great, and unaccountable change in the agreement. For the reasons indicated in the quotation above made, we thought and said it was more probable that Walker's impression as to the day was wrong than that any such change was made. But Ryan, since he furnished that proof, has read the preceding testimony of Walker. At first he denied it, but being confronted with his own letter to Walker stating that he had, he admitted it. Whether he had also read the opinion of this court does not appear. But for some reason, his clear and positive statement turns out on this trial to be also at best only an "impression," quite as vague and shallow as that of Walker. He says: "The settlement of the Vigus claim was talked between Edwards and O'Bannon. I did not pay special attention to the details. . . . My best recollection is, it was agreed to pay \$1000 cash, and note payable about the time the money would come in. . . . He stated, I think, it was a great favor they were extending O'Bannon in making advance payment, as the company was entitled to the date fixed. . . . Nothing was said about the result of the money due on the policy, in my presence. As I stated, I am not very clear as to what was said about the balance being paid when the claim was assessed and collected. My best recollection is, he was impressing on him that he was doing a favor; that the balance would be paid inside of ninety days, after

the assessment. My best recollection is, this was stated — be paid when the assessment was collected." On cross-examination he says: "Edwards ordered a check for \$1000 and a note for \$1000 on the Vigus claim, to be drawn up. I am not positive as to what was said about a balance. Have only a vague impression. Would not swear anything in relation to it, so void is my mind as to what was said." We regard this as a substantial recantation — an admission that according to the statement of Edwards on that occasion the settlement was for a check (cash) and note at sixty days each for \$1000; that the favor shown was by the payment in advance of the time mentioned in the policy; that the balance to be paid when assessed and collected, if anything of the kind was said, was the balance for which the note was given, as entered on the books, and not the further sum of \$3000, of which nothing was said in his presence. The whole of the talk was confined to the time of payment of the amount agreed on — O'Bannon wanting cash, and Edwards insisting on the time for a part. Thus the testimony of Ryan is additional evidence of an actual settlement for \$2000, and that it was made in good faith.

(2) The other contention of counsel is also shown to be groundless. Walker's impression as to the time of the meeting and agreement in his office, was wrong; it took place on Tuesday, January 5th, and immediately preceding the execution of the papers, in the office of Edwards, as is more fully proved by the new evidence. Walker testified before, and now also, that the meeting was in the *morning*. Counsel's position was that it was *Monday* morning, and that the parties had all the afternoon and evening after the agreement, in which to conspire, before the papers were executed. We thought it was Tuesday, because they would naturally proceed to execute the agree-

ment immediately, since it would require only a few minutes' work, and the office of the secretary and bookkeeper was just "downstairs," whither they went together; and further, because of the improbability that the preceding meetings and discussions and the intervals of time between them, together with the meeting in Walker's office, could have all occurred on the same morning, as they must if the latter, which was the last, was on Monday. First, O'Bannon, after a night ride in the cars, met Edwards — where or at what time was not shown — and they had a talk, doubtless somewhat lengthy, as it involved the justice of the claim and the question of a compromise; afterward, how long is not shown, Edwards saw Walker, told him O'Bannon was in town about the Vigus claim, that he had talked with him about a compromise, offered him \$2000, which O'Bannon had not accepted, and that he probably would if advised by Walker to do so; and then, after another interview, how long did not appear, Walker says he took O'Bannon up to his office, went over the case, and advised him to accept the offer made. All this took place before Edwards was called up and the agreement made. We still think it highly improbable that all of this took place on one morning. The question, however, is only as to the last, when the three parties were together and the agreement was made.

We regard the point of the time when it was made, within the period from O'Bannon's arrival in Chicago to his receipt of the note and check, as of no importance whatever to the defense of appellant, because, in our judgment, the idea of such a change in the agreement as is claimed, within any time that can be pretended for it, is on its face not to be entertained. Why, Ryan himself says that in the very conversation between them when the papers were drawn up, Edwards told O'Bannon that "there was a dis-

pute about the claim, and an investigation, owing to letters from his locality in regard to Mrs. Vigus's condition," though he could not say what was said, particularly, as to their contents. And yet it is seriously claimed that he promised to pay \$3000 more than had so recently been agreed on; Ryan added that, when Edwards told him about the letters, O'Bannon, in substance, stated that "some enemies or unfriendly parties had been interfering with other people's business," which may help to explain the cancer testimony, and to show that the parties were still dealing at arm's length and O'Bannon was still faithful.

Counsel for appellee seem to see that unless by way of this idea of a change in agreement, his every approach to a recovery from this estate is solidly excluded by the evidence; and therefore, whether a sufficient reason can or cannot, at least a sufficient time and opportunity to make it, must be shown. Though proof of these might not materially aid his case, the want of it would be fatal. Important as it is to him, the whole argument for the time claimed is as follows: "On Sunday night, January 3, 1875, O'Bannon started to Chicago, where he arrived the next morning . . . and it seems called *at once* on Edwards. After seeing Edwards, O'Bannon seems to have left the place of meeting, for when Edwards saw Walker, *that morning, so Walker says*, the former told the latter that O'Bannon had come to Chicago on the Vigus matter, and that he, Edwards, had offered \$2000 to settle the claim, and that he thought O'Bannon would accept it if Walker saw him and talked to him. We call particular attention to what Walker says. In response to the question, what Edwards said, he answered: 'Said Dick O'Bannon was in town.' For what purpose did he say he was in town? 'Said to me, Uncle Dick O'Bannon is in town; was up to see about the Vigus

matter, etc.' This language clearly shows that O'Bannon's coming *must* have been of very recent occurrence; that he had *just* had his first interview with Edwards; that it *must* have been the first morning he was there; otherwise his old friend Walker *would* have sooner heard of it. Now, as O'Bannon left Raymond Sunday night, and would naturally arrive in Chicago the following morning, *the conclusion must irresistibly be that it was on Monday morning, January 4, 1875, that O'Bannon was in Walker's office.* Walker then says that he watched for O'Bannon at the foot of the stairs, from which they went to Walker's office." We find in the evidence no warrant for such positive use of any of the terms we have italicized; nothing to show with any definiteness at what time of the day or even on which of the two days O'Bannon first saw Edwards, how long he remained with him, how soon after they separated Edwards saw Walker, or how long he remained with him. All of these are matters of mere conjecture, or at most of very uncertain probability. It may have been as counsel assert — but it may not. For all the purposes of this case these assumptions may be conceded. We call attention to them only to show the looseness of the argument. But it would still be very easy to resist the conclusion last stated from the given premises or any other reasonably supported by the evidence, even as it appeared on the former trial. Now, consider the testimony of Walker on the last one. After stating the offer of \$2000, and its acceptance, he proceeds: "They then went downstairs together. I saw Edwards at twelve o'clock, as I went to lunch. I went into his office and said, "You and Uncle Dick settled the matter," and he said "Yes." I saw Uncle Dick that afternoon and said to him, "You are lucky; you and Edwards have settled the matter;" and he said, "Yes, have settled."

The conclusion from this language that it was *not* on Monday morning, January 4, 1875, that O'Bannon was in Walker's office, is so natural, reasonable, and plain that we draw it without hesitation. The twelve o'clock mentioned was the twelve o'clock of the same day they were in that office; they *settled* before that hour; and the settlement was made, as the papers show, on Tuesday, January 5, 1875. It was immediately on going downstairs together that they arranged the mode of payment and executed these papers. This was manifestly done in good faith. There was no time or reason for the asserted change in the agreement, and none whatever was made. Further, when Edwards was seen at twelve o'clock, O'Bannon was not with him, and when O'Bannon was seen in the afternoon, Edwards was not with him; and, as before said, there is not a particle of evidence tending to show that they were again together at any time before O'Bannon returned that night to Raymond. His report to appellee the next day that he had settled the claim for \$2000, and could get no more, was therefore substantially and literally true. That he had then conspired with Edwards to get more, or he had thought of getting it in any way, is a proposition without the least support in the evidence, so far as we can see.

It does not appear that Edwards himself had any such design until just before the \$1000 check was drawn. The new proof shows that in December he wrote to Walker, the company's attorney, that this claim should be compromised. On the former trial, as on this, it was shown that the assessment for this claim, as presented to and approved by the executive board, was for \$2500 (as it would be according to the custom, as proved, if it was compromised at \$2000), and it was so stated in the notices to members sent out in February; though the amount required to be paid by each

would raise \$5000. Ryan said the \$2500 got in by mistake or misprint, which may now be doubted. But however that may be, Walker testified on this trial that early in February, Edwards and Ryan came into his office with these notices and asked his opinion as to the propriety of sending them out. He told them that this claim was compromised at \$2000 and assessed for at \$2500; that these notices were wrong and ought not to be sent out, to which Edwards replied that "there was no time to reprint them now, and if anybody kicked he would send the money back"; that he represented \$25,000 of the company's stock, and that in consequence of this statement of Edwards he then determined to get out; and that though he made no further complaint about the matter, he did leave the company in the following May or June. Counsel indulge in an insinuation against Walker, because he did not call attention to this over-assessment, which we think gratuitous, since, according to his understanding and the statement, it was simply a premature collection and the excess would still inure to the benefit of the members, according to the regular course of business, as shown, because it would be turned to the contingent assessment account. Walker therefore discharged his duty when he advised as strongly as he did against the sending out of those notices. The point we are making, however, is that Edwards was then *fully aware* that Walker knew the claim had been settled for \$2000. It had been so declared and admitted in the presence of Ryan. (It is true that Ryan testified he had been instructed by Edwards to make the assessment for \$5000, and did so; that he had no recollection of the conversation related by Edwards; and at first positively denied that he was ever in his office while he was connected with the company, but on having his attention called more particularly to it admitted his mis-

take.) It is hard to believe that Edwards, in the face of this knowledge of Walker, then intended to rob the company of this excess of \$3000. Yet it may be that a month later — Walker in the meantime making no further complaint about the assessment notices and preparing to leave the company — he may have formed that purpose. The excess would be collected early in March. A check for it could then be drawn to balance the books and look regular, but need not be paid until Walker was out. Ryan was his friend, whose conduct in this connection is questionable. Edwards had the receipt of Vigus in full and could fill up the blank in that of O'Bannon with "five thousand." These would satisfy the company that he had paid to the beneficiary the full amount of the policy and explain the mistake in the representation of the assessment as for \$2500. He could easily find somebody who, for a consideration, would imitate the signature of Vigus, in his possession, and if he recognized the indorsement, the bank would not question it, and he could abstract the check when returned. For such reasons as these he may have concluded to take the risk. We do not say this is the true explanation of the facts proved, but we see no other. Counsel for appellee are compelled to charge, and do charge, Edwards with complicity. We, too, are fully satisfied that if O'Bannon is guilty, Edwards also must be; for O'Bannon, without his aid, could not have obtained the check. But it is clear that after Edwards got the receipts of O'Bannon and Vigus, he had no need of O'Bannon's aid; and we fully believe, as we have endeavored to show from the evidence, that O'Bannon gave his and procured that of Vigus without a thought of wrong.

(3) Of the testimony of Mr. and Mrs. Hill but little need be said. We regard it as wholly unreliable in itself, and abundantly contra-

dicted by the facts and probabilities of the case. They do not themselves agree. They were not witnesses of a kind to be relied upon as to the precise language used in a casual conversation fifteen years before and never thought of in the meantime — not for lack of honesty, but of intelligence, discrimination, and nice observation. They first talked it over with a zealous attorney for appellee, — to whom we impute no improper purpose or method, but every experienced lawyer knows the tendency. Mr. Hill was a farm tenant; he testified that in April or May, 1875, he and his wife were in the store of O'Bannon (J. D.) & Vigus, where they generally did their trading: that she then had an interest in a policy of this company on her father's life; that crops were poor, it was hard to keep up payments, and they had talked of letting it lapse; that as he came into the store after her, R. W. O'Bannon said to him that his wife had been telling him this, and advised them not to do so; that he said it was a good, reliable company, and that he had just collected \$5000 on this Vigus policy. On further examination he testified that O'Bannon might have said he settled the Vigus policy for \$5000, though he thought it was the other way; then, that he said, "I received \$5000 on the policy"; then, again, that the word was collected, of which he was pretty certain; then, that he could not give the identical language, and finally, "*my best recollection is that he said settled.*" It appears that from O'Bannon's language, whatever it was, this witness got the impression that he had received the insurance, as he easily might from the statement that he had "settled" the claim on a \$5000 policy, and therefore, naturally enough, he so testified at first; but he made it just as clear afterward that he couldn't pretend to be confident as to the language. His testimony on the whole shows it more probable that

O'Bannon said he had settled a \$5000 policy, or a claim on such a policy, than that he said he had collected or received \$5000 on it.

Mrs. Hill, who was excluded during his examination, with a like impression received in the same way, testified that the conversation occurred in May, 1875, which she thought was only eight years ago, and that O'Bannon said he collected the full amount, \$5000, and that she could give his exact words. She stood immovably by her first statement. Giving her full credit for honesty, it may yet be observed that a woman, as ignorant as she, and unused to courts, might naturally be inclined to resent a cross-examination, however proper, and show herself quite unreasonably persistent and positive. And conceding that the jury, with better means than ours, discovered in her manner no sign of such a weakness, we still think her statement unreliable in its nature and untrue in fact. There was plenty of room for a misunderstanding, and of time for a failure of memory.

Her husband's "best recollection" of it is different. It is refuted by the accumulated evidence of an actual and honest settlement for \$2000, to which we have referred. Its strange inconsistency with the whole current of his statements on that point, from January 6, 1875, when he reported that settlement to appellee, doubtless to and beyond the time of the conversation with the Hills, cannot be explained or rationally accounted for. The amount of the policy, his mission to Chicago, its somewhat disappointing result, and its reluctant acceptance by appellee, were generally known and talked of in that little community. O'Bannon made no secret of it. He enjoined secrecy upon nobody to whom he told it, and he told it to many persons and on many occasions. Nor was there anything more secret or confidential in his talk with the Hills. J. D. O'Ban-



non was in the store waiting on customers. Vigus himself had gone out, but for aught that appears was liable to return while that talk was going on. To all these persons on all these occasions he stated that he settled for \$2000, and could get no more. On what principle or course of human conduct, common or exceptional, can it be believed upon such testimony as Mrs. Hill's, that he told her he collected the full amount, \$5000?

The theory of appellee's case is itself strongly against it. That is, that on the 4th or 5th day of January, 1875, O'Bannon entered into a conspiracy with Edwards to defraud appellee of \$3000, by making it to be believed that his claim was compromised for only \$2000. According to this theory, the most important thing of all he was to do and to keep carefully and constantly in his mind to do, was to conceal the fact that he had collected or received \$5000 on that policy. It was the very gist of the supposed conspiracy. If he was in it, he was bound by every motive of interest, hope, and fear to guard against every word or act that might lead to a suspicion of that fact. And yet it is claimed to be overwhelmingly proved that in the open store of his victim, where he had so often and to so many asserted the contrary without the slightest reason or occasion, and apparently with the utmost coolness and unconcern, he was blabbing the secret he was so vitally interested to keep. And then he went right on for nearly nine years, to the day of his death, living and acting as though he had never either blabbed it or possessed it. . . .

Each of the new trials has deepened and strengthened our convictions as to the facts which should dictate the finding. Upon the question whether R. W. O'Bannon ever received upon the policy anything whatever other or more than the note and check he reported and delivered to appellee, or by conspiracy

with Edwards enabled him to get it, we regard the case as not a close one. In our judgment, after three trials, carefully reviewed, the negative is established by a clear and satisfactory preponderance of the evidence — proving not only that the deceased did not commit the wrong shown, but that another, without his concurrence or knowledge, did. Whatever may be claimed for the *prima facie* case for plaintiff, it was overcome and overwhelmed by the defense. Of the receipt, its integrity as well as its truth was impeached. . . . That it was forged or altered after its execution, may be proved by a bare preponderance. This was so altered, and by the insertion of a falsehood, as shown by far more than a bare preponderance. The alleged verbal admissions are not truly reported. They were never made. The testimony in relation to them is otherwise easily explained. The more it is considered, in the light of the theories of the case on both sides, of O'Bannon's life and conduct before and afterward, and of the other independent evidence that the fact was not as claimed to have been admitted, the more clearly it is seen to be unworthy of consideration.

This verdict, then, is unsupported. On the other hand, it is shown by direct and positive evidence, and not left to inference, that O'Bannon was authorized and expected to compromise the claim; he was met with a denial of its justice, an argument against its allowance and an offer of \$2000; resisted the argument and declined the offer, or left it unaccepted; the next day, upon further argument by Walker reinforcing that of Edwards, agreed to accept it; immediately afterward received the note and check and signed the receipt on the policy left with Edwards; returned home that night and the next day reported to appellee. On maintaining and forwarding his receipt, his agency ceased. The assessment and collection for the

loss, the alteration of his receipt, the drawing of the \$3000 check, its presentation, payment, return, and abstraction, all took place afterward, at Chicago, more than two hundred miles from Raymond. We think we know who were concerned in each and all of them. There is not one particle of evidence tending to prove that O'Bannon had any connection with either, except the alleged admissions. The fact that he visited Chicago in the spring, if a fact, at most proves only a bare possibility, most remote. Any and every inference of his guilt must presuppose a conspiracy on the 4th or 5th of January, 1875, which could not

then have been formed. The conspiracy cannot be legitimately argued from assumed facts whose existence must in turn be argued from the assumption of the conspiracy. Excepting the admission, such is, in our opinion, the character of the argument here made, and the claim of such admission seems to us well-nigh absurdity. The verdict, then, was not only unsupported by the evidence, but against the great weight and body of it, and therefore should have been set aside. . . .

The judgment of the Circuit Court will be reversed and the cause remanded.

384. **TOURTELOTTE v. BROWN.** (1894. COLORADO COURT OF APPEALS. 4 Colo. App. 378.) . . .

This case was formerly before this court. All the questions and issues involved were settled except one. It was alleged in the answer that the note in controversy was a forgery, was not executed by Francina Hawkins. Issue was taken and the defense relied upon. A large amount of evidence was introduced in an attempt to establish the forgery. No finding as to the question of forgery was made by the jury. The Court submitted to the jury the following question for a special finding: "Was the name of Francina Hawkins at the end of the note forged?" To which was answered: "Jury cannot agree." A general verdict was rendered for the defendant (defendant in error in this case). The case was brought by writ of error to this court. . . .

REED, J., delivered the opinion of the Court.

A brief statement in regard to the subject matter of the controversy and relation of the interested parties will suffice to explain this case. In July, 1887, Mrs. Francina Hawkins was an aged widow of over 70 years, possessed of considerable property, — the amount is not shown. Her heirs were her daughters Maggie A., wife of Nathan S. Hurd, and Nancy, the wife of H. A. E. Pickard, both of mature age. There was also one A. E. Mansfield, who, though he does not appear to have been legally adopted, was raised by the Hawkinses from an infant, and was recognized as, or claimed to be, one of the family. Some time prior to the date given, Pickard and family removed to Denver. The old lady conveyed to her daughter, the wife of Pickard, a residence in West Denver of the admitted value of some \$7000, and also furnished the family money, more or less, as the exigencies of the occasion required. Mrs. Hurd and her husband, who had received nothing from the mother, felt ag-

grieved at the apparent partiality of the mother, and, fearing an inequitable division of the estate in the interest of the Pickards, attempted to counteract it. As claimed by Hurd, the old lady was by him invited to his house, the error of her ways pointed out, and the necessity of doing equal justice impressed upon her; and she, recognizing the justice of the claim and not wishing to offend the Pickards, executed the note in question to equalize affairs between her daughters. The execution and existence of the note remained a secret until after Mrs. Hawkins's death, when it was presented for allowance against the estate, out of which has grown the present litigation. The Pickard family and Mansfield resisted the claim, as it would materially affect their interests in the distribution of the estate, and asserted the note to be a forgery. Like all other controversies of this kind, where quite an amount of money is involved, the contest degenerated into a personal one, developing great intensity and acrimony. That this should be the case with Hurd is naturally to be expected, for although the crime of forgery is not, by the proceedings, directly charged upon him, and no criminal conviction could follow, all the testimony tends to show that, if forgery, it was perpetrated by him, and he is morally, if not legally, convicted of the crime. . . .

It becomes the duty, or at least the privilege, of the Court to examine the entire evidence introduced to determine whether the jury was warranted in its findings.

First. Taking up the evidence of the plaintiff to establish the genuineness of the note, we find it conceded that Mrs. Pickard and Mrs. Hurd were the only children and legal heirs of Mrs. Hawkins, that she had by deed of conveyance of real property and supplies of

money made advances to the Pickards of somewhere from \$7000 to \$10,000, while the Hurd family had received nothing. It was very natural that the circumstances should prompt the Hurd family to seek to equalize matters and secure a proper share of the estate, by calling the attention of the mother to the apparent injustice, and her duty to correct it. It is apparent that at that time ill feeling existed between the two families in regard to the estate of the mother. Such being the fact and the mother recognizing the justice of the Hurd claim and not wishing to intensify existing family feuds, she and Hurd might very readily have adopted the plan of the note, for a sum sufficient to equalize advances to the Pickards, on long time presumably, as really happened, payable after her death. These uncontradicted facts, while not conclusive, become very potent in explaining what otherwise might be considered questionable and doubtful, by showing the justice of the demand and the mother's recognition of it. These explanatory circumstances afford strong presumptions in favor of the integrity of the note, and cannot be rejected in an examination of the case.

Second. We have the evidence of Mr. Hurd detailing all the facts leading up to the execution of the note, the blanks left by him in drawing it, the consultation and agreement as to filling the blanks, the filling of them, the signature in his presence, and delivery of the note. Mr. Hurd was not impeached nor was any effort made to do so; he is not contradicted in any important particular, except by circumstances supposed to be inconsistent. A careful examination of his entire testimony, not only that properly, but improperly admitted, fails to show anything contradictory, or detracting from the truth of his direct evidence. Leaving out of consideration the evidence of his daughter in regard to seeing her grandmother

on some occasion sign a paper at her home, as too indefinite to identify the note in controversy, consequently of little value, also the evidence of the son in regard to the genuineness of the signature in his opinion, we come to the evidence of the experts who testified in the case.

Mr. Denman, Mr. Rose, Mr. Frasier, Mr. McCrimmon, and Mr. Young, all men whose business it has been for years, as bankers, to examine and pass upon signatures, and who showed themselves fully qualified as experts, upon careful comparison of the signature in question with numerous others admitted to be genuine, they each and all unhesitatingly declared in favor of the genuineness of the signature. Eighteen signatures of Mrs. Hawkins, including the one in question, seventeen of which were proved and conceded to be genuine, were submitted to the experts for comparison, and all are photographed and submitted to the court. . . .

No experts were called upon the part of the defendant; those attacking the genuineness of the signature, on comparison and examination, and their knowledge of Mrs. Hawkins's signature from having frequently seen her write it, were Mr. Pickard, his wife, young son, and Mr. Mansfield, all interested in the result. We shall not attempt to analyze and discuss the testimony of these witnesses. We can only give our conclusions, after a very careful examination. Mr. Pickard said "He did not *believe* it was her signature," and proceeds to give his reasons for his belief in a very lengthy and elaborate explanation, which is vague, speculative, and confused, which, in our opinion, weakens instead of strengthens his position. Much, if not all, of it would apply with equal or greater force to each of the signatures shown to be genuine. Mrs. Pickard upon the former trial (Steel & Malone) testified that she could not tell whether it was or was not the signature of her

mother; upon the trial of this cause, with no greater means of knowledge than she formerly had, she testified that it was not her mother's signature. On direct examination she was asked, "Have you examined the signature purporting to be hers on this note? A. Not very closely. No, Sir." Upon cross-examination (speaking of the former trial). "Q. And you stated you could not tell whether it was or not? A. I was undecided, I said so. Q. Now you say it is not her signature? A. Yes, Sir. Q. What has led you to change your mind? A. *I have had closer examination, and circumstances connected with it.*" No matter how honest the witness was in her conviction, nor how satisfactory to herself her reasons were, her evidence could be of very little value. The youth, son of Mrs. Pickard, showed himself, by reason of inexperience and want of opportunities, unqualified to judge, and what he thought about it was unimportant.

The other witness, Mr. Mansfield, arrives at the same conclusion as Mr. Pickard for the same reasons, viz. the signature is too regular, lacks the nervousness that characterizes the signature known to be genuine, and the language of himself and Pickard is so identical in one respect that it is worthy of notice. Mr. Pickard: "It might do for twenty or thirty years ago, but for the last five years she could not sign her name with the steady hand that it seems that was written by." Mr. Mansfield said, "It is written there like she might have written twenty-five or thirty years ago, a steady hand." This being the basis of the judgment of each, and examination and comparison of the signatures by any one, whether expert or not, shows that the conclusion could hardly have been reached without the aid of interest or imagination or both.

This brings us to the main defense relied upon, an *alibi* on the

part of Mrs. Hawkins on the day the note bears date and the day Mr. Hurd testified she executed it at his home in the afternoon, by attempting to show that she was at the house of Mr. Mansfield, seven or eight miles in the country, from the day preceding until two days afterwards. But a very brief review of the testimony upon the point can be had, or is deemed necessary. Mrs. Hawkins was the foster mother of Mansfield. His testimony and that of his wife was that Mrs. Hawkins visited them frequently during the summer of 1887. Two years and a half afterwards this case came on for trial; then the note in question was examined and the attempt made to establish the fact of Mrs. Hawkins having been at their house on the day the note bore date, and thus, inferentially, discredit it, not by showing that Mrs. Hawkins did not execute the note, but by showing that she did not do it on the day testified to by Hurd, thus, by establishing a collateral fact in connection with the date, attempting to establish the forgery. Human memory is so defective that it was apparently realized that unless fortified strongly by circumstances and other facts corroborative, that particular date could not be fixed out of the numerous dates she visited; so the purchase of a harvester, the making of a note in payment, of the same date as the note in controversy, and the taking the machine home are involved to fix the date. It appears that upon the Steel & Malone trial the note given for the machine was exhibited, afterwards lost or misplaced, and never put in evidence in the trial of this cause; consequently its existence, the date and everything pertaining to it, was the oral evidence of those that had seen it. Admitting its existence and its date to have been as stated, still the whole fabric rests upon the testimony of Mansfield that he made it on the day it bore date.

Mrs. Mansfield's evidence is of very little value, for she admits that her knowledge of the date and even the existence of the note was derived from her husband. Allowing all these collateral facts to have been properly established, which they were not, they could have no bearing upon the question of the genuineness of the signature, would only show that it was not executed on the day of its date, and would only show that Hurd had either been mistaken as to the date or Mansfield mistaken in his dates, but could not establish the forgery. Forgery cannot be established by inference from some other facts, and these facts dependent upon memory for that interval of time. . . .

In a case of the magnitude of this, and where the result is so serious as to morally convict a party of crime, the evidence establishing the forgery must be competent and all

that is legally required. It must be satisfactory in every respect; nothing less than clearly satisfactory evidence should be permitted to defeat the note and place upon the witness Hurd the obloquy of crime. In this case there is no such evidence. Examined and analyzed, it is found utterly insufficient to overthrow the evidence of the plaintiff. It, at most, only raises a presumption or suspicion of fraud by setting up an illy founded and poorly authenticated set of facts, from which fraud and crime might be inferred. Under such circumstances the verdict should not be permitted to stand. It was evidently the result of mistake or of willful bias and in direct disregard of the instructions of the Court. For reasons given, the judgment will be reversed and the cause remanded for a trial *de novo*.

*Reversed.* — BISSELL, P. J., concurs. THOMSON, J., dissents.

385. **VANCIL v. HUTCHINSON.** (1895. APPELLATE COURT OF ILLINOIS. 63 Ill. App. 632.) . . .

*Conkling & Grout*, attorneys for appellant. *Patton, Hamilton & Patton*, attorneys for appellee.

Mr. Justice PLEASANTS delivered the opinion of the Court.

This action was commenced October 2, 1893, by appellee, upon the common counts in assumpsit, to which appellant pleaded the general issue. The trial resulted in a verdict for plaintiff for \$1997, which the court sustained against a motion for a new trial and rendered judgment thereon. As disclosed by the evidence, plaintiff's claim was for the unpaid residue of \$1997 of the sum of \$3000, alleged to have been left for her in defendant's hands by Edmund C. Vancil, who was his father and her father-in-law. Defendant claimed that he received only \$1003, which amount, it is admitted, he paid to her; and the record presents but little else than the question of fact.

Appellee's first husband, a brother of appellant, died in 1861, leaving a daughter. After twelve or fifteen years of widowhood she married Mr. Hutchinson, her present husband, and has since resided with him in the State of Texas. Some time in the early part of 1890, Edmund lost his wife, and about a month afterward went to live with appellant, with whom he remained until the 31st day of December, 1891, when, as the result of a fall, he died at the great age of ninety-two years, leaving several children and grandchildren, and a very considerable amount of property in money and notes. He had made a will, which had been destroyed — when, how, or by whom does not appear, but probably before the death of his wife. No copy of it was produced nor its contents otherwise shown. He had also given to several, if not each of his children, considerable sums of money, among them to appellee, at different times

during her widowhood and afterward, the aggregate amount of which she would not attempt to state, even approximately, having kept no account of them, and which no one else appears to have known unless it was the old man himself, who deducted such advances in the cases of others in the final distribution which he made in his lifetime. Her statement, upon strong pressure from her counsel, that she did not receive \$1997 in all, after such admissions of her ignorance of the amount she and her daughter had received, must be considered of little weight, since it would be true if she had received \$1796.99. It was admitted that by the will he had expressed his intention that appellee should have \$3000, but whether it was declared to be subject to such deduction was made a question pertinent to the main issue, which was, How much had he intrusted to appellant to be delivered to her?

In the latter part of April, 1890, shortly before the death of his wife, he and his sons, William A. and appellant, were together at his house, selecting from his notes the amounts he intended then to appropriate to several members of his family, respectively, and some other objects of his bounty. On that occasion William did the figuring. Appellant claims that they selected for appellee three notes, amounting to \$1003, and placed them together in an envelope, which, with others so placed for other parties, the old gentleman kept for a time in his own possession to receive payments of interest thereon that should be made before delivery for their intended use. He distributed some notes to appellant and William, and perhaps to some others, within a few days — mostly notes given by them to him — for which he took their receipts; and in June following, assisted by appellant and

in the absence of William, made a further distribution and prepared receipts to be signed therefor by the distributees respectively, as before, but of which also he retained possession. On the 11th of November, 1891, having been seriously hurt by a fall, and thinking the end was not far, he delivered to appellant for the beneficiaries the notes for the several amounts intended for them, together with the receipts therefor so prepared. We understand it was mostly, if not entirely, in notes, from the proceeds of which appellant was to pay them, though some of it may have been in notes of the parties, to be surrendered. Among them were the three above-mentioned for appellee, and which appellant says were all that he ever received from his father for her.

Her claim for \$1997, to make up the \$3000 bequeathed to, and alleged to have been intrusted to him for her, and which the jury allowed, rests upon the testimony of her brother-in-law, William A. Vancil, and her nephew, A. C. Moffet, and a statement in a written communication in the name of appellant, to William, and designated in the record as "Exhibit A." Neither of these witnesses, when he testified, May, 1894, was on friendly terms with appellant. Their testimony related almost entirely to verbal admissions and statements, said to have been made by him from two to four years before, only one of which was stated to have been made in the presence of a third person, then living, and that person was not produced. Not one, therefore, was directly corroborated. Appellant positively denied them, in the sense in which they were intended for the jury. They were nearly all in the same language, viz. "that Mary (appellee) was to have \$3000," without explanation; which of itself would be no evidence that appellant ever received from his father, for her, more than \$1003, the receipt of which he admitted,

and which appellee admitted he paid to her in full. He never denied, but freely admitted and may have repeatedly said, that *by the will* she was to have \$3000, but he claimed that either by it, or his father's determination after it was destroyed, or by both, that amount was expressed to include what she had already received.

Moffet, however, also testified that about a month before the old man died, in reply to his question whether he had sent to Mary *the \$2000*, appellant said he had. And this is supposed to be made intelligible and consistent by the statement of William, on cross-examination, that at the meeting to make some division, in April, 1890, where he was told that by the will Mary was to have \$3000, and when they "were dividing up the notes," his mother and his father both "said to send Mary her money; we could keep the notes and send her the money; that there was plenty of money on hand to send her"; and that appellant then said, "by God, he would send her but a thousand"; a remarkable declaration, certainly, when we consider in whose presence and of whose money it was said to have been made. The suggestion is that his father asked him if he had sent to appellee the two thousand, as stated by Moffet, in view of this declaration more than six months before, as stated by William, that he would send her but one thousand, showing his understanding that she was to receive \$3000, and that appellant's answer showed he had received it for her. Appellant denied Moffet's statement, both as to the question and the answer, and that of William as well. He testified that all he received from his father for appellee was the package of notes for \$1003.13, out of which he was to get the money; that he received them on November 11, 1891, about two weeks before the alleged conversation mentioned by Moffet, and



about six before the death of his father; that he was not expected to send her the money before that event, and did not until long after. Her receipts for the amount he sent, being \$500 and \$503, bear date respectively of October 10, 1892, and March 24, 1893.

On his cross-examination William A. Vancil stated that the last time he was at his father's to divide the notes was in April, and might have been the 24th, 1890, and testified, "We did not set off any notes to Mrs. Hutchinson (appellee) that day. I did not make a memorandum in my own handwriting there of the amount to be set off to her, that I remember of." He was then shown a memorandum as follows — "April 24, 1890. Three (3) notes to Mrs. Mary M. Hutchinson amount to \$1003.13," and admitted it was all in his handwriting. We refrain from comment on the explanation he attempted to make of it, further than to say that in our judgment, as respects his own credit, it was worse than a failure. Again, he testified that two or three months after his father's death, he wrote to appellant inquiring about the amounts his father had appropriated to different persons and purposes, as shown by receipts prepared for their respective signatures, and received an answer giving the several amounts, among which was one showing that appellant had received for appellee \$3000. That is the paper already referred to as one of the supports of appellee's claim. It can be more intelligibly explained after the introduction of some other documentary evidence and will be noticed again in that connection. It is "Exhibit A." He further testified that after his father's death, having learned that appellant had not paid appellee all that was due to her, he advised her of it, and shortly before this suit was brought she came to visit him. He lived at Waverly, in Sangamon county, and appellant near Modesto,

in Macoupin. He took her to appellant's place and demanded of him, for her, the \$2000, claimed to be still due. Appellant denied it — said that what she had received was all that was coming to her, and asked them both to come into the house and look over the books and papers, but they did not go; William says he had some business in town and was in a hurry to get back. Appellant says that William flew into a passion and threatened to sue him — was going to get out of the buggy and whip him, and said he would whip him the first chance he got; that he tried to pacify him, and did everything he could to get him to come in and examine the books and papers — told him they would satisfy him that he (appellant) was all right, and that if sued he thought he could beat him without a witness. William and appellee were both afterward called in rebuttal, but neither denied the fact nor the urgency of appellant's invitation nor the threats he said were made and passion displayed by William.

The foregoing is substantially all of the oral testimony on behalf of appellee. As already observed, it comes from two witnesses, both being biased by personal animosity against appellant, and relates to alleged verbal statements which were separated in time and place, neither of which was directly corroborated and each of which was denied by him. That on behalf of appellant, excepting what was introduced in connection with or relation to the writings, came from himself alone, and is also in substance above set forth. We now turn to the documents.

The memorandum of William A. Vancil, offered as contradicting his oral statement and confirming that of appellant as to the setting apart for appellee of \$1003.13 at the division of April 24, 1890, has been adverted to. It was picked up by appellant's wife from the table or

floor, on that day, after the business was done and the parties had separated.

Next is a receipt taken by his father from appellant, of November 11, 1891, upon delivering to him the several packages of notes, the proceeds of which were by the latter to be paid over to the persons respectively named; which is as follows: "Received of E. C. Vancil, \$10,000 for Mordecai Vancil; also \$3000 for Mary M. Hutchinson, less \$1997 that she has already received on the aforesaid \$3000; also \$500 for Portia Gilkerson; also \$2500 for Effie Vancil; also \$2500 for Ida Vancil; also \$2500 for Ollie Vancil; also \$100 for graveyard, and \$20 for 'the church.' All of which I agree to pay over according to instructions. I. B. Vancil. Effie Vancil, witness. November 11, 1891." This paper, excepting the signature of appellant, is in the handwriting of his oldest daughter, Effie, now Mrs. Jordan. She testified that she wrote and witnessed it at her grandfather's request, and at his like request read and showed it to him. He then gave it to her father to sign, and it was put with her grandfather's papers. It was written in his room, on the day of its date, in the presence of her father and grandfather.

An attempt was made on her cross-examination to show that it was dictated by her father. We think nothing was elicited to impair the force of the paper or of her statements in chief respecting it. Her answers seem to be natural and candid. She thought she used in part a receipt which her grandfather had written, but had no very distinct recollection as to that nor as to any dictation; her father may have dictated it in part. The material part is the deduction of previous gifts from the \$3000 for appellee. It is not probable that appellant knew the amount of those advancements except by information from his father or the fact that

notes for only \$1003 had been set apart for her. If he mentioned the matter and amount (which does not appear) he must have done it in the presence and hearing of his father, to whom the paper was read, shown, and delivered as it is, by the witness.

That he knew it and intended to have it so is further shown by the receipt prepared by him and in his own handwriting, to be signed by her when she should get the \$1003, which is as follows: "April 30, 1890, received of E. C. Vancil one thousand and three dollars (\$1003), part of my stepfather's estate, and I agree that this shall be a final receipt of all claims against my stepfather up to date. This amount is the same as specified in his will, and if I try to break his will, aid or persuade others to do so, I agree to pay back all this money and relinquish all claims to his estate." Under this appears the following, in the handwriting of appellant's daughter, Ida: "Be sure and return this. It is all my written authority"; which appellant explained by the statement that when he sent to her the draft for \$503, in March, 1893, he directed his daughter to write the letter and inclose a receipt for the amount to be signed by appellee, and also this receipt prepared by his father for the full amount, \$1003, not to be signed by her because she had already receipted for the \$500 sent in October, 1892, and was to sign the inclosed for the residue, but to show her it was all his father left him or intended for her, and to be returned to him. He says he put it in the letter of Ida, and mailed it himself, and that it was returned to him with the receipt, also produced, for the \$503. Appellee denied that she received it with the draft, or ever saw it before the trial, and her letter acknowledging the receipt of the \$503 was not produced. We think the fact, however it may have been, was immaterial. He may have in-

advertently omitted it though intending to inclose it. No motive for withholding it is apparent. Its genuineness is fully proved and not questioned. That he actually gave it to Ida to be so sent, as she understood, is manifest from her request underwritten. And the appellee may have received it and forgotten the fact. She never had a suspicion that any more money was left with him for her until so informed, afterward, by William A. Vancil, and therefore the paper was not likely to be regarded by her as important to be remembered. It appears that some if not all the packages set apart at the first division, April 24, 1890, were delivered to the parties for whom they were intended on or before the 30th. William A. received his at that time and the receipt prepared for him to sign was dated on that day, as was appellee's. A further division was made in June, at which William was not present. Receipts for these were prepared in like manner, but were all retained by the old man, with the notes, to receive and credit payments of interest thereon, until November 11, 1891, after he was disabled, and about six weeks before his death, when he delivered them to appellant and took his receipt of that date, above set forth. Some two or three months after his death William A. wrote to appellant for copies of the receipts his father had held, and received in reply the following, which is the "Exhibit A," introduced by appellee: "I do not think it will be necessary to copy all these receipts, as they are nearly identical in language, but will give a list of the amounts.

I. B. Vancil . . .	\$24,500.00
A. E. Moffett . . .	3,002.41
I. B. Vancil, for	
Mary . . . . .	3,000.00
I. B. Vancil, for Mort.	
(Mordecai, a brother of appellant in California)	10,000.00"

The list proceeds in like manner,

giving the other amounts mentioned in his receipt to E. C. Vancil, of November 11, 1891, hereinbefore copied, and others, amounting in all to a little over \$100,000 and then continues: — "He gave Burke \$2500 in cash, for which there is no receipt. . . . I have the notes all just as I received them, and as they have been for the last year. I have his books in which all the notes are listed. Come down some day and I will show you all about it. . . . I hope you will not be foolish enough to take this into court, as there will be nothing in it. Now I believe this is all I think of. I. B. Vancil."

The material item in this statement is that of "I. B. Vancil, for Mary, \$3000." It is conceded that Mary, there named, is the appellee. William testified that the body of the paper was not in the handwriting of appellant, but he believed the signature was. Appellant positively denied it, and was corroborated by his daughter Effie and his son Burke, each of whom also testified that it was in the handwriting of his daughter Ida, and not of appellant. The latter stated that when he received the request he was very busy; that his older daughter, who usually wrote for him if she was at home, was then away; that he placed all the papers in the hands of Ida, and directed her to copy the two receipts from William, and give him a list of the amounts of the others; that she had his receipt to his father of November 11, 1891, and must have taken from it the items with which her statement charges him; that, after giving her all the receipts and papers, and the general direction stated, he went about his business, and never saw or knew of her statement until it was produced on the trial; that he did not direct her to put down in that letter "I. B. Vancil, for Mary, \$3000"; and closed by saying "the amount of it is she just struck the first amount and never said anything about the conditions." Ida was

too ill at the time of the trial to be present. We perceive nothing in this explanation, of itself or in the light of any circumstances shown, which would justify a reasonable doubt of its truth.

The foregoing comprises substantially all the evidence, and is perhaps set out at unnecessary length. Had the verdict been found upon the oral testimony alone, we should have had no inclination to interfere with the finding. It would have been for the jury to reconcile, accept and reject, as they in their judgment, with their superior advantages, saw fit. But that which seems to us to be the most convincing by far, is shown by what is more to be trusted than the recollection by witnesses of oral declarations, after the lapse of so long a time, however disinterested and honest they may be. With the correction made, as it fairly should be, of Ida's statement in the letter written in her father's name to William A. Vancil, the documentary evidence is all one way. So far as we see, it clearly preponderates against the evidence of appellant's admissions that he received \$3000 from his father for appellee, and corroborates his denials of them, and his statement of the material facts generally. The charge of a disposition on his part to withhold his father's books and papers from examination by or for appellee, is refuted by the letter of Ida and the testimony of William, assented to by appellee. He had no reason to anticipate a need of these books on the trial. Whether they showed the advancements to appellee, which is all it is said they

might have done, was not material to the issue; which was, how much had appellant received for her. He did not state, nor pretend to know, how much she had previously received. If his father, upon his understanding or misunderstanding, stated what it was and therefore left for her only the difference between that amount and \$3000, then whatever the books might show was the amount charged to her, it could not affect appellant's liability in this case, and that he did so state is conclusively shown by his own writing. There is nothing in the record upon which to found a charge of forgery, fraud or mistake, in connection with that statement. That he acted upon it is further shown, as we think, by the memorandum made by William on April 24, 1890. Excepting his alleged verbal admissions, there is not a particle of evidence that appellant received for appellee a dollar in cash or otherwise besides the notes for \$1003.13. He must have understood that William knew that was the amount set apart for her, and have presumed that Ida had given him the amount as stated in the receipt of November 11th; and therefore he could hardly have admitted to William or stated to his father in the presence of Moffet that he had received \$2000 more for that purpose. It is unnecessary, and might be harmful, to comment further upon the oral testimony.

Being of opinion that the verdict was clearly against the weight of the evidence, the judgment will be reversed and the cause remanded.

386. **THE DURRANT CASE.** (JOHN H. WIGMORE. *American Law Review*. 1895, Vol. XXX, p. 29.)

<sup>1</sup>The case was called on Monday, July 22, 1895, in the Superior Court, Department 3, of the City and County of San Francisco, California, before Hon. Daniel James Murphy. The twelfth juror was obtained on Thursday, August 29, or 5½ weeks later; 21 actual days being consumed in selecting the jury. The lists needed were a general one of 1250, from the general venire, and two more special venires of 75 each; of these, 482 were challenged for cause, and 15 peremptorily (4 for the State, and 11 for the defense). The opening address, followed by a view of the premises, took place September 4; the counsel for the State being Mr. Wm. Sanford Barnes, District Attorney, and Mr. Edgar Davis Peixotto; and for the defense, Mr. John Henry Dickinson, Mr. Eugene Nelson Deuprey and Mr. Abram Warren Thompson.

The facts leading up to the charge were in brief as follows: Miss Blanche Lamont, 21 years of age, lived with her aunt and her aunt's husband at 209 21st street. She had been brought up in Dillon, Mont., and had come for her health to San Francisco, in September, 1894, her sister Maud (19 years old) having come in the preceding June. She had been, since her arrival, an attendant, as well as her uncle, aunt, and sister, of Emmanuel Baptist Church, Pastor George J. Gibson, situated on the east side of Bartlett street, halfway between 22d and 23d streets. She here attended with fair regularity the Sunday-school and the morning service, as well as the weekly and monthly meetings of the local branch of the Young People's Christian Endeavor Society. She also went weekly to the meetings of an amateur orchestra, in which she played the violin, at Grace Methodist Church; and,

for a short period, went weekly to a reading-club, of which her uncle was a member. Other than this she went out little; and she was chiefly in the society of her own family, except that this or that young man more or less frequently escorted her home (alone or with her sister) from the meetings of the church, the society, and the orchestra.

On Wednesday, April 3, 1895, she left her home as usual to attend the morning work at the Girls' High School, on Sutter street, near Gough. Thence she went (also in accordance with her customary practice, beginning with that week) to an afternoon cooking class, at the Girls' Normal School, on the east side of Clay street, just north of Powell. She left this school with the other pupils at 3 o'clock; by supper time she had not yet reached home, and when morning came, she was still missing. The police were informed, search was made, and the disappearance was discussed in the newspapers as a mysterious case of possible enticement or elopement.

On Saturday morning, April 13 (Easter Sunday falling on April 14), some ladies went to the Emmanuel Church to decorate it with flowers. Happening into the library, they found there the dead body of one Minnie Williams (who had disappeared on the preceding Friday night), evidently murdered. The police were called, and searched the church, finishing late in the evening. The search of the belfry tower, however, was postponed until the following morning, — the tower door being locked, and (as afterwards appeared) the handles broken off and thrown from the inside underneath the flooring. At 9 A.M. on Sunday, the search being resumed, the door was forced open, and on the second or top landing of the belfry stairs was

<sup>1</sup> For the proceedings at the trial and for other information the writer is indebted to the courtesy of T. Worthington Hubbard, Esq., of San Francisco.

found a body, which was immediately suspected to be and was soon afterwards identified by Mr. Noble as that of Blanche Lamont.

The body lay upon its back, entirely naked; the hands crossed in front, the feet together, and the head supported on each side by a block of wood somewhat in the manner used at autopsies to steady the body to be operated upon. An examination showed that death had occurred by strangulation. The lungs and the windpipe were congested; the throat was compressed, and there was some clotted blood about the mouth and the nose; while upon the right side of the neck were five finger-nail incisions, and upon the left side seven, one of these (on the left side) appearing to be that of a thumb.

The decomposition which had set in pointed to perhaps two weeks as the period elapsing since death, and it had so far progressed that it was impossible to determine from the body whether an attempt on the virtue of the deceased had been made. No blood appeared about the premises,<sup>1</sup> and though the floor was dusty, it was so littered with sticks, sawdust, shavings, and papers, that traces of a struggle or of footprints were hardly to be expected, if indeed there was any serious attempt to discover them. The clothes of the dead girl were missing; but after some search (made by the three or four policemen present, as well as by some of the dozen other persons who had been allowed indiscriminately to enter) the various articles were found in the following places: A glove and other articles on the floor near by; the girl's school books and strap, under the joists in the southwest (front) corner of the middle ceiling; her hat, under the belfry flooring; her shoes, under the rafters of the lower ceil-

ing in the southwest corner; another glove, between the joists in the southeast (rear) corner of the lower ceiling.

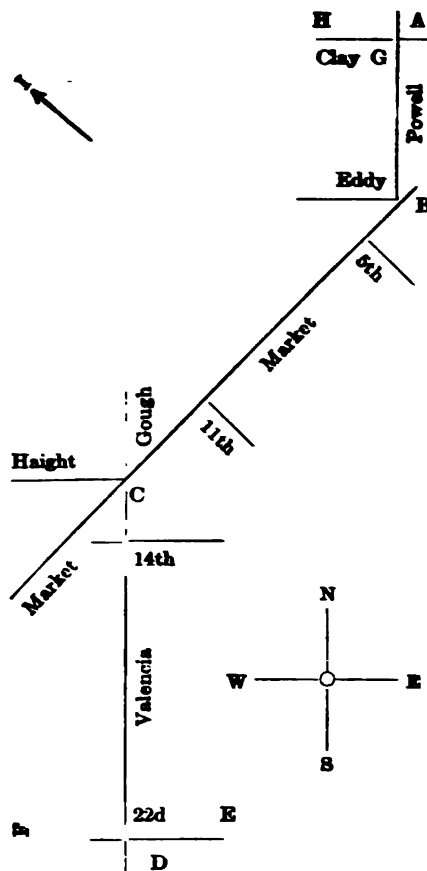
The situation and construction of the building, as they are material to the understanding of this and subsequent parts of the story, must now be explained.<sup>2</sup> The church building, measuring some 115 × 55 feet, stands full up to the street line on a lot 125 × 80 feet, the street being 60 feet wide over all, and the church standing some 200 feet from 22d street. On the north side of the building is an alley space of nearly 4 feet, on the south side another of 20 feet, both of these being fenced in, with a gate in each front fence. There is a door on the north and on the south sides, as well as in front.

Within, on the ground floor, is first a vestibule, with stairs leading upwards right and left (to the main auditorium vestibule); at the left side is a small library room; then a large Sunday-school room; then an infants' classroom separated from the main room by folding doors; and, at the same or east end of the church, a janitor's room, a wash room, and a stairway to the next floor. On the second floor, the east or rear end contains (back of the auditorium) a pastor's study, a baptistery, and a choir and organ loft; the latter receives the stairs from below; and from a passage behind the study and the baptistery another stairway ascends through the rafters to an attic at the back of the roof. At the west or front end is the main vestibule, from which a stairway leads to a gallery on the west wall, some 12 feet above the floor, and 15 or 20 feet below the ceiling. The belfry tower, at the same end, projects from the main building, and is entered exclusively by a door from this gallery. A

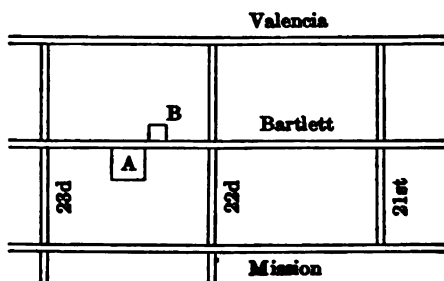
<sup>1</sup> Some stains found below were otherwise explained.

<sup>2</sup> The subjoined diagrams show the situation of the building and the other localities important in the case. The interior of the building could be represented — if indeed by anything short of a model — only by several diagrams, for which space does not suffice.

A - Normal School. B - Transfer Junction. C - Transfer Junction. D - Church. E - Miss Lamont's home. F - Defendant's home. G - High School. H - Medical School. I - Direction of Mrs. Crossett's starting point. AB =  $\frac{1}{2}$  mile. BCD =  $2\frac{1}{2}$  miles. ICD =  $3\frac{1}{4}$  miles (by streets).



A - Emmanuel Church.  
B - Mrs. Leake's House.



No. 386. STREETS AND PREMISES IN DURRANT CASE





winding stair, in 53 steps, goes up within the tower 15 feet to an intermediate or first landing, then 18 feet more to the second or main landing. The peculiarity of the roof is that there are three distinct levels, creating two chambers or lofts extending over the entire auditorium; first, the real or outer roof; next, the original ceiling, several feet below and formerly plastered on the ceiling side; and last, a new wooden ceiling, several feet below the old one, added in 1894. The wall at the front or west end is sheathed over for the space between the new and the old ceilings; but there are two openings (one like a doorway) in the wall beams between the old one and the roof; and thus access could be had to it at this end from the belfry landing;<sup>1</sup> while at the other or east end the attic over the stair leading up from the baptistery admitted to the lower chamber between the old and the new ceilings. Furthermore, access from the level of the old ceiling to the new one could be had at the front end by climbing down through a space between the rafters of the old ceiling. Finally, the regular way to get inside the new ceiling from the church proper was through an opening at the front end above the gallery, by means of a ladder kept in the gallery; this access being necessary in order to adjust the gas jets or "sun-burners" which hung down into the auditorium at the rear or east end through openings in the lower ceiling. Thus, the murderer, after the belfry door handles were broken off on the inside, would have to leave by stepping from the belfry to the level of the old ceiling, and then through the beams to the lower ceiling, and either passing across it to the stair in the attic at the rear or climbing down by the ladder to the gallery; in either case he must be completely familiar with the church; while the former

mode of exit would be the more natural, because he could not have placed the ladder beforehand while in the girl's company, and without the ladder the drop from the ceiling to the gallery would be unpleasant, if not dangerous.

The surroundings furnished also these further indications. First, the death must have occurred before the afternoon of April 4, because on that day the plumbers were in the church and could not get into the belfry because the handles were broken off and the door locked. Next, the murderer must have been one who was furnished with keys to enter the church and who knew it would be deserted at the time. Finally, the entry must have been voluntary on the part of the deceased, and therefore the murderer must have been a person sufficiently familiar with the deceased and sufficiently entitled to have business at the church to be able to furnish plausible inducements to a girl of the character of Miss Lamont to enter the church with him for some special occasion on a week day.

How, then, was suspicion directed towards the accused, and on what evidence did the State charge him with the murder?

We may take up the evidential material in several groups.

A. 1. *Motive*. — Up to the last moment of time when either Durrant or the deceased girl was seen, there was absolutely no evidence of a motive for him to kill her. The accused met Miss Lamont in September, 1894, soon after her arrival. He was then librarian and assistant superintendent of the Sunday-school in Emmanuel Church, as well as usher at the church services. They were both members of the local Christian Endeavor Society; and he had frequently escorted the sisters home from church on Sunday and also from the week-day meetings of the society. He had called at

<sup>1</sup> It appeared that by a hole in the plaster in the gallery wall there was another possible mode of access; but no question was raised as to its use.

the house not more than twice or thrice. Of her few friends he was perhaps her most frequent but not an exclusive nor an assiduous attendant. He was at the time 23 years of age, was born in Toronto, and had lived in San Francisco some 16 years. He had attended the Emmanuel Church some three or four years, lived five or six blocks distant from the church, and was in April, 1895, in his third or senior year as a student at the Cooper Medical College. Neither in his own life, then, nor in that of Miss Lamont, was there found any circumstance betraying a likely motive for killing her.<sup>1</sup>

*2. Opportunity; Presence at the Time and Place of the Killing.* — The main reliance of the State was upon a chain of testimony which, if true, would place the accused in the church with the deceased at the probable time of the murder. To begin with, the accused had met her (by accident, it seems; at any rate it was the first occasion of the sort) on the very morning of Wednesday, April 3, on her way to the High School; and had ridden with her in the cars to the school,<sup>2</sup> there leaving her and passing on to the Medical College.

But his presence at the church with Miss Lamont in the afternoon of that day was the main support of the State's charge, and this they affirmed on the credit of the following series of witnesses, who traced him from point to point: —

*Miss Edwards:* Came out of the Normal School about 2:55 P.M., and walked to the corner (Clay and Powell) with Blanche Lamont; here a young man met Miss Lamont and boarded the passing car with her, sitting on the east side (the school side) of the grip car; the witness

entered the closed car attached, and rode south with them; but she said at one time that she did not, at another that she did, notice them when the car reached Market street. The witness had never seen Durrant before, but identified him positively.

*Miss Pleasant,* now Mrs. Dorgan: Came out of the school at the same time and walked south on the east side, in company with Miss Lannigan; at the corner of California street (two blocks farther) a car overtook them, passing south, about 3.05 or 3.10, and on the east side of the grip-car, facing them,<sup>3</sup> was Miss Lamont with a young man, the latter holding an open book and both looking at it. The witness had never seen Durrant before, but identified him positively; she called Miss Lannigan's attention to the couple.

*Miss Lannigan:* Told exactly the same story; she had never seen Durrant before, but identified him positively.

*Mrs. Vogel:* Lived directly across the street (on the west side) from the Normal School. On the above day she was looking from her front window about 2.07, and saw a young man at the corner on the east side; he walked back and forth between there and the school till 3 o'clock, standing at one point facing the witness for as much as 15 minutes at one time. The witness had \$300 in the house, and, thinking his lingering suspicious, watched him carefully, even using an opera-glass for this purpose. About 3 o'clock, when the scholars came out, he met two of them, and got on the grip car with one of these, while the other entered the closed car. The witness had never seen Durrant before, but identified him positively; the girls she had not noticed sufficiently to identify.

From this point there was no tracing until that stage of the journey was reached in which they would

<sup>1</sup> There were but three available hypotheses as to the motive of the murderer: (a) a pure glut for blood; (b) a sudden angry purpose arising from the girl's refusal to accede to an improper proposal, and from her threat, or the general probability, of speedy exposure of her would-be seducer's conduct; (c) murder to destroy the victim of his rape.

<sup>2</sup> This was proved by the conductor of the car, who knew Miss Lamont by sight as a frequent passenger; by a classmate of Durrant who was on the same car; and by the statements of the accused to his classmate, to Mrs. Noble, and to others; and it was afterwards admitted by his counsel.

<sup>3</sup> The seats of these cars run lengthwise.

pass along Valencia street, beyond the junction of Market and Haight.

*Mrs. Crossett*: Was seventy-one years old, lived a few blocks south of the church, and had known the defendant about four years, having seen him frequently in that time. On the afternoon of April 3, she was riding home in a Valencia street car, and saw the defendant sitting on the left side of the grip car with a young lady, the witness sitting on the right forward seat inside, second from the end.<sup>1</sup> She identified Durrant positively, but as to the young lady she could say only that her hat was like that shown as Miss Lamont's. The couple left the car at 21st or 22d street, and walked east toward Bartlett street. The time of seeing them at Valencia street near Market was fixed by the witness at a little later than 3.30, in the following way: She left her granddaughter's house, on Washington and Laurel streets, about 3.20 P.M.,<sup>2</sup> walked 2 blocks south to Laurel and Sacramento streets, then 1 block east to Walnut and Sacramento streets; boarded a cable car and rode 5 blocks east on Sacramento to Devisadero; changed and rode 10 blocks south on a cable car on Devisadero to Turk; changed and rode in an electric car 8 blocks south on Devisadero to Page; walked 1 block south on Page to Haight; took a cable car 8 blocks east on Haight street to the junction of Haight, Market and Valencia;

crossed the square and boarded the car coming west on Market street and turning off south at this point on Valencia; and it was on this car that she saw the defendant and the young lady. She arrived at her own house, some 6 blocks beyond the point of their departure from the car, at 3.58 or 3.59 by the clock.

The defense argued that her testimony was valueless, since it was impossible to make the trip in that time. The defendant's witnesses made the same trip (exclusive of the preliminary 3 blocks' walk) in 46 minutes. Allowing 5 minutes for the walk, this would make an error of 12 or 13 minutes in Mrs. Crossett's reckoning (33 or 34 minutes). But this discrepancy was accounted for (1) by proving an excessive delay of 3 or 4 minutes at one point for the defendant's witnesses; (2) by taking Mrs. Crossett's daughter's time (3.15) for her starting; (3) by supposing<sup>3</sup> some minutes' difference between clocks; all of which would give 43 or 42 minutes for the defendant's reckoning, and 42 or 41 minutes for Mrs. Crossett's, — an error of no significance. The only serious criticism to be made upon her times was their inconsistency with those of the other witnesses.<sup>3</sup>

*Martin Quinlan*: Lived on Mission street nearly back of the church, and knew Durrant by sight only, having seen him several times. On the above day he

<sup>1</sup> These cars are built in one piece, with glassed partitions between the open or grip section and the closed section; the seats all run lengthwise.

<sup>2</sup> According to her daughter, 3.15.

<sup>3</sup> Thus: By the Powell street witnesses the couple should have reached 21st or 22d street and Valencia by 3.40 at the latest; by Mrs. Crossett's time, by 3.48 at the earliest, and 3.52 at the latest; while by the next witness, Quinlan's time, they were at Bartlett and 22d streets not before 4.10. These differences were hypothetically accounted for as follows: (1) A lounging or a treating at a candy store in changing cars at Market and Powell streets; or a meeting and talking there with one Minnie Williams, afterwards murdered, this knowledge by her of their doings being the possible motive for her murder, as explained later; this delay would reconcile the stories of Mrs. Crossett and the Powell street witnesses. (2) A probable getting off the car at 21st street, on which Miss Lamont's home was, and the resumption and consummation of the defendant's solicitations to turn aside to the church down Bartlett street; a process which, together with a sauntering along the 2 blocks, would account naturally for difference between the time (3.48 or 3.50) when, by Mrs. Crossett's story, they left the car, and the time (4.10) at which by Quinlan's story they approached the church.

But it must be remembered that the sole effect of these discrepancies, such as they were, could be to impeach the trustworthiness of the identifying testimony. They did not affect the feasibility by Durrant of the murder. Whether the two reached the church by 3.45 or by 4.15 was immaterial to the State in this aspect; because, though the killing (as will be seen) could not have been done by him after 5.05, his presence at church for any period more than half an hour before that time was ample for the deed.

had an appointment with one David Clark at the saloon at the northeast corner of Mission and 22d streets; and at 3.53 or 3.55 (looking at the clock with reference to his appointment), boarded a Valencia street car on Market street near 9th; he got off at 22d street, and walked east on the right-hand (south) side; at the corner of Bartlett street he saw Durrant and a young lady crossing from the north to the south side of 22d street on the east side of Bartlett street, the witness being on the southwest corner approaching them at right angles as they reached the southeast corner going south, Durrant walking on the inside. The time must have been between 4.10 and 4.20. The appointment was kept, and the witness, in going about with Clark, took many drinks, which served as material for criticism on cross-examination.<sup>1</sup>

*David Clark:* Corroborated this witness as to the appointment, and fixed the times as the same, having looked at the clock in the saloon.<sup>2</sup>

*Mrs. Leake:* A member of the Emmanuel Church, an elderly person, lived at 124 Bartlett street, on the west side almost directly opposite the north alley gate. She had known Durrant for two years, having seen him nearly every Sunday, and on the above day she was looking out of her window, between 4 and 4.30 P.M., expecting and looking for her daughter, when she saw Durrant and a young lady, the former on the inside of the walk, approaching the church from 22d street on the east side of Bartlett street. They went on past the church and entered the south alley gate, Durrant opening it. The witness identified him positively (though she could not remember his clothes); the young lady she thought at the time was either Miss Lamont or Miss Turner. The witness wore glasses for reading only, and did not have them on when she looked out.

*George R. King:* Organist of Em-

manuel Church and assistant librarian of the Sunday-school, 19 years old, well acquainted with Durrant and the Lamont sisters, went to church on the above day "just about" 5 P.M. to practice a piece on the piano in the main school-room. He entered by the front door, went into the library for a few moments, then went to the piano, and had played 2 or 3 minutes when the defendant appeared at the folding doors (between the main room and the infants' room), and came through them into the main room. He had neither coat nor hat on; but his vest and necktie were in order. The witness said: "Hello, you look pale!" and Durrant<sup>3</sup> explained that he had been fixing the sun-burners over the auditorium, and had been overcome by the gas; then gave him fifty cents and asked him to get some bromo-seltzer; the witness went to a drug store one and one half blocks away, and brought back the bromo-seltzer; Durrant went with him to the kitchen and drank it. About this time Durrant mentioned that he had that morning ridden on the car with Blanche Lamont. He later went to a mirror to see how pale he was. After he had at King's request helped the latter to bring down a small cabinet organ from the choir loft, they went to the library, where Durrant found and put on his hat and coat and they left the church by the front door, about 6 P.M.<sup>4</sup>

Analyzing the story of the seven witnesses who bring him to the door of the church, we find that the first four did not know him before, but that three of these knew Blanche Lamont, while all four agreed upon the circumstances; and that the last three had known Durrant before, but did not know or could not positively identify Miss Lamont.

It will be now necessary to notice the remaining evidence of the State.

<sup>1</sup> This witness' character for integrity was impeached by half a dozen witnesses.

<sup>2</sup> An attempt was made, but of slight consequence only, to impeach this witness' character.

<sup>3</sup> Durrant himself tells that he said: "You would be pale, too, if you had been where I have."

<sup>4</sup> He arrived home at 6:15, and was thereafter satisfactorily accounted for.

### 3. *Subsequent Indications of Guilt.*

(1) On Wednesday, April 10, three rings worn by the deceased came by post, wrapped in a piece of the *Examiner* newspaper, to Mrs. Noble, the aunt. The paper bore in pencil the names "John T. King, Prof. Schernstein." Both George King (there being no John T. King) and Mr. Schernstein, the deceased's music teacher (who should have given her a lesson on April 3, the day of disappearance, but waited in vain at the house), denied on the stand that they had written the names. But Durrant's connection with it could not be shown. (2) On Friday, April 12, the church janitor, Sademan, saw Durrant about 4 P.M. waiting at the ferry at the foot of Market street; Durrant explained that there was a report that Blanche Lamont would come to the city that afternoon by the ferry, and he wished to see if it would prove true. To two fellow-members of the Signal Corps who passed him there and asked if he had heard anything about her, he made answer that he had a clew, the terms of the answer being disputed. They also testified that he explained that he was waiting for another member of the corps.<sup>1</sup> (3) On some day between April 4 and 10, about 11 A.M., Mr. Oppenheimer, a pawnbroker of 405 Dupont street, was visited by a young man, who submitted a cut-diamond ring for sale, the witness declining to buy. The witness identified Durrant positively as the man, and identified the ring as one of the three worn by the deceased and returned through the post on April 10. A Mr. Phillips, passing by the shop about the same period, identified Durrant as seen standing in front of the shop.

B. We may now turn to the defendant's evidence directed to the destruction of the fabric thus woven by

the State. As the State's main reliance (apart from the admitted fact of his being in the church at 5 P.M.) was upon the testimony which sent Durrant in the company of the deceased to the door of the church by 4.15 on the day of her disappearance, and upon the story of his afterwards bringing her ring to sell, so the defense concentrated its attack mainly on those two supposed facts.

1. *Motive.* — As no indication of a sinister motive had been produced against the defendant, there was here nothing to be disputed by him. The usual good character testimony was offered.

2. *Opportunity; Durrant at Another Place until too late to commit the Murder.* — The defense admitted without qualification that Durrant was at the church as testified by George King at 5.05 (approximately) on April 3; but proposed to show that he was at or near the Medical College until so late an hour that he could not have arrived at the church before 4.55; and in 10 minutes the deed, concededly, could not have been done.

In this view, then, the testimony of the seven eye-witnesses who believed that they saw Durrant with Miss Lamont (or another person) at successive stages of the route to the church was of course discredited. Against all of the seven (except Quinlan), the defense expressly disclaimed any imputation of dishonesty. It explained their identifying testimony as so many cases of mistake or illusion, and argued that the constant appearance of the accused's picture in the newspapers had tended to create the hallucination that he was the one whom they had seen. This they attempted to

<sup>1</sup> Other doings, not significant, were these. At the evening prayer-meeting of April 3, Durrant sat next to Mrs. Noble, said he had promised to bring Blanche "The Newcomes" but had forgotten it; asked whether Blanche was coming that evening; said that he would bring the book on Thursday; and did bring it on Friday. About April 10 he came to Mrs. Noble's house (as nearly every member of the church had done) and offered to search for her at places (meaning of ill-fame) which the police did not know of, but a friend would show him. This theory of her disappearance, he afterwards explained, had been suggested to him by a detective, an explanation not improbable in fact.

enforce, as to the last four, by pointing out that they had not appeared at the preliminary hearing, and had not notified the prosecution of their supposed knowledge until several weeks later. The discrepancies alleged between the statement of Mrs. Crossett and the others as to the time of day when Durrant was seen have already been referred to.

As to the constructive portion of the story of the defense, it falls into two parts: (1) The fixing of Durrant's whereabouts till 4.55; (2) The explanation of his reason for going to the church at all and of his doings while there. The defense, it will be seen, had in the latter part (resting mainly on the defendant's own testimony) a double risk to encounter; for not only would the failure to prove the facts alleged leave the State's story unshaken, but any serious inconsistencies or palpable falsities would tend to discredit his entire story as a manufactured one.

(1) Durrant at the Medical College. The defendant himself with commendable courage (and yet his case inevitably involved it) took the stand to tell his own story, which was in brief as follows:—

On April 3, the day of the disappearance, his last morning lecture closed at 12, a recess of one hour following. Not feeling well enough for a hearty lunch, he went north on Webster street for a walk, stopping at the corner of Clay street to buy some nuts which he ate as he walked. He returned by 1 P.M., and finding a notice that Dr. Stillman (the next lecturer) would not come that day, went with Student Ross for another walk north on Webster street, meeting on the way Student Carter, and returning in half or three quarters of an hour; then went to the library for about the

same time, speaking there with Student Diggins, then went downstairs and talked with Student Glaser, omitting a lecture by Dr. Hansen; then attended Dr. Cheney's lecture from 3.30 to 4.15, taking 5 pages of notes; then took the cars from Sutter to Larkin, to Mission, to 22d street, getting off at Bartlett, and reaching the church library at 4.55 P.M. by the watch.

As to this part of the story, the three students, Ross, Carter and Diggins, testified that they remembered the conversations and walks respectively; but they were unable to identify the date; the circumstances making April 3 of greater or less probability in different instances.<sup>1</sup> Student Glaser was not questioned on this point. Durrant's presence at the lecture, however (3.30–4.15), would have disposed conclusively of the State's story. As to this, first, neither the lecturer nor a single student of the 74 usually in the class could remember whether Durrant was or was not present at that lecture,—a not unnatural state of mind, since 12 or 13 days elapsed before his arrest would cause them to recall the occasion. Next, and of most consequence, the attendance-roll did show Durrant to be present,—the absent ones being marked by an "A," and Durrant's name having no such mark appended. But the accuracy of this roll was questioned by the State. The evidence *pro* and *con* as to the roll-call was as follows:—

*Dr. Cheney:* At the close of the lecture the roll was called by Student Gray, standing beside him and marking it. Dr. Cheney, though having no personal knowledge, believed the roll to be correct, having subsequently questioned each student (apparently after the ar-

<sup>1</sup> It may be pointed out that even if the walks had occurred on that day, the State's story was not thus disproved; for, taking the minimum estimate (half an hour) for the walk and the library visit, we reach only 2 P.M.; and the 15 blocks to Clay and Powell streets could have been covered by car in 15 minutes, bringing us to 2.15, a time not materially different from that at which Mrs. Vogel first saw him waiting there near the school (2.07).

rest) and found the record corroborated.<sup>1</sup>

*Student Gray*, in marking the roll, depended entirely on the answers as heard, not on eye-sight. In March the roll had not been written up, and so the roll for April 3 was at first by error marked in the blank space of March 31, and afterwards was copied into the correct place, the original marks being erased. The roll method was liable to error, he admitted, and in the succeeding June an improved system was adopted. He had no means of knowing whether one student was answering for another. Questions as to his experience on this point on past occasions were ruled out. On the defendant's cross-examination, however, it was brought out that on at least two occasions shortly afterwards (April 8 and 12) he had himself asked a fellow-student to answer for him, and on one of these it was only when the defendant was called upon to recite that his absence was detected. Out of the 74 usually in the class, apparently all (except one deceased) testified that they did not answer for Durrant on April 3; but one of them, who was marked absent, testified that he was in fact present.

But, besides the evidence (whatever it might amount to) of the roll-call record, the notebook of Durrant was of consequence. His 5 pages of notes fairly represented the lecture, and were as much like those of other students as they would naturally be. Two classes of evidence, however, were offered by the State to destroy the value of this circumstance. (a) It was claimed that there had been ample opportunity to copy them in afterwards. On April 10, Student Glaser went over with Durrant at the college

their notes of this day, April 3, Glaser alone reading and Durrant copying from time to time.<sup>2</sup> As to this, Durrant explained that a mutual "quiz," for purposes of improvement, etc., was not uncommon, and that he had copied only two rules in all.

(b) Furthermore, his notebook remained at the house till April 17th (unthought of by the police), when it was sent to his attorney's office (Durrant having been arrested on the 14th); his attorneys told him the notes were not complete, and the book remained in their possession for an indefinite time thereafter.

(c) It was claimed that Durrant had expressly admitted that he had few or no notes of that lecture, and had tried to borrow from others to complete them. Student Graham went on April 20th to the prison, and Durrant, asking Graham's companion to step aside,<sup>3</sup> —

"asked me if I would lend him my notes to compare with his own. He told me he had no notes at all, and if he could get them from me he could establish his alibi. He told me I could take them to his house and put them in his book and thus have them brought to him. He also said I might learn them and then tell them to him."

Graham did not accede to this request. Durrant admitted expressing to Graham a wish to have the notes, because "he didn't know whether he had full notes," and made this singular explanation: "I was following instructions of one of my lawyers to get notes of Dr. Cheney's lecture and complete my own notes and compare them."<sup>4</sup>

<sup>1</sup> This evidence, in another form, was objected to and excluded, but afterwards permitted, when the defense declined to accept the opportunity.

<sup>2</sup> On April 10 he already knew for several days that Miss Lamont had disappeared on the 3d.

<sup>3</sup> It was their joint request, Durrant said.

<sup>4</sup> Some apparent inconsistencies here appeared in his story. He claimed that when he was arrested on the 14th, he had forgotten whether he had notes, and first learned from his attorneys on the 17th that he had. But (1) on the 10th he had already gone over the same notes with Student Glaser; (2) on the 20th he at least told Student Graham that he did not know whether he had full notes.

It must be added that, according to two or three reporters, Durrant, when first arrested,

(2) Durrant at the Church. How did Durrant happen to be at the church at all, on the day of Miss Lamont's disappearance? His purpose, according to his own story, was to repair the easterly "sun-burner" hanging through the ceiling above the rostrum. It consisted of 24 gas jets, one being fitted with an electric vibrator, by means of which all were lit. The wire ran 75 feet to the gallery wall, where a gas valve turned on the gas and a push-button made the connection with a battery. Durrant's story, in brief, was as follows:—

He was interested in electricity (but knew nothing of gas), and had several times repaired the sun-burner attachment. He had several times been told of defects by Mr. Davis, the treasurer, by one of the trustees, and by the janitor, Sademan; one of these occasions was in the preceding January. About March 23 preceding, a trustee or Sademan (later he fixed it as Sademan) told him that the lights would not work at the first press of the button, and he said he would look after it. When he came to the church he went to the library, put his watch in his coat, and left coat and hat there on a box; went through the Sunday-school room up to the auditorium; proceeded to the gallery at the front end to turn on the gas; plugged the button, turned the gas half on, raised the ladder, mounted, went along the lower ceiling to the opening, took off the cover and reflectors, remedied with nippers the spring on the vibrator (an operation of 4 minutes or so), tested its working, and returned to the gallery and shut off the gas. While making the repairs he lay on his stomach, his head protruding downwards through the open-

ing over the gas, and the escaping gas nauseated him. This it was that caused the paleness described by the witness King. The rest of his story coincided substantially with that of King.

A vigorous cross-examination of nearly two days was met by Durrant with almost entire success so far as this part of his story was involved, — a circumstance of considerable significance in view of the great mass of details involved. But the State attacked the story at several points in the following ways:—

(a) The treasurer Davis and each of the five trustees testified that they had not spoken about the gas to Durrant at any time in 1895. The janitor Sademan testified that he had had no conversation with Durrant about the sun-burner at or about the time stated, and that the gas apparatus was "in a perfect state of repair," except for a loose key in the front lobby below, which sometimes caused a slight leak.<sup>1</sup> (b) Experts testified that the effect of inhaling gas would be a flush and redness of the face, not a paleness; but an expert for the defense denied this. (c) King testified that when he entered the library (which must have been about 5, or after Durrant had, by his own story, arrived) he saw no hat and coat there; and, as the door was locked when they went back there before leaving, it would follow (assuming that his not seeing them indicated that they were in fact not there) that Durrant, and he only, had put them there in the meantime, i.e., during King's absence to get the bromo-seltzer; since it was admitted that a new lock (to keep out book thieves) had been put on the door only a few days before, to which Durrant and himself alone had

told them that he had reached the church between 4 and 4.30. This he explained as a misunderstanding of his expression "gone to the church between 4 and 4.30," signifying the time of leaving the Medical School. But the newspaper reports of what witnesses had said or would say, proved so unreliable throughout the trial that this particular evidence did not play an important part.

<sup>1</sup> Workmen had repaired the single wall-burners in the church on April 2, and this, as the source of a gas escape, was made much of by the defense; as also the fact that King, on entering, smelled gas in the lobby below. But this could not affect the question of the state of repair of the sun-burner; and so far as it was offered to show the cause of Durrant's nausea, it was of no consequence, for the only gas that could have overcome him was that which he inhaled from the sun-burner, while the leak in the lobby accounted for what King smelled.



keys, and since the interval of his absence had afforded Durrant time to put the articles there. The effect of this would be merely to show that Durrant's story about putting them there on his first arrival was false.<sup>1</sup>

#### Durrant's Exclusive Opportunity.

— As further negating the hostile effect of the State's testimony putting Durrant at the church on that afternoon (whether with or without Miss Lamont), it was of course open to the defense to show the possibility or probability of some other person having equal opportunity to commit the crime or showing equally strong traces of guilt. In this respect much was promised, but little attempted, and practically nothing effected. The State had shown, as to modes of access, that the north door to the church had been nailed up in the previous year; that to the front door keys were possessed by King and the janitor Sademan only; and that to the south door keys were possessed by only King, Durrant, Sademan, Pastor Gibson, and the President of the Ladies' Aid Society, Mrs. Moore; furthermore, that the murderer must have been completely familiar with the church interior. Practically, then, the matter lay between the defendant, King, Sademan and Gibson. As to the former two, no attempt whatever was made to implicate them, and we must assume that it was not possible to do so. But a distinct effort, indirect rather than direct,

was made to fix suspicion on Pastor Gibson. It probably originated in the fair, though not striking, resemblance between the writing on the inclosure of the deceased's rings sent to Mrs. Noble and some specimens of Pastor Gibson's handwriting. The pastor was called to the stand to identify this handwriting, but for no other purpose. Other bits of evidence noted below, of little or no real significance, were, however, made much of by the defense (though scarcely mentioned in counsel's argument).<sup>2</sup>

#### 3. Durrant's Subsequent Conduct.

— The defense paid special attention to destroying the effect of two incidents of the State's story, — the visit to the pawnbroker Oppenheimer, and the waiting at the ferry on April 12.

The attack on the Oppenheimer story was made in several ways: (1) Durrant and his mother testified that he never wore in the daytime at that season the overcoat which the pawnbroker said he had on. (2) The pawnbroker appeared to be somewhat nearsighted. (3) Others who were sent or had for their own purposes gone to offer him jewelry testified to errors made by him in describing them. (4) A Mr. Lenahan, of the same general appearance as Durrant, had offered him a similar ring about the same time; but this witness' testimony was very weak; moreover Oppenheimer instantly picked out the Lamont ring when the two were shown him together. (5) Durrant's presence at other places on the mornings of the period in question

<sup>1</sup> It may be added that if Durrant had really come down by way of the west gallery, he would naturally have gone directly down the stairs at the west end to the library to get his hat and coat, instead of going unnecessarily to the stairs at the east end and then back through the Sunday-school rooms to the library. That he came down at the east stairs would, on the other hand, be perfectly consistent with his having just committed the murder, for as already mentioned, the natural way of retreat from the belfry was along the new ceiling to the east end and thence down to the baptistery and down the stairs to the Sunday-school rooms.

It may also be noted that as the gas-fitters (for some unexplained reason) took out the sun-burners on April 4, there was no means of testing Durrant's story as to his doings over the ceiling.

<sup>2</sup> (1) Footprints, in the belfry, of a shoe larger than Durrant's; (2) Marks of a chisel and a hammer on the belfry door, a chisel and a hammer being found in a box in the pastor's study; (3) shoes, of which one bore a brown spot, found in the pastor's study. But the attendant explanations and contradictions were such that this evidence may be fairly described as worthless.

was shown; but only partially. (6) Durrant was shown to have a little money in bank, and the ring was worth only \$2.50.

The ferry incident was so explained that perhaps Durrant did not in fact contradict himself as to his reason for being at the ferry. He claimed that he was really looking for Blanche Lamont; and, so far as his share in her death was concerned, this was quite consistent with his interest as a friend in her whereabouts.<sup>1</sup> But the prosecution made much of the absurdity of his story that he received the advice to go there from an unknown man, who stopped him on the street and then left him, and that Durrant made no attempt to inquire his

name or his source of information or to follow him; and to this extent the incident was used to discredit his whole story.

On Saturday, November 2, at 3.30 P.M., after 27 days actually occupied by the giving of testimony, and 5 or 6 more by the addresses of counsel, the jury retired. Within 30 minutes they returned with a verdict of "Guilty of murder in the first degree." A juror afterwards revealed that this result was reached without discussion and upon the first ballot. It is sufficient to note that the verdict appeared to be in harmony with the opinion of the community.

<sup>1</sup> The prosecution's view of his real purpose, which could not be brought out on this trial, was that he was waiting for Miss Williams, a girl who also had disappeared at the same time and was supposed to have been murdered by Durrant.

387. THE LUETGERT CASE. (JOHN H. WIGMORE. *American Law Review*. 1897. Vol. XXXII, p. 187.)

On May 1, 1897, Adolph Louis Luetgert, a native of Germany, lived with his wife Louisa, also a German by birth, in a house on Hermitage avenue, near Diversey boulevard, in Chicago. The husband was 52 years of age, large and heavy; the wife was 42 years of age, small and frail, weighing about 105 pounds. They had been married some 19 years, and had two children, Louis, 12 years old, and Elmer, 5 years old. Arnold, a grown-up son of the husband by a former marriage, lived elsewhere in Chicago. The only other inmate of the Luetgert household was Mary Siemering, a second cousin of Mrs. Luetgert, who worked for them as maid. Adolph Luetgert had made his way from small beginnings; at one time a tanner, afterwards a saloon keeper, then a butcher, he now carried on the manufacture of sausages in a large factory adjoining his residence, and in one of the buildings he had also a grocery store and a meat market. He had been reputed rich, and in the surrounding district of humble homes he was looked upon as a magnate. In the course of the preceding year, however, he had lost some \$25,000 through the schemes of an English swindler, and matters had rapidly gone from bad to worse, until in March, 1897, the sausage factory had been closed, only a few hands being retained for retail operations. The foreclosure of a chattel mortgage was impending, and on May 4, shortly after the events to be narrated, the sheriff took charge of the factory, and a sale under the chattel mortgage took place on May 11.

On the evening of Saturday, May 1, about 10.15 or a trifle later, little Louis Luetgert came home from the circus, entered the kitchen by the rear steps, and began to recount his experiences to his mother, who was sitting under the gaslight, dressed in a loose brown wrapper and in slippers. "Was it worth the 10 cents?" she asked. "Oh, yes, it was worth a great deal more than 10 cents," he insisted enthusiastically. But his story was interrupted by his father, who just then entered from the bathroom, with a lantern in his hand, and said, "You had better go to bed now; you can talk about the circus in the morning." The boy went to his room, which was on the same floor. He saw the father pick up his lantern (which he had at first set down), and later he heard him go down the basement stairs on the way out to the factory; for the father did not sleep in the house, but in a room partitioned off from the factory office, with some favorite big dogs for his only companions. The servant, Mary Siemering, was already in her room in bed. A little later in the evening (as some persons were found to assert), husband and wife were seen walking on Hermitage avenue, and along the alley towards the factory; but this testimony was so open to question that it may be laid out of consideration;<sup>1</sup> particularly as its correctness or incorrectness did not seriously affect the other elements of the controversy. This much, at least, is certain, that the wife was left in company with the husband about half past ten o'clock on Saturday evening, May 1. According to the prosecution, she has never

<sup>1</sup> Gottlieb Schimicke, 14 years old, and Emma Schimicke, an elder sister, declared that they saw this on the night of May 1; but the possibility of an error in dates is so serious, and they were so confused on cross-examination and had so discredited themselves by contradictions at other times, that one finds it impossible (while not disputing their honesty) to lay any stress on the incident they related. But Nicholas Faber testified to the same effect, and there may well have been truth in the story. Charles Hengst, passing the place a little later, thought he heard a cry; but little weight can be given to such experiences.

since been seen in human form, alive or dead, by any other person.<sup>1</sup>

On Tuesday, May 4, Diedrich Bicknese, a brother of Mrs. Luetgert, living in the country near Chicago, came to call at the Luetgert house, but did not find his sister there. Luetgert said, when Bicknese inquired where she was, "I don't know; ain't she at your place?" and then explained that he supposed she had run away. He said he would let Bicknese know in a week or two, if anything turned up; but Bicknese was not satisfied with this dilatory attitude; and when, on returning next day to the Luetgert house, he learned that his sister was still missing, he spent Wednesday, Thursday, and Friday in making inquiries of various relatives and friends, and ended by notifying the police on Friday, May 7. Luetgert meanwhile had done nothing, and had even reproached Bicknese for publishing the family's disgrace involved in his wife's desertion. On Saturday, May 8, the police began their search, dragging the river, the sewers, and the clay pits, and inquiring of all relatives and intimates. Six days later they turned their attention (in a somewhat belated fashion) to the factory employees, to discover what had been done there on the day of the disappearance; and on Saturday, May 15th (two weeks after the disappearance), upon hearing the story of Bialk, the factory watchman, five of the police (including Captain Schuettler and Inspector Schaack), with Bialk, visited the factory buildings and examined a large steam vat (11' X 3' X 2' 8"), one of three commonly used for dipping sausages, and standing in the basement of the main building. This vat they found about half full of a reddish-brown

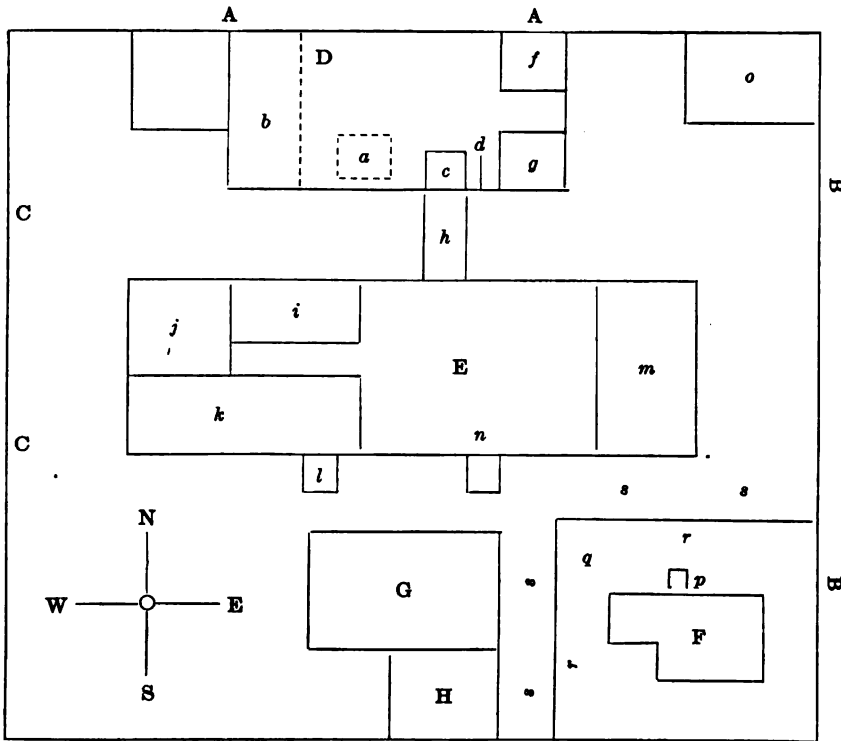
liquid, emitting a sickening odor. A plug on the outside, near the bottom, was withdrawn by one of the police, and some gunny sacks (found near at hand) were spread on the floor at the bung-hole. As the liquid passed out, a slimy sediment and a number of small pieces of bone were deposited on the sacks. The vat was then further searched, and at the bottom, besides other bone fragments, there were found two plain gold rings, stuck together (one inside the other) and covered with a slimy, reddish-gray substance; the smaller was a guard ring, the larger a wedding ring and on the inner surface of the latter was engraved in script "L. L." and "18 carat." It was later abundantly shown that these rings (or their facsimiles) had been habitually worn by Louisa Luetgert, the missing woman.<sup>2</sup>

The police found also, under or near this vat, a hair a foot long,<sup>3</sup> a piece of leather, a piece of cloth, some pieces of string, a hairpin, and the apparent half of an upper false tooth. It was later clearly shown by Mrs. Luetgert's dentist that she had a few false teeth in her upper jaw, but none in the lower. The police found also, in a pile of ashes in the street near by, at a spot where, by Luetgert's order, the smokehouse ashes had been dumped on Monday, May 3, other fragments of bone, as well as some pieces of burned corset steel (identified as such by a corset maker). The most characteristic of the boiled and burned bone fragments were identified by the two osteologists of the Columbian Museum as a femur (thigh), a rib, a sesamoid (extra bone near the big toe), a phalanx (toe joint), a temporal bone (skull fragment), a metacarpal (finger joint), and a

<sup>1</sup> The defense claimed appearances, discussed later.

<sup>2</sup> There was, to be sure, testimony denying that Mrs. Luetgert ever had rings of this description; but it carried no weight.

<sup>3</sup> Other hair was found at the sewer opening in the basement near by, but some or all of it proved to be hog hair.



PREMISES OF ADOLPH LUETGERT

AA, Diversey boulevard, 315 ft. frontage. BB, Hermitage ave., 290 ft. frontage. CC, Fence, near railroad track. D, Main building and store, main-floor plan. E, Factory building. F, residence. G, stable. H, wagon-house. *a*, relative position of middle vat, in basement below. *b*, relative position of smokehouse furnaces in basement. *c*, elevator. *d*, stairway down from main floor. *f*, office, on main floor; grocery, etc., on rest of same floor. *g*, shipping room. *h*, passageway, from D to E, 27×13; its level is slightly below the main floor of D, and through an opening one can look down, across the elevator-shaft, to the basement floor. *i*, casing-room. *j*, engine-room. *k*, boiler-room. *l*, chimney. *m*, ice-house. *n*, entrance. *o*, chicken-yard. *p*, back door. *q*, garden. *rr*, garden fence. *s s s s*, alley.

humerus (upper arm); but whether they were human or not was afterwards seriously disputed. The reddish liquid was said to contain traces of blood material (alkaline hematine). The ashes were said to contain phosphoric traces of human flesh; but it was afterwards disputed whether the quantity was more than would naturally be found in all sawdust ashes.

On Monday, May 17, in view of the discoveries of the police, Adolph Luetgert was arrested on the charge of murdering his wife. Upon the preliminary hearing he was bound

over to the grand jury, and then indicted, and after another lengthy hearing he was refused bail. Commendable promptness was shown in the collection of evidence, and the trial began on August 23, before Judge Richard S. Tuthill, in the Cook County Criminal Court. After only a week consumed in obtaining a jury, the opening address was made on August 30. The trial lasted nearly two months (till October 21), and such was the general interest excited by it that newspapers in middle-sized cities a thousand miles distant gave up

to it daily two columns of telegraphic news. The prosecution was represented by the State's Attorney for Cook County, Charles Samuel Deneen, and by his first assistant, Willard Milton McEwen, who conducted most of the cross-examinations. The defense was represented by William A. Vincent and by Albert Phalen. The jury was conceded by all to be an exceptionally intelligent one.<sup>1</sup>

I. What was the fabric of evidence upon which the State based its accusation against the husband?

1. *Motive.* — It was clearly shown that he was unkind to his wife, and regarded her as an incumbrance; he had even intimated indefinitely an inclination to get rid of her.<sup>2</sup> It was also proved beyond a doubt that he had shown no sorrow over her disappearance, and was wholly indifferent to her fate. He let her brother conduct the search for her;

he even discouraged the efforts that were made; and he did not go to see the police until they sent for him, although he knew Captain Schuettler personally and had once sought his aid about the loss of one of his big dogs.<sup>3</sup> It seems clear that he maintained illicit relations with Mary Siemering, the maid,<sup>4</sup> and had threatened to take her into the factory (where he slept) if his wife made trouble about her,<sup>5</sup> and had asked her, after the disappearance, to keep house for him.<sup>6</sup> Besides this, he at the same time proved his insensibility to the situation and exhibited a singular folly by writing from the jail to Mrs. Christina Feldt (a rich widow who had had money transactions with him and was in some respects a confidante) a series of amorous letters, in which he spoke of the future that now lay before them when he should be liberated.<sup>7</sup> These letters may have

<sup>1</sup> A feature of their experience, novel in jury annals, was the permission of the court that they should take exercise during their long confinement by playing ball, after adjournment, on a field near by. An unfortunate result was that one of the jurors took cold, and was threatened with severe illness. The second trial began on Dec. 14, before Judge Joseph E. Gary, the celebrated judge who presided at the trial of the anarchists, and ended Feb. 9, 1898. The defendant had at this trial different counsel, Lawrence Harmon, Max Joseph Riese, and John Edward Kehoe. The evidence at the second trial covered substantially the same ground as at the first trial; a few differences have been noted in the following pages; but space does not suffice to touch upon all, and the evidence at the first trial is for several reasons more satisfactory as the basis for a study of the case. At the second trial the defendant himself took the stand; but his testimony on the whole consisted in denials of the more salient facts asserted by the prosecution's witnesses and in reinforcing the testimony to the facts offered by the defense; and there seems no need of more than a few references to its tenor.

<sup>2</sup> By Mrs. *Tosch*: He had said when his wife was at one time ill, that, if he had waited a minute longer before calling the doctor, "the dirty rotten beast would have croaked": that he felt sometimes "like he could take her and crush her." By Mrs. *Grieser*: On one occasion, when he was angry, his wife asked what the matter was; he told her "to go and stick her nose in the cooking pot"; then he threw a plate at the ceiling and broke it, and said, "she was no wife for him; she had been raised in a pigsty; she was a wooden shoe." By Mrs. *Feldt*: He often said that he could not live any longer with his wife. By F. A. *Schultz*: On Sept. 2, 1896, he saw Luetgert holding his wife by the throat and choking her in the yard at the chicken coop.

<sup>3</sup> The defendant claimed that he had called up various hospitals on the telephone at the time, but, singularly enough, without giving his name. He did not deny otherwise his failure to search for her.

<sup>4</sup> She herself admitted this to the police and to the grand jury.

<sup>5</sup> By Mrs. *Tosch*, Mrs. *Feldt*.

<sup>6</sup> By Mary *Siemering*.

<sup>7</sup> "Beloved dear Christina, . . . this is our battle [and when it is won] as soon as I can be with you, we will have more money than we need. . . . Yours forever, true, loving Louis." "Where there is sincere love, there is everlasting faithfulness in pleasure as well as in trouble, through life until death. . . . [I hope] you have for me the same trust and belief. . . . Your faithful and sincere loving friend till death, Louis." Mrs. *Feldt* handed over these letters, having experienced a revulsion of feeling when it seemed to her that he was simply using her as a source of funds for his defense.

been insincerely intended merely to dupe her into lending more money to him (though they were in this only partially successful); but even on this supposition they indicated his state of mind towards his missing wife.

2. *Preparations.* — On March 11, 1897, he had purchased from a wholesale drug house a barrel (378 pounds) of crude potash. The barrel stood in the shipping room of the sausage factory (the head being broken in) until April 24. On that day Luetgert ordered the smoke-house helper, Frank Odorowsky, to take the barrel down to the basement, break up the lumps, and put them into the large middle vat, already described, cautioning him at the same time against handling the caustic stuff with the bare skin. This he did, "Ham" Frank Levandowsky, another employee, being called in to help. The substance in the barrel "burned like fire" wherever it touched him, and he had to put rags on his hands and in front of his face, and even then received several severe burns, the scars of which he showed in court. The stuff was placed in three barrels, standing alongside of the middle vat. Bialk, the watchman, and Luetgert then placed the potash in the vat, connected a hose so as to cover the substance with water, then turned on the factory steam so as to dissolve the potash. Here it lay dissolving during the week; and on Saturday, May 1 (the day of the wife's disappearance), about a quarter of 9 in the evening, Luetgert, in the presence of Bialk, the watchman, again turned on the steam into this vat. The steam was kept on, and the vat continued to boil, until about 3 o'clock Sunday morning, when Luetgert shut it off, and (between 3 and 4 o'clock) went up to his room

in the office. During the meantime the watchman was tending the engine in the other building.

3. *Opportunity.* — Twice during this period between 9 and 3 o'clock, the watchman was absent from his post at Luetgert's order.<sup>1</sup> Shortly after 9,<sup>2</sup> he was sent with an empty white bottle, as a sample, to a drug store on Clybourn avenue (the going and coming required not less than thirty minutes) to get a similar bottle of Celery-Kola compound; on returning with it, he found the ordinary passages from the engine room building into the vat room closed, and he handed the bottle to Luetgert over a wicket gate at the elevator. Again, shortly after 10 o'clock, he was sent to the same store with another bottle, this time a blue one (Hunyadi water), to be duplicated; the drug clerk had this time to be roused from bed, and the trip occupied some three quarters of an hour; Luetgert met him as before at the gate and took the bottle, and Bialk returned to the engine room, and stayed there the rest of the night. These two bottles did not appear to be needed, and their use, or non-use, remained to be explained. The inference from these errands was that Luetgert desired for some ulterior purpose to secure the watchman's absence. It will be noticed that it was during the watchman's second interval of absence that Luetgert came over (almost directly) to the house and sent little Louis out of the kitchen to bed. If Luetgert killed his wife at the vat in the basement, after inducing her to go over there with him from the house, it could have been done in this secure interval between about 10.30 and 11 o'clock; and it must have been done then or not at all.<sup>2</sup>

<sup>1</sup> The drug clerk corroborated the times of these two errands.

<sup>2</sup> The hours by the clock may, of course, have varied slightly from these; but the available interval of complete secrecy and security could not have been less than half an hour nor more than three quarters of an hour. At any point of time after that interval, it seems practically certain that either Bialk would have seen the woman (had she been in

#### 4. *Consummation of the Deed.* —

Between 3 and 4 o'clock in the morning, Luetgert went up to the office, where he was found by the watchman about 7 o'clock, when the latter went off duty. Luetgert was napping in a chair, his feet on the table, his clothes not removed. He told the watchman not to let the fire go out, but to keep it banked with the steam at fifty pounds (the usual amount for week-day work). During the day Luetgert was in and about the factory. At 6 o'clock the same evening (Sunday, May 2), the watchman came on duty again. He found the hose running into the vat, a chair from the office placed facing the vat, the floor covered with a streaky, slimy substance (the overflow from the vat) containing little flakes of bone, the fire out under the boiler, and ashes in front of the furnace. About 4 o'clock on Sunday afternoon, the factory chimney had been seen by several persons to be smoking, — a singular occurrence for Sunday. On Monday morning early, the smokehouse man, Odorowsky, came on duty, and found the same slimy, stinking substance on the floor, and saw also a shovel standing near the vat, the blade covered with the slimy stuff (having been used apparently to lift out the contents of the vat). Alongside of the vat he also saw three small wooden doors (from the smokehouse), and a number of gunny sacks, the doors and sacks being wet and slimy, as though they had been placed over the boiling vat to confine the steam and intensify the boiling. While Odorowsky was there, Luetgert knocked out the

stopper of the vat,<sup>1</sup> and then Odorowsky, under Luetgert's direction, cleaned into the sewer opening (in the basement) all that he could of the sticky, slimy liquid on the floor, scraped up the more solid stuff into a barrel, and dumped it near the fence by the railroad track; he then carried out what remained and buried it in the yard, — all as dictated to him by Luetgert. On the same morning, another man, at Luetgert's orders, hauled out the ashes from the furnace and dumped them into the street; and it was at the supposed locality of this deposit that the bones and corset-steels already spoken of were later found. From the vat were afterwards obtained, as already described, the two rings and the other bones. A large pocket knife, handed to Mrs. Feldt by Luetgert when arrested, was found to contain, when tested microscopically, traces of flesh and blood on the grooves at the edge.

5. *Guilty Suppression of Evidence.* — From various quarters came indications of Luetgert's anxiety to suppress all accounts of his doings on this Saturday night and Sunday. (1) He sent the watchman, Bialk (as we have seen), away from the factory upon two errands, apparently fictitious. Moreover, after he heard that the police had been talking with Bialk (May 14), he went to the house of the latter (then in bed with pretended illness; an officer being concealed under the bed), upbraided him with talking to the police, and asked what they had found in their search; when he was told they had found nothing, he

the vat room) when he returned with the second bottle, or (perhaps) from the engine room would have heard the two conversing, and also (perhaps) that Luetgert would not have ventured upon violence within the possible hearing of Bialk. On the other hand, a half hour's interval was ample time for the killing, since the process (as the traces in the vat indicate) need have involved only a choking or knocking down and then a placing of the entire body, the clothes still upon it, in the boiling potash.

If it should be asked why he should contrive two fictitious errands, the answer is that he may have intended to do the killing during the first, but then recollected that Louis was still at the circus and would inquire for his mother on returning.

<sup>1</sup> "He was mad," "He never looked so wild as he did that Monday," said the helper; the inference being that he was disappointed because the potash had not disposed of everything.



said, "That is good; you and your son can go to work for me soon, when I start up the factory." (2) When Odorowsky cleaned the floor on Monday morning, he said, "What the devil have you been doing here?" and Luetgert answered, "Don't say anything about it, Frank, and I will see that you have a good job as long as you live." (3) On Saturday, May 15, he went to the saloon of a friend, near by, and talked with Mrs. Tosch, the proprietor's wife, about the efforts of the police. He said, "If you know of anybody that saw anything, tell me." She said that Charlie Maeder, his engineer, was telling of the Sunday smoke from the chimney. Then he told her to tell the engineer to say nothing about the smoke; and later in the day he came back and tried to induce Mr. Tosch to go across the street to the dance hall and get the engineer away, so as to stop his talking to the police about the smoke. Subsequently this same Maeder disappeared, and at the time of the trial was known to be in Germany; the inference being that he knew, or was supposed by Luetgert to know, too much about the smoke, and perhaps about other things. (4) He showed the utmost reluctance to allow the aid of the police to be called in, and falsely told his two brothers-in-law that he had hired detectives. (5) He gave different versions of his wife's reasons for leaving, which, though they were rather mere opinions than assertions of fact, were nevertheless inconsistent. (a) He told his brother-in-law, Bicknese, that he thought she had gone off, perhaps to Bicknese's house, but that she had showed no signs of losing her mind; (b) then, a few moments later, he said that she might have gone off with another man; (c) on May 15, he first advanced the theory that she had "got crazy" and wandered off; this was

said to the police captain, and he explained that he had not reported the disappearance because he thought she might come back and he did not want the disgrace of notoriety.

Thus, the main points of the case made out by the State were as follows:

1. The improbability of a voluntary desertion by Mrs. Luetgert; and, in particular, the impossibility of discovering any trace of the living woman;

2. The presence about the premises of the apparent remains of her body;

3. An ample motive in the husband for getting rid of her;

4. A suitable opportunity for him, and for him only, to do this;

5. Operations by the husband about the factory, consistent only with some unusual deed, and corresponding to the mode of destruction indicated by the traces of the body;

6. Conduct of the husband indicating a guilty consciousness.

II. How were these cumulative items disposed of by the defense?

1. *Improbability of Voluntary Desertion.* — The refutation of this was attempted in two ways: (a) By evidence that Mrs. Luetgert (a') had often and recently expressed an intention to leave her husband, and (a'') had shown signs of losing her mind; (b) By evidence that she had been seen alive early in May (i.e. after the disappearance from home), near Kenosha, in Wisconsin, about forty-five miles from Chicago.

(a) This evidence was given by six witnesses. If their testimony could be fully believed, it is not too much to say that it should have created such a fair probability of her voluntary departure as would almost justify a jury's reasonable doubt; for she was said (at least by Mary Siemering)<sup>1</sup> distinctly to have planned going off and con-

<sup>1</sup> Mary Siemering originally told a great deal that was damaging to the defendant; but she retracted most of it on the stand, and seemed altogether an unreliable witness.

cealing herself in some distant town as a servant.<sup>1</sup> There were, however, several reasons for distrusting it completely. (1) None of these persons, singularly enough, had come forward to inform or had disclosed in any way these utterances of Mrs. Luetgert until the time of trial, — either during the two weeks that the police were dragging the river and the newspapers discussing the disappearance, or when their friend Luetgert was arrested, or during the two long preliminary examinations; their recollection, in short (it is difficult to doubt), had the suspicious appearance of being forced or manufactured for the occasion. (2) The two suppositions, that she was deliberately concealing herself, and that she was wandering about insane, were somewhat inconsistent; moreover, both were inconsistent with Luetgert's suggestion to her brother that she had gone off with another man. (3) The probability that she would be sitting in a wrapper and slippers, reading, a few moments or hours before so momentous a step, would be small. (4) The probability that, after such planning, she would, nevertheless, go off equipped only with wrapper, slippers, and shawl,<sup>2</sup> would be also decidedly small. (5) The probability that she would go off at all by midnight, when there was no obstacle whatever to her departure in the daytime, would be slight. (6) The probability that the wife would remain in hiding and let her husband hang for her murder would be also exceedingly small. (7) This supposed plan to go off and hide was inconsistent with the Kenosha

story, next described, the theory of which was that she was apparently making for a farm owned by Luetgert himself.

(b) The so-called Kenosha *alibi* was supported by six witnesses (one of whom had known Mrs. Luetgert personally); these persons saw a strange woman in that region on May 3, 4, 5, and 9, whom they thought was Mrs. Luetgert. But (1) the only identification (except of the one person above) was by a tintype picture taken several years before; (2) some or all of the identifiers seemed clearly to have expressed at other times disbelief in the identity, and in two instances at least there was evidence of deliberate falsifying; (3) they differed materially as to the description of the strange woman;<sup>3</sup> (4) eight other persons who had seen the same strange woman denied her likeness to Mrs. Luetgert; (5) if she was at Kenosha, it was apparently because there was there a farm owned by Luetgert, which she would naturally seek if she had chosen to come that way at all; but there was no evidence that she ever turned up at the Luetgert farm.

The Kenosha *alibi*, in short, was a claim too fragile and suspicious to be given much weight, if any, at least in the face of such circumstances as the rings in the vat.<sup>4</sup>

2. *Presence of Traces of the Body.* — These traces, as we have seen, were (1) two rings, stuck together, one marked "L. L."; (2) a number of bone fragments, corset steels, a rag, a long hair, etc.; (3) a slimy substance, etc. The last would indicate the presence of a body of

<sup>1</sup> The defendant also spoke, at the second trial, of express assertions by her, on the night of the disappearance, of an intention not to stay and witness their pecuniary ruin and disgrace.

<sup>2</sup> Both Luetgert and Mary Siemering told the police that these only were missing. As to money for a journey, she certainly had no more than \$80; but whether she could have had this much, or any at all, was so open to dispute that no argument can be founded on the state of her purse.

<sup>3</sup> One said that she was a blonde and wore a sailor hat; another, that she had black hair and eyes and wore a slouch hat.

<sup>4</sup> At the second trial the Kenosha *alibi* was abandoned, and an *alibi* at various other places was put forward. The above testimony is typical of all of these efforts.

flesh and blood; the second would mark it as human and female; the first would identify it as Louisa Luetgert's. All these indications the defense strenuously disputed.

(1) There was only one way of explaining away the cohering rings, i.e. that they had been caused to be made and then placed there by some implacable enemy of Luetgert's, — either by one of the police when searching, or by one of the employees, or by one of the persons who gained access on the day of the sheriff's sale, May 11.<sup>1</sup> Numerous considerations make such a supposition improbable in the uttermost, if not humanly impossible; these will easily suggest themselves, and it would here take too much space to analyze them.<sup>2</sup>

(2) The identification of the bones as human or as female, and of the blood and phosphorus traces, was contradicted by several anatomical and chemical experts. Of the directly opposing testimony on this point, it must suffice to say, that the witnesses on both sides were eminent and competent, and that some of the witnesses on each side were more or less shaken on cross-examination.<sup>3</sup> That any of the bones were fully proved to be human, it is hardly possible to assert; yet it certainly was not made out (nor even, perhaps, seriously claimed) that they could not be human. The identification of the corset steels and the human hair was not laid open to doubt; the difficulty here (as also for the strings, leather, and cloth) was that they might perhaps

have come from other sources than a dead body.

(3) The slimy substance, and the other refuse, it was suggested, came from the soap-making process described below.

3. *Motive.* — Witnesses were brought to disprove the ill-treatment of his wife by Luetgert; but they spoke merely of never having seen such behavior, and the prosecution's showing (it must be said) was not otherwise shaken.

4. *Opportunity.* — This was disputed in two ways. (a) Little Louis Luetgert spoke of waking and hearing near at hand a "rustling," late in the night of May 1, and the voice of his mother, answering his call, said, "It's me." But this story had never once been told before by him, even at the preliminary examinations; and, as the boy had been meanwhile in the custody of the defense, this afterthought of his can hardly be treated as valuable. (b) The presence of Bialk, the watchman, in the engine room all night, was argued as negating any real opportunity for the crime. But (1) Bialk was absent long enough to allow its commission; (2) after the body had been put into the vat, there was nothing for him to see; (3) Luetgert would not have been deterred by the fear of Bialk's intrusion, for Bialk, like the other employees, was evidently too much afraid of Luetgert to take such a liberty.<sup>4</sup>

5. *Operations at the Vat.* — That a solution of potash had been prepared in the vat, and that Luetgert

<sup>1</sup> It is true that there is a second possibility, viz. that the woman had thrown the rings herself into the vat before leaving; but this does not seem worth considering.

<sup>2</sup> Two only, as illustrations, may be suggested: (1) The miscreant must have divined exactly where to place the rings so as to harmonize most closely with the other facts *then quite unknown*; (2) the maker of the rings must have been a confederate in a conspiracy, else he would have come forward and informed.

<sup>3</sup> The incident simply illustrated anew the failure of our modern system of expert testimony; that failure resulting, be it noted, not from any inherent uncertainty in the subject nor in skilled testimony as such, but in the marshaling of opposing experts, each of them subjected to the suspicion of partisanship; the result being that the helpless layman is forced to regard them merely as units to be set off one against the other.

<sup>4</sup> By Bialk: "I haven't done it [i.e. looked in on him] because, if Mr. Luetgert saw me, I would have got something."

had gone through a process of boiling something, and then disposing of it, was not denied. The explanation offered was that he had been trying to make a quantity of soft-soap, preparatory to a thorough cleaning of the sausage factory in order to make a good impression upon possible purchasers or lenders of money. William Charles, Luetgert's brother-in-law and business agent or partner, testified fully to this plan. According to his story, the potash bought for this purpose in March had not been used, because the pending negotiation for the sale of the factory fell through; and the plan was again thought of when there seemed a new prospect of raising money. During all this time the potash was left plainly in view in the shipping room. The undertaking of soap making was left until the night time because during the day Leutgert was too busy in looking after his business and trying to raise money. There was no attempt to conceal the process, and Bialk and Odorowsky were called in to help. The additional material required consisted of three barrels of grease or tallow and one barrel of refuse meat and bones; these Charles himself had seen Luetgert put into the middle vat, where the potash was, about 7 P.M. on Saturday, May 1, and Adolph Elandt, an hostler (still in Luetgert's employ), testified to taking the barrels out of the ice house and placing them alongside the vat about 7 A.M. on the same day.<sup>1</sup> The soap making, however, had failed, the grease all coagulating in one mass and the tallow in another; so that the mixture was useless, and the material was therefore cleaned up and thrown away.<sup>2</sup>

It is important at this point to appreciate the relation of this plausible story to the rest of the case.

(a) If the story were false, and no soap making had ever been attempted, the defense was without strength at any one point. All the most sinister interpretations of the extraordinary process of Saturday and Sunday pressed irresistibly for immediate acceptance. They could mean nothing but murder; and with the other evidence they seemed to leave no room for doubt. (b) Suppose, on the other hand, that the soap making story were true. It would still be not impossible that the soap making had been undertaken as a mere cover for the murder, and that the body, the grease, and the sausage refuse had been boiled together. Nevertheless, the soap making once assumed as a fact, the case of the prosecution was decidedly weakened. The whole boiling process and the preceding preparations were open to an innocent explanation; the Sunday smoke and the subsequent disposal of the refuse were perhaps natural enough; and the slimy stuff, the reddish liquid, and some at least of the bones were possibly accounted for; while the uncertainty as to the nature of the other bones was emphasized, and demanded fairly to be solved in favor of the accused. The only fact of the process remaining wholly unexplained by this theory was the presence of the rings in the vat. This, to be sure, with the other evidence, might well go for proof; but one at least could not quarrel with those who would in that situation find their minds in suspense and give the accused the benefit of the doubt. Thus, in short, if the soap-making

<sup>1</sup> Three witnesses testified to this man's having originally denied all knowledge of the affair. Moreover, Odorowsky and Levandowski, the regular men about the factory, did not remember seeing Elandt in the basement at any time on that day.

<sup>2</sup> This theory was further supported by expert testimony that the various traces found on the premises were inconsistent with the hypothesis that a human body had been boiled there, but were consistent with the soap-making theory; and upon this issue, and its details, another hopeless conflict of testimony arose. Much burning, boiling, and testing was done; and two gruesome experiments with human bodies were conducted in the self-same middle vat of the basement.

story were false, the accused's case (it would seem) was left hopelessly weak; while, if it were true, his case, though not clear, was perhaps entitled to the benefit of a reasonable doubt. In this way the soap-making story may be said to have formed the crucial element in the case.

Was it to be believed? There were numerous objections to be made to it, — some slight, some grave, some fatally significant. (1) The story was not advanced at the time of his arrest or at either of the preliminary hearings, when it would have been natural to clear himself by it. Moreover, neither Bialk nor Odorowsky, the helpers, were told of the purpose of the process, though it would have been natural to explain to them at the time; nor was any one else told, except (as alleged) Charles. In short, it bore the appearance of an afterthought. (2) If the purpose of the process was so innocent, why should Luetgert take the depths of the night, stay close by the vat till 3 in the morning, and then sit in his chair, fully clothed, until daylight? That he was too busy in the daytime looking for money not only does not explain all this, but was not true, for he was proved by his own witnesses to have been about the factory all day Sunday, when the factory was idle. (3) If the purpose was innocent, why was he so anxious that Charlie Maeder should say nothing about the Sunday smoke, and why did he not explain, as was natural, to Mrs. Tosch, that his soap making

had required an extra fire on that Sunday? (4) If the purpose was innocent, why did he send Bialk away from the basement upon two needless errands?<sup>1</sup> (5) If the purpose of the potash was this soap making, why did he tell the selling clerk of Lord, Owen & Co. that the potash was an order on commission for another person? (6) Why was any soap making needed, when the factory, so far as appears, was sufficiently clean?<sup>2</sup> (7) If cleanliness was so persistently in his mind, why did he leave such a mess in the vat for two weeks? And why, when the soap making failed, did he show no further attempts to carry out his important project of cleaning the factory? (8) Why, before making soap, did he not take pains to learn more exactly the conditions of the process, and why did he proceed in a way which his own soap making experts declared could never have produced good soap? What could have made him suppose that refuse meat and bones were essential to the process? Why did he apparently shovel out some of the bones after the failure, and burn them in the smokehouse? And if there were separate masses of grease and tallow (said by Charles to have been formed), why did they appear to Odorowsky as a slimy stinking substance permeating the whole liquid? (9) What moved Luetgert, if preparing for soap making, to purchase and boil down enough potash — 378 pounds — to make, as his own expert admitted, from 1600 to

<sup>1</sup> The Celery-Kola compound may indeed have been desired for some ill turn; but the nature of it was not explained; moreover, why were not both commissions, if genuine, given to Bialk for a single errand? The Hunyadi-water errand was, in itself, natural enough, for Luetgert was accustomed to use it; but it was shown that he had already a stock of thirty filled bottles at his disposal in the factory; and why should he send out for one? It was explained that these bottles had been used and then fraudulently refilled with water from his pump, to be palmed off upon retail customers at his store; but this explanation only suggests that a man who will so cheat his customers will not hesitate to manufacture evidence. Moreover, he did not drink the Hunyadi water after all; why not? It was said that the druggist had sent him the wrong brand of Hunyadi water; but it did not appear that the difference was enough to cause him to reject it.

<sup>2</sup> By *Odorowsky*: "I cleaned the basement pretty nearly every day, good and clean"; cleaning was a regular part of his work. The deputy sheriff foreclosing on May 4 was surprised to find a sausage factory so clean a place.

2000 pounds of soft-soap,<sup>1</sup> — enough to clean the factory several times over? (10) Why should he wish to be his own soap maker, when there were at hand in his grocery shop many cases of hard soap, and several boxes of soapine and scrubine, equally suited for his purpose? (11) Why should he proceed in his own way clumsily to make soft soap (if soft soap he must have) at an expense of \$15 for potash and something more for his fuel and salable grease, when with less money he could have bought at \$1 a barrel enough soft soap to answer his supposed purpose? (12) Finally, it was apparently impossible that he could have tried at all to make soap, because there *were no barrels of grease* in his basement on the evening of May 1, and there never had been during any one week since March more than half a barrel. This was proved by Albert Brinkhoff, the teamster of Lester & Co., fertilizer makers, who had a contract with Luetgert for all the grease (tallow) and bone product of the sausage factory. Until March, when the factory shut down, this man had come every day for the grease and bones, which were left in barrels in the basement; but after that date he called only every Saturday, getting now only as much weekly as before he got daily. On no Satur-

day had he taken away more than 70 pounds, and on Saturday morning, May 1 (the day of the supposed soap making), at his usual call, he had taken away all that then remained, — about 66 pounds of grease (tallow) and 115 pounds of bones.<sup>2</sup> It was thus impossible that there could have been three barrells (about 800 pounds) in the basement on Saturday evening.<sup>3</sup> This fact, it would seem, disposed fatally of the soap-making explanation, and put it out of the case as not merely an improbability, but an impossibility.

6. *Guilty Conduct.* — The answer to this evidence was simply a denial of some of the assertions and an impeachment of the witnesses. The accused's disinclination to report his wife's disappearance was ascribed to a wish to avoid the notoriety and disgrace of publicity.<sup>4</sup> But it must be said that the evidence adduced by the prosecution remained substantially undisturbed and unexplained.

On October 21st, after deliberating for sixty-six hours, the jury were unable to agree, and by consent were discharged. They stood nine for conviction and three for acquittal. On February 9, 1898, the second jury brought in a verdict of guilty, fixing the sentence at imprisonment for life. This sentence was explained as due to no doubts

<sup>1</sup> By another witness for the defense, 800 pounds; by a witness for the prosecution (a foreman of Armour & Co., making 100,000 pounds of soap daily), one and a half tons.

<sup>2</sup> Two ex-employees of Luetgert also testified that there had never been a full barrel of tallow accumulated before the weekly removal. Odorowsky and Lewandowsky, who had put the potash near the vat, saw no tallow or bones there on Saturday, May 1.

<sup>3</sup> In surrebuttal it was shown that there did exist in the ice house a quantity of fine tallow used in making sausages; but it was of a quality which no one could be conceived of as wishing to waste in the manufacture of coarse soft soap.

<sup>4</sup> Mr. Goodrich, a member of his counsel's firm, testified that on Monday, May 3, two days after the disappearance, Luetgert had consulted him about his pecuniary troubles, and incidentally mentioned that his wife had left him; Mr. Goodrich agreed with him that it was better not to make the matter public, as it would prevent his raising money on his property. But this seems a slim reason for such secrecy; for if the wife was in fact missing when it came to requiring a release of dower, all the previous concealment would avail nothing.

On the second trial, the defendant gave much time to explaining that his pecuniary troubles prevented him from spending time in the search. This led to a refutation from a former bookkeeper, whose testimony to the frauds and falsifications in his business showed (if believed) that the defendant was an unscrupulous swindler of the deepest dye; this testimony of course was attacked as false.

of guilt, but to scruples as to capital punishment.

Looking over the case as a whole, the prosecution may be said to have presented a thorough array of significant circumstances, covering all the chief avenues of inference, and amounting in combination to an irresistible *prima facie* case. The only weaknesses of the prosecution were (so to speak) accidental ones, not inherent in its case nor essential to its argument; for the inconclusiveness of the Schimicke girl's story, and the uncertainty resulting from conflict of the osteological and chemical experts, which seemed at the time to be a serious reverse for the prosecution, yet in truth are seen, upon a survey of the whole case, to concern only two subsidiary and non-essential circumstances.

The case of the defense was in itself a weak and unsubstantial one, except for the soap-making story and the plea of desertion, which were *prima facie* elements of great intrinsic weight. The real achievement of the defense, however, consisted in its determined attack all along the line, opposing every accusing circumstance by some answer or other, however weak. The result was a noise and smoke of general conflict, and an appearance of real balance of forces and uncertainty of issue, while a close observation, after the smoke had cleared away, seemed to show that there never had been any real equality of forces and that at most points the opposing movement could hardly be described as more than a feint.

It was, perhaps, this general and vigorous attempt to give battle all along the line which marks the trial out for prominence among others of its class. It belongs, to be sure, to those cases in which the evidence was entirely circumstantial; but so many of the supposed circumstances depended upon conflicting testimony that it is impossible to settle upon the data of inference without assuming that one or the other set of witnesses spoke falsely. It is therefore not a pure case of circumstantial evidence. In difficulty of solution as a problem and in perennial capacity for difference of opinion, it can never compare with the famous cases which will forever interest the student, — such trials as that of Captain Donellan, of Tutor Monson, of Elizabeth Canning, of Cadet Whitaker, of Lizzie Borden. The cool, grim, unique method of the supposed uxoricide; the choice by fate of a sausage factory as the locality of the crime; the cellar, the vats, the potash, the slime; the imagined picture of the husband stirring at midnight the caldron in which his wife slowly seethes to jelly; and the curious responsiveness of the sausage market to the repulsive though unfounded suspicions of potential adulteration, — these features, to be sure, were at least distinctive, and served to give the case current notoriety; but they do not contribute to place it among the great problems of circumstantial evidence.

388. **KARL FRANZ'S CASE.**<sup>1</sup> (*a.* As reported in 2 F. & F. 580.) . . .

The Queen *v.* Franz. Murder. — The prisoner, a German, was indicted, alone, for the willful murder of Martha Halliday, on the 10th of June, 1861, at Kingswood, near Reigate.

On the 7th of June, three days before the murder, a young German (not the prisoner) had called on Mademoiselle Tietjens, using the name of Kron, and obtained a letter from her to some one at Hamburgh, representing that he was in distress, and desired to return to his own country. There was evidence that, late on the night of the 9th of June, the prisoner and another foreigner were near the spot, and they were identified as having bought some string at Reigate. The murder was committed on the night of the 10th of June. The deceased was found tied hand and foot with string (identified with that proved to have been so bought), and something was forced into her throat (apparently with the object of preventing an outcry), by which she had been suffocated. There was a stick or club found and two pieces of wood, indicating an intention of the burglars to use violence, if disturbed. The house had been forcibly entered, and the object evidently had been robbery. In the room were found divers papers, which it was admitted belonged to the prisoner, and also the letter given by Mademoiselle Tietjens, addressed to Adolph Kron; there was likewise a book containing entries by the prisoner, in the manner of a diary, coming down to the 8th, 9th, and 10th of some month. On the 12th of June, two days after the murder, the prisoner and another foreigner were in Whitechapel, where they went to a lodging house, and where the other left him. On the 16th or 17th of June, the prisoner (as it appeared by his subsequent statement) had heard that two

Germans, Franz and Kron, were suspected of the murder. On the 23d of June, the prisoner, being in Newgate for some offense, was there told of this charge with the usual caution, and gave a false name, stating that he had come from Hull through Leeds, and had lost his papers.

On the 27th of June, being brought up for the first time on this charge, he gave the false name, and declared he had never been at Reigate. After a remand, he was brought up again on July 1st, and the discovery of the pocket book, etc., was stated in his presence. On the 8th he was brought up again, after a week's remand; and, after hearing all the evidence, he made a statement. He declared that he was thus robbed both of his pocket book and "pass," his papers, and some of his clothes; and he accounted for his identification by suggesting that the murderer had worn his coat and dropped his pocket book and papers on the spot. He said one of the foreigners was called Kron, and among the papers found in his pocket book was a letter to Kron. He did not in his statement make any allusion to the foreigner with whom he had gone to the lodging house on the 12th of June.

Many witnesses swore to seeing *two* foreigners at or near the place about the time of the murder, and identified the prisoner as one of them with more or less distinctness. They were traced walking towards London on the 11th, and would have reached London probably on the 12th, the day on which the prisoner, with a foreigner, were found entering London, fatigued and in search of washing and refreshment, as if they had been out all night. And the prisoner's things were tied with a

<sup>1</sup> [This case is given in three different accounts, as a study in the adequacy and relative trustworthiness of different commentators. See what was said in the introductory text to Part III. The citation of the full report of the case is given in the Appendix. — Ed.]



string, which tallied with that found about the corpse, and both pieces were identified by the maker, who had sold string to the seller, at Reigate, who had identified the prisoner as the purchaser of string from him just before the murder.

The prisoner called no witnesses; his statement being, that his papers had been stolen at Leeds. It must have been by some person who on the 7th of June had a letter from Madame Tietjens in London, and on the 10th was at Reigate, on the scene of the murder.

BLACKBURN, J. (charging the jury): The first question is, has the crime been committed? That must be determined before you can say whether the prisoner is guilty of it. You will hardly have a doubt here that a murder has been committed by some one. . . . All who are parties to that violence are guilty of murder. You need not take on yourselves the responsibility of that [law]. I take that on myself. The great question for you is, whether, taking all the circumstances, it is made out to your satisfaction that the prisoner was one of those who inflicted that violence.

The whole case turns on circumstantial evidence; *i.e.* no eyes have witnessed the act. You are to weigh each circumstance to see if it is proved by itself. There are many circumstances put in evidence; you may believe some, and think others not established; but when you take all those things that you are satisfied of, take into view all the evidence, and see those circumstances. Some of the facts are more strongly established than others. But the question for you is, if all the circumstances you think established lead you to such certainty as you would act on in a matter of great consequence, that the prisoner was one of those persons; if so, it is your duty to public justice to say so. But if, taking all those circumstances, you think that fact

not made out, the prisoner is entitled to be acquitted. . . .

Not guilty.

**Karl Franz's Case.** (*b.* As stated by H. L. ADAM, *The Story of Crime*, 19—, p. 313.) . . . Some years ago a mysterious crime was committed at Kingswood Rectory, Reigate. The rector and his family had gone away, leaving the house in charge of a Mrs. Halliday, who was the wife of the parish clerk. One night she went to bed as usual, and the next morning was found dead — murdered. She was bound hand and foot on the bed, and in her mouth some sacking had been stuffed, which had suffocated her. An examination of the premises soon revealed the fact that the crime had been committed by thieves. The fact that they had taken nothing with them pointed to the supposition that they must have been disturbed. Now the village schoolmaster lived opposite, quite near, and on the night in question he returned home rather late, and slammed his gate as he went in. It must have been this noise which alarmed the burglars at a moment when they had succeeded in silencing the unfortunate lady, preparatory to sacking the place, and induced them to clear out. The probability was that they thought it was the gate of the house they were in which was slammed, and that somebody was entering the house. The men left behind them a packet of six papers tied with a thread, and these formed important clues, and led to curious developments.

How many burglars were there? Clearly two, by the footprints about the house. Their method of procedure was also soon "reconstructed" by the police. They had first gone to the kitchen window, where they had failed to effect an entry. They had then taken themselves to the back of the house, climbed on to the roof of a small "lean-to" building just beneath the window of the room in

which the victim was sleeping, removed the window, climbed into the room, and committed the crime of murder. At that moment the schoolmaster's gate slammed, they retreated by the same way they had entered, and hastily made off.

What were the clues? Let us first examine the papers. They were in German, and consisted of a certificate of birth, a certificate of baptism, and the credentials which in Germany are given to craftsmen. All the papers purported to belong to and be concerning one Johann Carl Franz, of Scandau, in Upper Saxony. In addition to these documents there was a letter of a begging description, signed Adolph Khron, a second letter from a well-known Continental vocalist, and lastly a slip of paper containing a number of addresses. So far the papers. Inquiry in the neighborhood soon elicited the information that two foreigners had appeared at the Cricketers Inn the previous evening, had slept there the night, and the following day were seen not far from Kingswood Rectory; the supposition being that they were "reconnoitring." They were also known to have purchased from a general shop some peculiar string known as "rublay," the like of which had been used to bind the deceased woman. It seemed pretty conclusive now that the two foreigners in question were the culprits. But where were they? In one of the papers referred to there was a description of the "Carl Franz" mentioned, but the police could discover no trace of such a person.

In spite of these clues it seemed that no further light was destined to be thrown upon this dark deed. However, some time after, an illuminating ray shone across the path of the mystery, which served though to render the surroundings even darker still. One day a destitute German was arrested in London upon some trivial charge, but what interested the police most was his

striking resemblance to the "Carl Franz" of the papers, and he was handed over to the Reigate police. At first he said his name was "Salzmann," but upon being pressed he admitted that his name was Carl Franz, and that some of the papers found at the rectory were his property! Upon searching his lodgings they came across a shirt tied round with a piece of string identical with that purchased by the two foreigners and that found on the body of the deceased woman! In addition to this, he was identified as being one of the two strangers seen in Reigate. Could anything be blacker, more conclusive?

Yet in spite of all this, the man was innocent. It appeared that Franz had, some weeks prior to the murder, landed at Hull and traveled on foot to London. On the way he fell in with two fellow countrymen, sailors, one of whom was named Adolph Khron, the other William Gerstenberg. The latter had no "papers," and was very pressing in trying to induce Franz to let him have his, which, however, the latter steadfastly refused to do. One evening they all lay down in a field upon a heap of straw and went to sleep. When Franz awoke his companions had disappeared, as also had his papers. Eventually he arrived in London in a destitute condition. One day he made himself known to one of his countrymen, who took him into an eating house and paid for a meal for him. During the latter, Franz's companion produced a newspaper containing an account of the murder at Reigate, in which it was stated that two foreigners were connected with the crime, one of whom was named Carl Franz. At this Franz became alarmed, and, in order not to be annoyed, changed his name, adopting the one given to the police, "Salzmann."

This story, however, was not considered by the police sufficient to clear him. What about the

string? It was found that this could only be matched at the manufacturer's. Questioned as to how he came into possession of the string found at his lodgings, Franz explained that he simply picked it up outside a tobacconist's shop in Whitechapel. This, on the face of it, looked very like a lame excuse, yet it proved to be correct, and was not the least strange part of this very strange story. It was found that the shop he had indicated was, in fact, near his lodgings, and moreover it was also within a stone's throw of the warehouse of the very string maker who made the particular "rublay" cord for the Reigate tradesman! The prisoner's solicitor was of an inquiring turn of mind, so he went to Whitechapel, and on the doorsill of the printer's office next to the tobacconist's mentioned by Franz himself picked up a piece of "rublay" cord. Inside the office they had a ball of it.

There was yet the evidence of identification to be disposed of, and upon this being sifted it was found to be very weak. A number of persons who had seen the two foreigners in Reigate both before and after the murder swore that Franz was one of them. But experience has proved to demonstration that the average evidence of identification is most unreliable, and some people, carried away by their imagination, which is in no way discouraged by the police, will swear almost anything. It was fortunate for Franz that the man who should most readily have identified him had he been one of the murderers, entirely failed to do so. That was the potman of the Cricketers Inn at Reigate, who had had the two foreigners under his notice for two days, and was particularly attracted to them by their conversing in a foreign tongue. The others had only seen the strangers casually. This negative witness therefore was worth more than all the other positive witnesses

put together. His lack of evidence was conclusive. But even further, the Continental vocalist, a letter from whom was found among the papers left behind by the murderers at Kingswood Rectory, testified that she gave a letter of introduction to a young German named Adolph Khron, but that the prisoner was certainly not the man. This evidence confirmed the prisoner's statement that one of the men he met on his way to London, and who stole his papers, was named Adolph Khron. When the police questioned him concerning the papers he gave a minutely correct description of those which belonged to him, and which had been stolen from him.

There was, of course, nothing left to do but to release the prisoner, which was accordingly done. There can be no doubt that the murder was committed by the two German sailors who robbed Franz, and who were never captured. As to their present whereabouts, Old Time knows, but he won't tell.

**Karl Franz's Case.** (c. As stated by N. W. SIBLEY, *Criminal Appeal and Evidence*, 1908, p. 210.) . . . The facts shown in evidence in the Kingswood murder case were that Martha Halliday, the victim of the crime, was the wife of the parish clerk, and acted as caretaker at Kingswood Vicarage, in Surrey, in the absence of the Vicar and his family. On Monday evening, June 10, 1861, she parted from her husband at the Vicarage door between six and seven o'clock. Next morning, when Halliday was proceeding to the Vicarage to see his wife, he noticed footprints, apparently of two strangers, on the Vicarage grounds. The footprints were traced to the kitchen window, in front of the house, where an apparent attempt had been made to break in, which had been foiled by shutters. The footprints then were traced to beneath the window of the room in which Martha Halliday slept. When Halliday pro-

ceeded to the back door of the parsonage he found it closed, as he had left it on the previous evening; then, passing to the other side of the house, he found the front door partially opened. This being the reverse of what was usual during the family's absence, he became doubly alarmed. Not finding his wife downstairs, he went to her bedroom, and there found her lying on the floor in her nightdress, evidently murdered. She had been suffocated; a sock was thrust with great violence into her mouth as a gag, and her tongue was forced back over the glottis. It was evident that she had been roused from her sleep by the breaking of the pane of glass and by the burglars having overturned, in their ingress through the window, the looking-glass on the chest of drawers. She was further secured by tying her feet and arms tightly around with some rublay cord which the offenders must have brought with them, prepared with slip knots. There was picked up just under the bed and about six inches from the shoulder of the corpse, a packet of six papers tied round with a thread. Upon opening the packet, these papers were all found to be written in German. Three of the six papers were a book called the "service book," being the credentials furnished in Germany to craftsmen and others; a certificate of birth, and a certificate of baptism, all three purporting to belong to Johann Carl Franz, of Schandau, in Upper Saxony. The other three papers did not suggest any connection with Franz. One was a letter soliciting relief from some lady of quality, signed "Adolph Kron." There was also a letter from Madame Tietjens, the then famous operatic singer, dated June 7th, the Friday preceding the crime. Lastly, there was a slip of paper with a number of addresses on it. All six papers found on the scene of the crime were written in German. There

was also a thick bludgeon-shaped stick found in the room. It was also evident that the ruffians must have quitted the house precipitately, as presumably the motive was robbery, but nothing was taken, though the purse of the victim, with some money and a ring in it, was found in the pocket of her dress, hanging on the door of her room. The conjecture that the burglars must have been disturbed seemed indirectly confirmed by the fact that the village schoolmaster, on returning home at midnight on the night of the murder, stated that he slammed his gate with some noise, and he lived close to the parsonage.

The clew afforded by the papers found by the corpse — furnishing inflamed probability that the murder had been committed by two Germans — appeared at once to unravel the mystery, as very indicative evidence was at once forthcoming of the presence of one, if not two, pairs of rough-looking foreigners in the neighborhood, and in the immediate vicinity of the parsonage, only a few hours before the time when the murder must have been committed. About midday on Sunday, the day before the crime was committed (it having been committed during the night of Monday, June 10th), two foreigners, one short and dark, the other fairer and taller, entered the town of Reigate from the London side, and applied for lodging at the Cricketers public house, immediately opposite the police station, four miles from Kingswood. They went out after an hour to make some purchases, which consisted of small quantities of meat, barley, and flour. While at the Cricketers Inn the two foreigners sat in the public room, and were well observed by the potman and the frequenters of the place. They left the Cricketers Inn at half past four in the afternoon on the next day, Monday, June 10th. On Monday, June 10th, between two and four o'clock in the afternoon, two foreign-

ers purchased a ball of string of peculiar make at Reigate. The maker, in subsequently describing the string, pronounced it to be rublay cord, and very seldom made. The men were some six minutes in suiting themselves with this string, and were noticed both by the mistress of the shop and her servant. On Monday afternoon, at a time subsequent to the departure of the two men from the Cricketers Inn at Reigate, two foreigners were seen crossing Reigate Hill on the road to Kingswood. About seven o'clock on Monday evening, within little more than a mile from the parsonage at Kingswood, a laborer saw two men, ten yards off, under a beech tree in a thicket called Kingswood Roughit. On this same tree there was found, in a search made subsequently to the murder, the broken end of a branch, which corresponded with the thick bludgeon-shaped stick found in the room where the murder was committed. Finally, a police constable, stationed at Sutton, at 2.30 A.M. on the morning of Tuesday, June 11th, met two foreigners talking and walking very fast towards London, on the road between Kingswood and Sutton. Mr. Alcock, M. P., in whose employ the husband of the murdered woman was, offered a reward of £200 for the discovery of the perpetrators of the crime.

After a few weeks, a destitute German was arrested in London upon the charge of being secreted in a house in Old Broad Street with intent to commit felony. On arrest he gave his name as Saltzmann, but became suspected of the Kingswood murder by being identified by witnesses from Reigate, and he ultimately confessed his name was Franz. On July 8th he was brought before the magistrates at Reigate, and was committed for trial. Three facts pointed strongly to the guilt of the prisoner: (1) He was completely identified on the testimony of a police officer from Saxony as the owner of the papers bearing his name, and

the individual to whom the service book had been delivered in Germany, which had been found within a few inches of the corpse of the murdered woman by her husband on Tuesday, June 11th; (2) Mrs. Mary Pither, of Reigate, at whose shop the two foreigners had purchased the string on the Monday, gave evidence before the magistrates that, to the best of her belief, Franz was one of them. She recognized the voice, She, however, declared that his appearance, hair, and cap impressed her more than his countenance. She could not "realize his countenance." Franz, she added, looked thinner than when she saw him previously. She described the purchaser of the string as "rather tall, fair, and thin." In the account of the police court proceedings in the *Times*, Franz was described as "slight and lithe, about 5 feet 5 inches in height; he has very trifling indications of a light downy beard, and appears to be little more than twenty years of age." Mrs. Pither's servant identified Franz with more distinctness. It appears that the two foreigners took about six minutes to purchase the string, having rejected kinds previously offered them. James Blunden, a laborer, gave evidence that Franz appeared to correspond with one of the two foreigners he saw standing in a thicket about a mile and a quarter from Kingswood Rectory a little after seven in the evening before the commission of the murder. But this witness also declared that he could not identify him with any certainty. Both the men Blunden saw in the thicket were dressed in dark clothes. But Mary Elsey, a servant to Mrs. Pither, swore positively that the prisoner was one of the two foreigners who purchased string at her shop between two and four on the Monday afternoon. Mr. J. F. Matthews, a builder, of Reigate, expressed his belief before the magistrates that he recognized the prisoner as one

of two men he met on the road going towards Kingswood between three and five on the Monday afternoon. He stated that at first sight, on seeing him full face at the station, he failed to recognize the prisoner, but on seeing Franz in court he believed him to be the person whom he passed on the road. He added that the two men he passed looked very hard at him, and so he turned round and looked at them. George Roseblade, the potman at the Cricketers Inn, Reigate, recollected the two foreigners who came to that place on Sunday, June 9th, about 11.15 A.M., and stayed there till 4.30 P.M. on the next day. He declared that the prisoner was the taller of the two, and the one who could not speak English. But this witness only identified Franz after a third examination. Finally, Police-constable Peck identified Franz as the taller of the two foreigners he met very early in the morning of June 11th, on the road between Kingswood and Sutton, walking very fast towards London. He stated that he believed Franz to be the one of the two foreigners who stood on the other side of the road, but who spoke two or three times in his presence to the other foreigner. However, this witness did not render very conclusive evidence, as he could not positively swear to Franz's identity with one of the foreigners he met; he merely said he believed the prisoner to be that man. — It is curious to note that Adolph Kron, who was more proximately identified with the packet of papers found near the corpse of the murdered woman than Franz, was described with the utmost distinctness by all the above witnesses, as well as by Madame Tietjens. The fact that he should have been more clearly described, however, seems accounted for by the fact that he alone of the two foreigners knew English and acted as spokesman. A person is more likely to identify another with

whom he has spoken than a third person whom he has neither answered nor addressed a remark to. It seems impossible not to suppose that Kron was one of the parties who committed the crime. But though Kron was proved to have been in company with Franz at a lodging-house in Whitechapel some days after the murder, the former deserted the latter on June 15th, and was never again heard of till his reported death in September of that year.

Police-constable Baslford, of Reigate, swore positively that Franz was one of the two foreigners he saw at the Cricketers Inn on Monday, June 10th, and declared that the other was "dark-haired and fresh complexioned," very youthful in appearance, did not look above twenty, and was very short, little over five feet in height. Madame Tietjens described Kron, whom she had assisted on the Friday preceding the murder, out of compassion to a destitute foreigner, as a boyish-looking person of probably eighteen or nineteen years of age. He had light brown hair, wore a brown coat, blue and white striped shirt with a turn-down collar, and a black necktie. The potman at the Cricketers Inn at Reigate described one of the two foreigners who came there on the Sunday morning as about nineteen years of age, about five foot three or four in height. He wore, this witness added, a very dark coat, dark trousers, common blue striped shirt and black necktie, with a collar turned down over. The police-constable who met the two foreigners walking very rapidly on the road between Kingswood and Sutton very early on Tuesday morning, June 11th, declared that the one with whom he exchanged remarks was about nineteen years of age, about five foot one inch in height, had dark frizzly hair, and was dressed in dark clothes with a cap. David Levi, a Polish Jew, stated before the magistrates

at Croydon that he recognized Franz as one of two foreigners he met in Osborne Street, Whitechapel, on June 12th, that is, two days after the crime. The other foreigner was a smaller man than Franz, not more than eighteen or nineteen years of age, and looked quite a boy. Levi directed the men, who said they had been out all night, to a lodging-house. It also appeared that after three or four days the two had a quarrel, in the course of which Kron struck Franz. The latter then said: "Don't think so much of yourself, you know very well." Kron betrayed marks of great discomfiture at the remark, and parted from Franz next morning, on June 15th.

The third circumstance that appeared to connect Franz with the crime was that there was found round a shirt left by him at his lodgings a piece of hempen cord, of precisely the same kind and the same appearance as the pieces with which the limbs of the victim of the Kingswood murder had been bound, and matching as precisely with the bulk from which the ball sold at Reigate to the two foreigners had been severed.

The prisoner's statement, which is invested with nothing less than decisive interest in view of the occurrences that transpired at his arrest, is as follows: "I will confess that I am Johann Carl Franz, from Shandau. I have hitherto instinctively kept it secret from love of life. It might be the 16th or 17th of June when I went about in Whitechapel about 4 o'clock in the afternoon. I heard a couple of young men, who had the appearance of mechanics, speak together, and I perceived by their language they were Germans. As they separated from one another I accosted one of them and complained to him of my distress, telling him I had eaten nothing the whole day, and that a penny was wanting to pay for my bed. He gave me as answer, 'I

am hungry too; let us go into the next eating-house.' There he had some peas given to me for 2d. He himself ate broth. Afterwards he read the newspaper, and said, 'There are two other Germans being pursued; one is called Johann Carl Franz.' At that I was very much frightened and turned pale. He perceived by my face that I did so, and asked me, 'What's the matter with you?' He said that the other's name was Adolphe Krohn. Hereupon he related to me that he was a journeyman baker, and would emigrate to America in a few days. I must already announce that I stated to Sergeant Spittal that I wandered on the road from Hull to London with two German sailors. Of them, the younger one was named Adolphe Krohn, and the taller one — of my stature — was named William Gerstenberg. I was wandering with both of them; I do not know the name of the nearest town from Hull where I met both sailors. I traveled with them to beyond Leeds. There we passed the night in the open fields behind a straw stack. When I awoke, at six o'clock in the morning, both the sailors were vanished, and had taken my traveling bag with them. In this bag there was a brown greatcoat, a pair of brown buckskin trousers, a waistcoat from the same piece as that which I now wear, and my papers, consisting of a sailor's pass-book, a certificate of birth and baptism, and a railway tariff. These were together in a blue cover. Both the sailors had expressed that they were going to furnish themselves with money from some Catholic priest, because they thought that the Catholic priests were always very rich, and they themselves were Catholics. But the tallest one had no papers, and was constantly asking me whether I had no papers to spare for him. I constantly refused him them because I wanted to keep them myself. Now I must, at the same time, own

that I am really married, and have a wife with two children. When I heard the name Adolphe Krohn in the eating-house, I immediately foreboded that it might be the two sailors, and that the tall one had seized my papers. In that the only error consists that so many people here in Reigate fancy they have seen me, because the tallest one wore my whole attire. The taller one had no coat at all when I was with them. He went in a sailor's blue shirt, and probably he put on my brown overcoat, and thus he had much resemblance to me. Adolphe Krohn, the other one, spoke English better than German. Both pretended to have been born in Vienna. Now I can aver to the magistrates that I have never been in Reigate, and take the greatest oath that I am no murderer."<sup>1</sup>

This extraordinary narrative received dramatic, if merely admittedly partial, corroboration by evidence that came into the possession of the Crown after Franz's arrest. The prisoner mentioned a railway tariff as among the papers that had been stolen from him, and this was not found at Kingswood. Again, in order to prove the prisoner's handwriting, the Crown, at the trial, produced a diary kept by the prisoner from the time he left his home, recording his arrival at Hull, his travels through Leeds, Oldham, and Manchester to Liverpool, his stay there while endeavoring to get a ship for America, his departure for London, and his passage through Warrington and some other places to Leek in Staffordshire, where the narrative abruptly ended. The entries in this diary came down to the 8th, 9th, 10th of some month. It then transpired that the railway tariff, the diary, and a certificate of confirmation had been picked up by two tramps on a heap of straw in a roadside hovel on the borders of

Northamptonshire, and had been brought by them to a magistrate on July 9th, the day after the prisoner told his story, of which it thus afforded a singular corroboration.

Again, it was true that the prisoner had a pack when he landed in England, though *non constat* that it was stolen. It was suggested that, owing to the state of destitution he was in, he might have sold or pawned it, but no such transaction was shown to have occurred. A very curious coincidence was that an unfinished letter of Franz to his parents was found on him to the following effect: "Dear Parents, — for goodness' sake, what shall I do? You know with what resolution I went to work to get to America. I found myself in a most horrible position, but how I came in that position is very natural." It is difficult to conceive, broken and abrupt as this epistle is, a more natural letter to pen than this for a man who, like Franz, found himself suddenly exposed to a terrible charge, alone and destitute in a strange land, assuming the hypothesis that he was an innocent man; and the question on this view seems solely to resolve itself into the inquiry whether it can be supposed that the letter was a mere stratagem to induce the view that he was innocent. It must be remembered that Franz was not a good character, having been previously convicted of felony in Saxony. But supposing it to be a mere criminal ruse, it seems strange that the letter should not have been finished. There was an interval of a whole month between the date of the murder at Kingswood and Franz's arrest for loitering with intent to commit a felony in Old Broad Street. If, therefore, he had formed the design of simulating innocence by the fabrication of a document, he had plenty of time within which he might have effected his object.

The weak points in Franz's story

<sup>1</sup> *The Times*, July 9, 1861, p. 5, col. d.



are his knowledge of Kron, his entire failure to prove an alibi, and the entire absence of any proof that William Gerstenberg ever existed. In spite of the great reward offered, the apprehension of Kron was never effected. It seems quite impossible to assume Kron's innocence. The letters found by the corpse must, only three days before the crime, have been in Kron's actual possession; this observation is clearly justified as regards the letter of Madame Tietjens. The packet found by the corpse was far more incriminating as regards Kron than as regards Franz, as there was nothing to show when the pass and baptismal certificate had last been in Franz's hands. All that can be supposed is that they were in his hands when he landed at Hull in April of the same year. On the other hand, it is plain to demonstration that the letter of Madame Tietjens must have been in Kron's possession on the 7th of June, the murder having been committed on the 10th of that month. Again, all the five witnesses who described the two foreigners in the vicinity of Reigate and Kingswood described one of them exactly as Madame Tietjens described Kron. As the spokesman of the two foreigners at Reigate, Kron exposed himself to much more certain evidence of identity. The guilt of Kron appears a far less precarious hypothesis than the guilt of Franz.

But Franz was associated with Kron in all imaginable ways. According to Franz's own admission he was associated with Kron before the murder. By documentary evidence the association of the two is brought down to a later date than seems consistent with Franz's story. It was stated in a paragraph in the *Times* that a short time before the murder Kron applied to a gentleman in the City for relief, and procured ten shillings and a free pass to Hamburg by a steam vessel which was leaving London for that place on the

following day; and this pass was found upon the prisoner Franz when apprehended. Again, Franz and Kron were identified indirectly by the packet found by the corpse of the murdered woman in the parsonage at Kingswood, to say nothing of the evidence as to identity regarding the two foreigners seen in the vicinity immediately preceding, and after, the time when the crime must have been committed. Lastly, there is evidence that Franz was associated with a foreigner two days after the murder in Whitechapel, whose description, as given by a witness, corresponded in all respects with the description of Kron given by Madame Tietjens five days before the murder. This witness, David Levi, who casually befriended Franz and his companion as a foreigner, described the latter as "a smaller man than Franz, and not more than 18 or 19 years of age; he looked quite a boy, and was a foreigner." The identification of Franz by this witness was complete, as he stated to him that he came from Shandau in the *Saxon Swiss*, that he intended to proceed to America, and that he had a wife and two children. This statement corresponded, therefore, in three material particulars with the statement Franz subsequently made before the magistrates.

BLACKBURN, J., as regards the evidence, told the jury that it certainly was a very material question for them whether it had been satisfactorily established that the prisoner was one of the men who was seen near the scene of the murder shortly before it was committed; and if they believed this to have been made out, they would then have to take into consideration the other circumstances of the case, and say by their verdict whether the evidence satisfied them that the prisoner was one of the parties concerned in the murder.<sup>1</sup> It seems regrettable that neither the account of the Kingswood murder in the "Annual Regis-

<sup>1</sup> *The Times*, August 8, 1861.

ter," nor the report in the *Times*, nor the report of R. v. Franz (1861, 2 F. & F. 580) affords the slightest clew as to the direction of Blackburn, J., as to the probative force of the discovery of the packet of letters identified with Kron and Franz found within six inches of the corpse of the murdered woman. Yet one may doubt whether a more dramatic, if not a more significant, evidentiary fact ever transpired, even at a trial for murder.

On the other hand, it seems very difficult to understand the extraordinary prominence that appears to have been given to the bludgeon found in the room, considered as an evidentiary fact. When Blackburn, J., in his summing-up, came to the evidence of the policeman, who produced the bludgeon and the other two pieces of wood, he said to him: "Step forward and help the jury. Don't make any statement; but show the jury the pieces of wood."<sup>1</sup> There was, of course, conclusive evidence that the bludgeon had been cut from the beech tree in Kingswood Ruffet, where the laborer Blunden saw two men standing at seven o'clock in the evening of the 10th of June, the night when the murder was committed. There was, however, nothing else that could have been significant about the bludgeon, as the murdered woman was suffocated with a sock. It was stated that there were no bruises found on the corpse, so the bludgeon could not possibly have been used. The discovery of the bludgeon without any marks in the room of the murdered woman may, however, have possessed significance as showing the precipitancy with which the ruffians fled. This fact, in turn, may have been considered as negating the conclusion that robbery was not intended because there had been nothing stolen. The fact that robbery was probably intended was of great legal importance, because Blackburn, J., directed the jury

that it was a case of constructive murder.

The following comment appeared in the leading article in the *Times* on the evidence in Franz's case: "A book which bears the name of 'Johan Carl Franz' is found in the room of the murdered woman; it is admitted that the prisoner is the owner of the book, and it is admitted that whoever left it in the room murdered the woman. This does not, of course, of itself, prove the identity of the owner of the book with the person who left it in the room of the murdered woman; it is possible, as the prisoner's counsel insisted, that the book might have gone previously out of the prisoner's possession. It is possible that Johann Carl Franz had slept till six o'clock in the morning behind a straw stack with two companions, and that when he awoke he found his traveling companions had carried off his bag, containing, among other articles, his papers and this book. This is a possible account of the termination of the connection between Johann Carl Franz's book and Johann Carl Franz. But there is other evidence, besides that of the book, against the prisoner. He is seen in the immediate neighborhood of the murder the day before, he goes into a shop at Reigate and buys a ball of string: a young woman in the shop identifies him positively and without the least hesitation. It is not common string: it is very uncommon string indeed; Joseph Dunmore, who made it for Mr. Cramp, who sold it to Mrs. Pither, in whose shop it was bought, pronounces it to be rublay cord and very seldom made. Accordingly, when the string which tied the feet and hands of the murdered woman and the string which had been tied round the blue shirt of the prisoner taken by the police were handed into court, Joseph Dunmore identifies both as being the same kind of string and of this uncommon kind: 'I hackled

<sup>1</sup> R. v. Franz, (1861) 2 F. & F. 580, 583.

the hemp in its rough state myself, and afterwards spun it myself, and made the balls myself.' Thus the purchase in the shop at Reigate affords much more than the mere proof of the prisoner being in the vicinity of the murder at the time of the perpetration, viz., in certain links of evidence which connect the prisoner with the murder. The links connect the string round the murdered woman with the string round Franz's shirt, and again, the string round both with the person identified in court with Franz as the purchaser of the string in the shop at Reigate. Mary Elsey's evidence and that of Joseph Dunmore thus corroborate each other remarkably; indeed, the identification of Franz with the purchaser of the string is admitted by the prisoner's counsel, though Franz himself disowned it before the Bench at Reigate, and attributed the apparent resemblance to the real purchaser of the string having on at the time Franz's clothes, carried off by him with the bag — an explanation which would imply that the prisoner's clothes in the bag were an exact duplicate of those worn by him in court when the identification was made."<sup>1</sup> It seems, on a reference to the "Annual Register," that this account, according to Franz's statement in the police court, is rather hard upon the prisoner. In the police court proceedings Franz, as has been seen, denied that he had ever been at Reigate, much more that he was one of the two foreigners who purchased the string there. It is of some interest to observe that the *Times* report of the assize trial before Blackburn, J., does not altogether bear out the statement in the leading article that Franz, through his counsel (Hon. G. Denman, K. C.), admitted that he was one of the two foreigners who pur-

chased the rublay cord at Reigate. Denman, K. C., on the contrary, merely made an admission that Franz was seen in the neighborhood of the place where the crime was committed in company with another man. He also stated that this was the principal evidence against Franz.

There is no doubt that this pregnant admission that Franz was one of the two foreigners seen in the vicinity puts an altogether different complexion on his story before the magistrates, in which he stoutly denied he had ever been at Reigate.<sup>2</sup> The circumstance appears conclusively to indicate that, if at that time a prisoner had been able to give evidence on his own behalf, and if Franz had elected to do so, cross-examination would have pulverized a story so full of retraction and contradiction as his original story. The final admission that he had been in the vicinity of the crime with another German, coupled with the entire want of any evidence of the existence of Gerstenberg, and of the theft of his pack, would have gone far to totally impair his defense.

However, it was clearly a far less dangerous admission for his counsel to make, that Franz was in the vicinity of the place where the crime was committed, than that he purchased the string at Reigate. This last fact was not admitted by his counsel at the trial, in spite of the statement in the *Times* leading article. A reference to the "Annual Register" shows the great importance of this, as the evidence was that the two Germans at the Cricketers Inn, among whom Franz was identified by at least two witnesses, were distinct from the two Germans who purchased the string. The rublay cord of peculiar make was purchased by the two Germans at Mrs. Pither's shop in Reigate be-

<sup>1</sup> *The Times*, August 9, 1861.

<sup>2</sup> Cf. *Times*, July 16, 1861, for Franz's statement before the magistrates, and *Times*, August 8, 1861, for Denman, K. C.'s, admission that Franz had been seen in the neighborhood of the place where the crime was committed in company with another man.

tween two and four o'clock in the afternoon of Monday, June 10th,<sup>1</sup> and the evidence of the potman at the Cricketers Inn was that the two Germans who came to that place on the 9th came downstairs the next morning at 8.30 and remained at the Cricketers Inn till half past four o'clock on that day. This was the Monday on the night of which the murder took place.<sup>2</sup> The Kingswood murder case, therefore, instances in a very signal manner that the truth of the facts composing a strand of circumstantial evidence depends on minute and careful observation, as to which even the most conscientious witnesses may make unintentional misstatements. The mistress of the shop where the two foreigners purchased the string on the Monday could not determine the hour of the purchase with any more definiteness than that it occurred between two and four o'clock in the afternoon. This induces the suspicion that her evidence was not rendered with enough precision to be relied on as to the time, though it was no doubt true the purchase was a fact. The importance of the matter is that the current of evidence is that the persons who bought the string at Reigate committed the murder at Kingswood a few hours later, and that, accepting Mrs. Pither's statement, Franz cannot have been one of the two Germans who purchased the string from her between two and four on Monday afternoon, if he was one of the two Germans at the Cricketers Inn, because the potman stated that the two latter did not leave the place till half-past four. It is this statement of the shopkeeper at Reigate that is the sole authority for concluding that there were two pairs of foreigners in the vicinity of Reigate about the time of the murder, an hypothesis that envelops the whole case with an impenetrable obscurity.

But in view of its vague nature it is clear that there is no placing any implicit reliance on Mrs. Pither's statement as to time. The dismissal of this evidence as to time must equally involve the entire abandonment of the hypothesis that there were two foreigners in the vicinage at the date of the murder. The *Times* report of the police court proceedings is, as has been noticed, entirely inconsistent with the hypothesis.<sup>3</sup>

It is rather curious to observe, in view of the variance between Franz's statement before the magistrates at Reigate and the defense raised by his counsel at Croydon Assizes, that Denman, K. C., stated, in his address to the jury, that Franz was not a man of bad character.<sup>4</sup> This was undoubtedly incorrect. A police inspector stated at the police court that a communication had been received at the Foreign Office from the British Consul at Dresden, stating that this Franz had been a very indifferent character, and that he had suffered two years and eight months' imprisonment for felony.<sup>5</sup> Again, the leading article in the *Times*<sup>6</sup> does not draw the conclusive inference that must, nevertheless, be derived from the letter of Madame Tietjens to Kron having been found in the packet of letters found by the corpse. This letter was dated the Friday before the murder, June 7th, and therefore must have been in Kron's possession only three days before the date of the crime. In Foster and Finlason's Reports it is stated that, if Franz's letters were stolen, they must have been stolen by the person to whom Madame Tietjens gave the letter dated June 7th.<sup>7</sup> There appears, therefore, to be drawn an implicit distinction between Kron and "the person" to whom Madame Tietjens gave the letter. There is no doubt from the evidence of Madame Tiet-

<sup>1</sup> *Times*, July 9, 1861.

<sup>2</sup> *Times*, July 16, 1861.

<sup>3</sup> *Times*, July 9 and 16, 1861.

<sup>4</sup> *Times*, August 8, 1861.

<sup>5</sup> *Times*, July 16, 1861.

<sup>6</sup> August 9, 1861.

<sup>7</sup> *R. v. Franz*, (1861) 2 F. & F. 580, 582.

jens that the person to whom she gave the letter was not Franz.<sup>1</sup> While there is no doubt that Kron employed various aliases — Jeretzky, Ahlborn, etc. — there is no evidence that any one personated him, if the statement of Franz is to be believed. Again, according to the prisoner Franz, the person who saw Madame Tietjens must have been Kron, who was very short and boyish looking. Franz did not accuse Kron, but stated that he suspected one Wilhelm Gerstenberg of having stolen the letters.<sup>2</sup> There was, however, no proof whatever adduced that this man existed except the statement of Franz.

Again, it appears "sub modo" to support the view that Kron stole Franz's papers that all the six papers found by the corpse were bound up with one thread, and that one of them must have been in Kron's possession four days previously.

But the report in Foster and Finlason seems inadequate to the degree of inaccuracy in its account of the evidence. It does not mention the one circumstance that so strikingly corroborated Franz's story as to the loss of the letters: the fact that some documents identified with him had undoubtedly been found by tramps on the borders of Northamptonshire, far farther south and nearer London than Leek, in Staffordshire, where the entries in the prisoner's diary abruptly ended. The report in Foster and Finlason gives a very inadequate description of the rebutting circumstantial evidence adduced for the defense in two other particulars; it does not state that it was proved the prisoner had a pack when he landed at Hull, which might have been stolen from him; and also omits mentioning that, however peculiar the string found tied round the corpse of the victim, its correspondence with that purchased the day previously at Reigate and with that tied round Franz's shirt seems

deprived of any significance since it was easily obtainable in Whitechapel. It was a necessary assumption of the case for the prosecution that the string round the corpse of the victim must have been purchased by Franz in Reigate. Again, the report in Foster and Finlason categorically states that Franz's diary was found in the parsonage at Kingswood (p. 580), whereas the fact was that the three papers connected with Franz found near the corpse were a service book, a certificate of birth, and a certificate of baptism. The diary was found by tramps on the borders of Northamptonshire, about a hundred miles away from Kingswood, and a whole month afterwards.<sup>3</sup> The discovery of the diary afforded nearly as strong presumptive evidence of Franz's innocence as the discovery of the other three documents in the room of the murdered woman did of his guilt, because it proved that some, at least, of his papers had passed out of his possession. As the entries in the manuscript book gave a consistent account of his wanderings after he landed at Hull, and purported finally to show that on the 10th of some month he arrived at Leek, in Staffordshire, and as the murder for which he was tried was committed on June 10th, if the entry in the diary could have been assumed to apply to the month preceding that on which it was found, Franz would have possessed clear, if not conclusive, evidence of an alibi, as he would then have been able to show that at the date of the Kingswood murder he was at Leek in Staffordshire. It is clear that, as he did not do this, the 10th day of the month referred to in the diary must have been May 10th, as the Foreign Office were informed that Franz left Königstein, in Saxony, in April, 1861.<sup>4</sup> But in his statement before the magistrates at Reigate, Franz entirely failed to account for

<sup>1</sup> *Times*, July 16, 1861; *R. v. Franz*, 2 F. & F. 580.

<sup>2</sup> *Ann. Reg.*, 1861, *Chronicle*, pp. 142-3.

<sup>3</sup> *Times*, July 9, 1861.

<sup>4</sup> *Times*, July 11, 1861.

his movements either previous to, or at the date of, the Kingswood murder, or, it may be added, subsequently.

While the report of *R. v. Franz* in Foster and Finlason seems very clearly to err on the side of both inaccuracy and omission, there is nothing to confirm, in the *Times* report of the proceedings before the magistrates at Reigate, the statement in the "Annual Register" that three witnesses before the magistrates, who were not examined at the trial, deposed that two foreigners, one short and dark, and the other fairer and taller, were within a hundred yards of the Kingswood parsonage at five o'clock on the Sunday afternoon, June 9th — the day before the crime — at which time two other persons specified that two similar foreigners were seated in the taproom at Reigate.<sup>1</sup> Again, it was stated in the leading article in the *Times* that Franz was seen "in the immediate neighborhood of the murder the day before."<sup>2</sup> But there is nothing in the *Times* report of the police court proceedings that in the slightest degree supports the notion that there was evidence that any foreigners were seen in the immediate vicinity of Kingswood parsonage on the Sunday.<sup>3</sup> That, in particular, Franz should have been seen in the vicinity of the murder on the Sunday is directly contradictory to the evidence of the potman at the Cricketers Inn, George Roseblade, who stated that, with the exception of about an hour's absence at midday on Sunday, the two foreigners who stayed there (amongst whom he identified Franz), remained indoors the whole of that day. As Kingswood is four miles from Reigate, it would have been clearly impossible for two persons who had no knowledge of the district to have gone out and made some purchases, and, in addition,

have walked at least eight miles, in the brief space of one hour. But the matter is concluded by the fact that no evidence was tendered that two foreigners were seen in the vicinity of the murder the day before the crime. If any such evidence had been tendered, it may be added, it seems certain that a report of it would have appeared in the *Times* notice of the police court proceedings of the Kingswood murder. That report was so full that, at the trial at Croydon Assizes, the learned reporter contented himself with a mere epitome of the evidence previously given, mentioning that there had already been a very detailed account of the evidence given before the magistrates.<sup>4</sup> It seems, therefore, nearly essential to conclude that there was no evidence of a second pair of foreigners in the vicinity of Kingswood parsonage the day before the murder, though a little more doubt may possibly exist as to whether on that day there was not some evidence that there were two pairs of Germans in Reigate. Even this last point is highly uncertain, and the conclusion of the account in the "Annual Register" leads to the abandonment of that hypothesis.

The "Annual Register," in its final observations on the Kingswood murder, states that none of the foreigners who were at Reigate at the date of the murder have been traced, and that no clew has been found to unravel the mystery.<sup>5</sup> This is, undoubtedly, incorrect as regards Kron, even considered merely as a *résumé* of annual information about events. The *Times*, on September 7, 1861, under a paragraph headed "Supposed Discovery of the Remains of Adolphe Krohn," stated that the police in Surrey had been informed that the dead body of a man believed to be Krohn had been found at High Leigh, near Warring-

<sup>1</sup> *Ann. Reg.*, 1861, *Chron.*, 143.

<sup>2</sup> *Cl. ante*, p. 216.

<sup>3</sup> *Times*, August 7, 1861.

<sup>4</sup> *Cf. Times*, July 9 and 16, 1861.

<sup>5</sup> *Ann. Reg.*, 1861, *Chron.*, 144.

ton, Cheshire. The body found was that of a young man, apparently a foreigner, between twenty-five and thirty years of age. It was found in a field adjoining the highroad from the south to Liverpool. Decomposition had proceeded so far that no trace of features could be discerned, but in dress, height, and every other ascertainable particular the body corresponded with the published description of Adolphe Kron. It must be remembered that a reward of 200 pounds had been offered by Mr. Alcock, M. P., for Kron's apprehension, so the published description is likely to have been both detailed and widely circulated. No marks of violence were discovered; nothing whatever was found in the pockets of the deceased's clothing; and it is supposed that the man must have lain down and died from exhaustion shortly after the Kingswood murder was committed, having fled from London on June 15th. From a statement

that appeared in the *Times* on July 11, 1861, it seems highly probable that the body found was that of Kron. It was for some reason anticipated Kron would proceed north, and that his sole *modus vivendi* would be that of soliciting alms from charitable foreigners under different aliases.

A curious feature of the Kingswood murder case is that no attention was paid to footprint evidence, which it nevertheless distinctly appears was available. The account in the "Annual Register" states that when Halliday went to see his wife at Kingswood Rectory the morning after the crime he traced the footprints of two persons, and that they proceeded up to the kitchen window, where an entry had clearly been foiled by the shutters, and that these same footprints were afterwards traced to beneath the window of the murdered woman. The entire neglect of such evidence appears culpable laches.

389. **HILLMON v. INSURANCE CO.** (CHARLES S. GLEED. 18th Annual Report of the Kansas State Superintendent of Insurance. 1887. p. 49.)<sup>1</sup>

**PRELIMINARY.** — The Hillmon cases in the United States Circuit Court for the District of Kansas are styled: *Sallie E. Hillmon v. The Mutual Life Insurance Company of New York*; *Sallie E. Hillmon v. The New York Life Insurance Company of New York*; *Sallie E. Hillmon v. The Connecticut Mutual Life Insurance Company*. These cases were docketed on the 13th of July, 1880.

The first trial was at Leavenworth, June 14–July 1, 1882, before the Hon. CASSIUS G. FOSTER, of the United States District Court for the District of Kansas, the attorneys being *L. B. Wheat, John Hutchings, R. J. Borgolthaus*, and *S. A. Riggs* for the plaintiff; and *George J. Barker* and *James W. Green* for the defendants. The jurors were as follows: R. B. McClure, Thomas White, James M. Walthal, Wm. Stocklebrand, E. H. Hutchings, Leonard Bradley, J. T. Fulton, Daniel Horville, Wm. Lyons, J. S. Tood, John P. Gleich, and Samuel Kieser. This jury failed to agree, seven being for the plaintiff, and five for the defendants.

The second trial was at Leavenworth, in June, 1885, before the Hon. DAVID J. BREWER, United States Circuit Judge, the attorneys being *L. B. Wheat, John Hutchings*, and *Samuel A. Riggs* for the plaintiff, and *George J. Barker, J. W. Green*, and *Charles S. Gleed* for the defend-

ants. The jurors were as follows: B. M. Tanner, J. P. G. Creamer, C. O. Knowles, H. D. Shepard, Nelson Giles, Jr., R. H. Stott, G. W. Greever, Wm. N. Nace, Joseph Kleinfeld, Wm. H. Hamm, H. A. Cook, and P. B. Maxson. This jury failed to agree, Messrs. Tanner, Kleinfeld, Stott, Maxson, Creamer, and Shepard being for the plaintiff, and Messrs. Greever, Giles, Knowles, Cook, Nace, and Hamm for the defendants.

The third trial was at Topeka, Feb. 29–Mar. 20, 1888, before the Hon. O. P. SHIRAS, Judge of the United States District Court for the Northern District of Iowa, the attorneys being *L. B. Wheat, John Hutchings*, and *Samuel A. Riggs* for the plaintiff, and *George J. Barker, J. W. Green, Charles S. Gleed*, and *William C. Spangler* for the defendants. The jurors were as follows: Samuel Kozier, Jacob Moon, J. S. Bouton, A. S. Davidson, N. S. Miller, Riley Elkins, J. S. Earnest, John W. Farnsworth, Enoch Chase, Furman Baker, G. W. Coffin, and J. P. Rood. This jury agreed on the second ballot, rendering a verdict of \$35,730 (in all) for the plaintiff.

The cases are now (April, 1888) in the Circuit Court pending the argument of a motion for a new trial. If this motion is overruled, an appeal will probably be taken to the United States Supreme Court.<sup>2</sup>

<sup>1</sup> [A typewritten copy was supplied for use in this work, by the courtesy of Mr. Gleed. — Ed.]

<sup>2</sup> [The appeal was so taken. In 1892 (*Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285), the judgment was set aside, and a new trial ordered. This fourth trial took place Jan. 9–Mar. 19, 1895; the jury disagreed. The fifth trial took place Mar. 11–Mar. 31, 1896, and the jury disagreed. The sixth trial took place Oct. 17–Nov. 18, 1899, and the jury gave a verdict for the plaintiff. This verdict was later affirmed on appeal: *Connecticut Mut. Life Ins. Co. v. Hillmon* (107 Fed. 842, C. C. A., April, 1901); but was finally set aside in the Supreme Court (188 U. S. 208, January, 1903), two judges dissenting.

Of the three defendants, each had chosen a different course:

The New York Life Insurance Co. had settled, in 1898, before the sixth trial, the case being dismissed. In 1896, during the Populist government, the State Insurance Commissioner had barred these three companies from doing business in Kansas, owing to the popular disapproval of the companies' resistance to the Hillmon claim. To regain admission to the State, this settlement was made. Later, upon a change of political administration, the bar was removed for all.



In stating the facts in this controversy, the writer has confined himself to the evidence adduced at the second and third trials, except as otherwise indicated; and, though sure that the companies are in the right, he still feels bound in this sketch to make a clear distinction between the facts and his construction of them — between citations from the evidence, and his opinions. Aside from his knowledge of the cases as an attorney, he was one of the first newspaper reporters to become familiar with them, and has a personal acquaintance with most of the witnesses. Such familiarity gives him a knowledge of many facts which, under the rules of evidence, cannot go to the jury, but which might properly appear here. He has thought best, however, to avoid criticism by confining himself to what appeared or was closely suggested in court, and to further give both sides of the case a hearing by quoting the reports of the arguments made by the plaintiff's counsel at the trial at Leavenworth. These reports were made in the *Daily Standard* by Henry C. Burnett, now of New Mexico, also one of the first journalists engaged on the case, and a thoroughly competent and conscientious reporter. All citations from the testimony of the second trial are from the bound volumes of reports made by Mr. F. O. Popenoe, the official stenographic reporter. If the writer has made errors of any sort in quoting the evidence, they are certainly trivial and unimportant, as the utmost accuracy has been desired.

#### THE EVIDENCE.

*Hillmon and Wife, before Hillmon's Disappearance.* (In Evidence.) — John W. Hillmon was born in

Indiana, in 1845, and was therefore about thirty-four years of age at the time of his alleged death near Medicine Lodge, Kansas, March 17, 1879. He came to Kansas with his father, who settled near Valley Falls, Jefferson county, Kansas. He attended school more or less, and then became a cattle herder and farm laborer, working for various farmers and cattlemen in Jefferson, Leavenworth, and Douglas counties. He entered the army in 1863, at eighteen years of age, and remained about one year. In 1874 he went to Colorado, and worked in the mines at Quartzville and Central City as a miner and mining boss. In 1876 he returned to his home in Kansas, and resumed his occupation as cattle herder. He left Kansas again in 1876, going to Sweetwater and Reynoldsville, Texas, where he engaged in killing buffalo, gathering buffalo bones and hides, and in hauling freight. He returned to Kansas via New Mexico and Colorado, selling the ox teams of his Texas outfit at various points on the return trip, and arriving at Lawrence in August, 1877. For a time he bought and sold hogs in Lawrence. On or about December 15, 1878, he left Lawrence for a trip to Wichita, Dodge city, and other western and southwestern points, as he said, to find a cattle ranch, leaving Wichita December 26, 1878.

The following extracts from his pocket journal will show the character of this first trip, the journal or memorandum book having been taken from the body of the man killed near Medicine Lodge on the 18th day of March, 1879:

"John W. Hillmon's book; residence, Lawrence, Kansas. Mrs. S. E. Hillmon,

The Mutual Life Insurance Co. of New York, in 1900, made satisfaction of the judgment obtained in 1899 on the sixth trial.

The case was dismissed against the Connecticut Mutual Life Insurance Co., in 1903, presumably because of a settlement after the Supreme Court's order for a new trial.

Thus ended the Hillmon Case.

For most of this later history of the case, the Compiler is indebted to Morton Albaugh, Esq., Clerk of the United States District Court for the District of Kansas, at Topeka. — Ed.]

corner Henry and Alabama streets, Lawrence, Kansas. Traveling companion, J. H. Brown; residence, Wyandotte, Kansas.

"My first memorandum I lost after I had been out a few days, so I replaced it with a new one. Could not recall all that I had in my first, but placed my dates correct. I lost it the second day from Wichita, together with some cough medicine; I had caught a severe cold at Wichita, and provided for it. Colds are numerous through this part. Prescription, Bon Bay root.

"December 18th. I left Lawrence on the 18th of December, 1878, for the purpose of looking up a stock ranch in the southwest. Went by way of the Atchison, Topeka & Santa Fe to Wichita. Arrived at Wichita at twelve at night. Found snow about three inches deep.

"December 19. On the morning of the 19th looked around town during the day. Wichita is a livery town. Streets full of teams every day. They will face the storm to go to the city.

"December 20. Rather warm overhead. The snow melting some. Wrote a letter home, and one to Baldwin. Looked around some for a team. Did not get any up to this evening.

"December 26. Started early for the west. Turned cold and began to storm. Drove all day, nearly facing the storm. The country is dotted with houses all over the prairie. No timber and no accommodations to amount to anything. Stopped at night about 25 miles from Wichita. Their principal fuel is corn stalks.

"December 27. Cold. A long drive through rather an unsettled country. Jack frosted his feet. Had to break road most of the way. Horses as well as us was very tired. Stopped for the night with some Hoosiers, though they made us very comfortable.

"December 28. Drove thirty-five miles, and arrived at Medicine Lodge about four in the evening. The weather has been so cold, and the scarcity of fuel has prevented us from camping out. There is no timber from here to Wichita, about a hundred miles. Settlers have to

haul what timber they use forty or fifty miles. Received a letter from L. Seelig, Lawrence, Kansas. Did not receive any word from home.

"December 29. At Medicine Lodge. Snowed during the past night. Too cold to travel. Remained in town. Wrote a letter home. Went to church at night. Medicine affords a very good congregation for a new and frontier town.

"January 6. After looking around we find that we have broke our wagon. Will have to go back to Sun City to get it fixed. The wind is blowing very hard and cold. I think something very strange will happen soon. It has not snowed any since yesterday. Have just had a good time after our horses. They got loose and ran all over the country. Think they are done running for a while except they are hitched up. Last night was very cold and blustery. This morning, the 7th, threatened snow. Wind cold from the north. We are in camp on the Medicine river, at Myers's ranch, about twelve miles west of Sun City. Jack is complaining with cold. Nothing to do to-day except set by the fire, and it smokes so we can hardly see at times. This kind of weather will make one almost curse camp life, and himself for being so silly as to start on a trip of this kind during the winter months. I have prophesied a cold winter this winter, but so far it has overreached my expectations. My opinion was formed by the extra quality of all kinds of furs, both small and large. Muskrats in the north build higher than they was known to for years. The sun goes down to-night dark with snow and wind. I think it has been as blustery an afternoon as I have ever witnessed. This kind of weather is what will condemn this part of the country for stock. It will be almost impossible to save near all of the stock. Admitting it a good country, why was man made to drift in the world like wild animals? I guess the intent was good, and our life what we make them. I would freely give fifty dollars if I had postponed my trip until one month later at least. I think then a man would have some show to travel

with safety, while now he has but very little.

"January 8. Rather pleasant overhead. Old man Myers came down to camp and talked until we both had the headache. He thinks himself the pioneer of Kansas, and has only been in the country about four years. He says woman is a swindle, and that every one knows. At least his, for they look worse than h——I sewed for murder. We have concluded that we will set in camp a day or two longer, and see what the weather is going to do. A fair prospect for a good day to-morrow.

"January 12. We left Medicine river early in the morning. It had every appearance of being a beautiful day. Traveled northwest. Crossed the head of Spring creek, near Bannister's ranch. We found the road very rough and tiresome. The sand hills numerous. Snow badly drifted in many places. We put up for the night at Smith's ranch, 14 miles southeast of Kinsley. I should like to own all this country, if I had it on a big hill or mountain where I could roll it down by sections. I think then I could save many from living out a miserable existence, which they are trying to do here on these bald prairies, without wood or coal to keep themselves warm. If the country affords such, many of them are not able to buy, but burn corn stalks and hay.

"January 20. Warm and pleasant overhead. Roads very bad. Mud and ice. Arrived in Wichita in the afternoon. Think we will wait a few days and see if the traveling will get better. Think will go south to the Nation line next time.

"January 22. At Wichita waiting for the roads to get a little better. They are very muddy. The weather looks some like a storm again, cloudy and dark. Wichita is packed with teams in the streets. I think it is the boss town of Kansas for business. Hogs seem to be in good demand. Buyers are quarreling over them to-day. They are bringing \$2.60 for good ones. Wheat 54 cents. Corn is selling at about 18 cents. Wichita is

having a glorious time, that is, the praying portion of the city. 22d. Went to church in the evening. Thought it would last all night. They have several mourners — fish for the preachers.

"January 25. Started home morning at 5 o'clock. Arrived at Lawrence half-past three evening. Met Mr. Wiseman of the Mutual Life, Topeka.

"January 26th and 27th at home.

"January 28. Left Lawrence 12.40 by A. T. & S. F. for Wichita. Weather damp and cloudy. Arrived at Wichita at 10 in the evening.

"February 8. Still I remain in Wichita waiting for the roads to get in a passable condition. They are very bad. I think I have never did as hard work in my life as I have done in the past six weeks. It is killing me almost by inches to loaf around and do nothing as I have been doing of late. I think I will leave here within a day or two, if I have to go home.

"Monday, 17th. Cloudy and cool. Am at home in Lawrence.

"18th, 19th and 20th, at home.

"23d. Came home in the evening. Very warm. Don't see as there is any good to grow out of me trying to keep track of my misdeeds, while I am apt to err as any one. And that I would be sure ashamed not to make a memorandum of, and only show up the best parts as others have done before me. I do not want to be an exception to the rule or make any new ones so to keep from answering any hard questions. If any one should want to know where I spent my evenings I will say to them I have forgotten to make a memorandum of the time, and my memory is bad, as I never charge it with anything, and of course cannot answer prompting. So ends this part at Lawrence.

"February 23, 1879.

"(Signed) J. W. HILLMON."

On January 25, 1879, Hillmon went from Wichita to Lawrence, for a few days, and returned to Wichita, leaving there on March 4, 1879, on his next and last trip, prior to his disappearance at Crooked creek, a

few miles from Medicine Lodge, Barber county, Kansas. The two Wichita trips in search of a ranch were exceedingly hard ones. He was accompanied by John H. Brown, who had also been his companion in Colorado and Texas, and the two men were at home wherever night overtook them.

Hillmon was married October 3, 1878, to Sally E. Quinn, about four and a half months before his disappearance. Hillmon and wife lived in one room in the house of Mrs. Judson, where they were married, in Lawrence. Mrs. Hillmon was a second cousin to Levi Baldwin, who lived near Tonganoxie, Leavenworth county, Kansas, and who was Hillmon's best friend. Mrs. Hillmon came to Kansas from Columbus, Ohio, at an early age, and had been employed at Lawrence as a family servant, and waiter in a restaurant, which was managed by her mother.

Hillmon was always a poor man. No one knows of his ever having had money or property of consequence except the train taken from Texas and sold in Mexico and Colorado (his possession of which is explained later), and two notes given to Hillmon by Levi Baldwin, and produced for the first time on the last trial. Three notes, signed "Hillmon & Brown," the signatures having been identified as the work of Hillmon, and the notes having been executed to McKamy & Anderson, of Texas, were introduced by the defendants to contradict the evidence that Hillmon had money above his debts. The Texas parties, to whom these notes were given, wrote to the City Marshal of Lawrence, saying that Hillmon was wanted. Hon. J. B. Johnson holds an unpaid note of Hillmon's for \$100, given by Hillmon for professional services, which note has never been collectible.

An accurate description of Hillmon at the time he was last in Lawrence, is as follows: Weight, 165

pounds; height, 5 feet 9 inches; hair, brown; mustache, full; teeth, imperfect, and one gone; face egg-shaped, and broadest through the temples; cheek bones, medium, and not prominent or high; nose, straight and regular; jaws, tapering to the front; lips, closed; scar on back of head and on hand, and vaccination sore on arm.

(Not in Evidence.)—Hillmon and Brown bought the train which they used in Texas of McKamy and Anderson, and gave back the three notes for about \$1600 each above referred to, and a bill of sale for the train. The train was taken to New Mexico and Colorado and sold as also above stated, and the notes were never paid. It was on this account that the police inquiry came from Texas to City Marshal Brockelsby, of Lawrence. Hon. W. N. Allen once paid a bond for about \$100 for Hillmon when the latter had been arrested in Jefferson county, with others, for brutally trying to force information out of an old farmer on the subject of horse stealing.

(Comment.)—From all the evidence it appears that Hillmon was a rough character, familiar chiefly with the hard life of the soldier, the plainsman, the miner, the hunter, and the cowboy; accustomed to seeing human life held cheaply; practically an outlaw; absolutely poor; without a definite occupation; with no particular respect for women, or home, or relations, or law. He was mentally active, however, and always had work or business of some kind in which he showed more or less cunning and shrewdness. His penmanship was better than ordinary, and his journal gives evidence of considerable crude thought. Such was John W. Hillmon at the time of his disappearance.

From all the evidence it seems that Mrs. Hillmon before marriage was a young woman of good character and industrious habits. As a family servant and waitress in a

restaurant she supported herself, and perhaps assisted in the support of her mother and sister, her father being dead. Her marriage does not seem to have materially changed the situation, as her subsequent living arrangements were of the simplest sort. After the insurance quarrel began, she entered on the interesting chapter of her life. In nine years she has traveled much and prospered fairly. She may or may not be married. She was not asked her name by any of the attorneys, but she was accompanied through the trial by a Mr. Smith, who is understood to be her present husband. Why her attorneys did not develop this fact, if fact it be, on the trial, the writer does not know.

*The Insurance Transaction.* (In Evidence.)—Shortly after the marriage of Hillmon, which took place October 3, 1878, he went with his friend Levi Baldwin to the office of J. H. Blythe, attorney, at Tonganoxie, a small town in Leavenworth county, and asked his advice as to the best methods for securing insurance. Mr. Blythe was not a regular insurance agent, but he told Hillmon and Baldwin what he knew in the line of their inquiries. On the 31st of October, 1878, Hillmon and Baldwin went to the office of A. L. Selig, a well-known insurance man in Lawrence, to whom Hillmon applied for insurance in the New York Life Insurance Company in the sum of \$5000. On December 4, 1878, he and Baldwin again called on Mr. Selig and applied for a second policy on the life of Hillmon in the New York Life Insurance Company in the sum of \$5000. The New York Life Insurance Company issued policies on the applications made to it. The Connecticut Mutual was refused on technical grounds. On the 4th day of December, the same day the applications were made, Hillmon and Baldwin called also on G. W. E. Griffith, of Lawrence, and made application for insurance in the Mutual Life Insur-

ance Company of New York in the sum of \$10,000. The Mutual Life Insurance Company issued a policy as applied for. On February 14, 1879, Hillmon returned from Wichita to Lawrence, and applied for a policy in the Connecticut Mutual Life Insurance Company in the sum of \$5000, which policy was granted. This gave Hillmon insurance for \$10,000 in the Mutual Life of New York, \$10,000 in the New York Life, and \$5000 in the Connecticut Mutual, the total being \$25,000 in all. The annual premiums on this sum called for about \$60 a month. Hillmon made the first semiannual payments, part in cash, and part by one note, the latter being given to Mr. Selig, agent of the Connecticut Mutual Company.

The insurance agents testified that they had never known of Hillmon's personal character or financial standing when the policies were issued, except that he was vouched for by Levi Baldwin as a cattleman with money. Baldwin was a farmer, supposed to be in good circumstances, but subsequent evidence proved that he was bankrupt. Mr. J. S. Crew, as assignee of a bank, had to foreclose a mortgage on Baldwin's farm. Baldwin asked him to wait until the money was paid on Hillmon's insurance, as he would then have \$10,000. After the litigation commenced, Crew would wait no longer, and the foreclosure was made, after which Baldwin removed to New Mexico.

One policy was declined because Hillmon wanted permission to ride fast after cattle and carry firearms. Hillmon's last visit to Lawrence seems to have been on a matter of life insurance, as a question had been raised as to the validity of his policy, on the ground that he had never been vaccinated. He objected to vaccination until assured beyond a doubt by the agents of the company that in case of death, his policy would be void, on the ground of his

they had seen in the wagon with Brown going west. The Medicine Lodge witnesses did not know Hillmon personally, but believed that the dead man was the man they had seen briefly, as above described. Mr. Riggs spent considerable time in and about Medicine Lodge working up this line of evidence.

Mrs. Hillmon, immediately before the body reached Lawrence, went to the office of G. W. E. Griffith, in response to a letter from Griffith asking her to call and take steps to make proof of death. At Griffith's office Mrs. Hillmon met Griffith and A. Selig, insurance agents. They asked her for a description of her husband. Both Griffith and Selig testified that she seemed unable or unwilling to give any description. They attempted to take down what she answered, but stopped trying, as they could get nothing definite from her. What they did get down on paper in the beginning was given to County Attorney J. W. Green, to the best of Mr. Griffith's recollection. Mr. Green never remembered having seen anything of the sort. Mr. Selig says that Mrs. Hillmon said that she did not know her husband very well. At the inquest Mrs. Hillmon was accompanied by her first attorney, Mr. R. J. Borgholthaus. She produced pictures of her husband, but would not answer satisfactorily questions put to her by the County Attorney and the coroner's jury. When asked how much hair her husband had, she answered that he had more than Mr. Green. As that gentleman was bald, this wild dash of levity afforded a pleasing break in the melancholy course of the proceedings.

The jury found the body to be that of an unknown man feloniously shot by John H. Brown. Four of these jurymen — E. B. Good, J. W. Adams, W. O. Hubbell, and Andrew Tosh, knew Hillmon well, and swore that the body was not that of Hill-

mon. The same was sworn to by W. H. Lamon, the photographer who took the pictures of Hillmon, exhibited by Mrs. Hillmon, and also the picture of the dead man; Col. Sam Walker, who saw the body when it was first exhumed at Medicine Lodge; Theodore Wiseman, who was also at the opening of the grave at Medicine Lodge; A. L. Selig, Mr. Tillinghast, and G. W. E. Griffith, insurance agents; Edward Monroe, a hackman who had carried Hillmon; George Gould, an implement dealer; Joseph Bebout, a farmer; Wm. Brown, another farmer (the three latter having done business with Hillmon); Wm. Brockelsby, City Marshal of Lawrence, who at the time of the disappearance was looking for Hillmon on information from the Texas parties who had lost their teams; Frank L. Woodruff, merchant, who had traded with Hillmon frequently; Dr. V. G. Miller, who examined Hillmon for his policy in the Mutual Life Insurance Company of New York, and who knew him well; Dr. J. H. Stuart, who examined Hillmon for his policies in the New York Life, and who vaccinated him on the 20th of February; and Dr. C. V. Mottram, who also knew him. Dr. Stuart met Hillmon in Selig's office October 31, 1878, and on that day examined him for life insurance. Early in December he examined him again for another policy. On the 20th day of February he vaccinated Hillmon at two points on the left arm. Hillmon consulted him five or six times about the vaccination. All or practically all of the witnesses above named as having sworn positively that the body was not that of Hillmon, based their belief, first, on their general inability to recognize the dead face; and, second, on the facts that the dead man, as compared with Hillmon, had very much darker hair, higher cheek bones, a broader chin, a more Roman nose, larger hands and longer arms, better teeth, larger

feet, and a longer measurement. Not all of these witnesses testified to all of these facts, but all testified to some of them, and nearly all to nearly all of them.

An important branch of the testimony of identification was the tooth testimony. The following-named witnesses, thirty-eight in number, testified that Hillmon had a defective tooth, or was minus a tooth altogether from the front part of the upper jaw, most of them locating it on the upper left side, immediately in front of the eyetooth; Major Wiseman, Colonel Sam Walker, Oliver Walker, William Hogan, Jackson Hogan, Tinnette Korkadel, Charles Snow, Josiah B. Brown, James T. Cameron, Mrs. M. J. Dart, Dr. V. G. Miller, Frank H. Hatch, J. E. Taylor, W. S. Angel, H. D. Marshall, Mrs. Wm. T. Faxon, Joseph Bebout, Claude Holliday, Harriet Adams, James A. Adams, E. L. Emmons, Mr. Rothwell, R. A. Brown, Joshua Wilson, William Brockelsby, Mrs. Smith, Wm. T. Faxon, Mary Carr, Margaret Jane Kaufman, Jackson Taylor, Robert Blake, S. D. Nixon, Mrs. Harris, W. W. Nichols, George A. Nichols, Mrs. Geo. A. Nichols, Maggie J. Dixon, and Jefferson Schleppy. Wiseman remembered that there was something imperfect about Hillmon's front teeth. Colonel Walker remembered that once when lying on a bunk in his stable, Hillmon came to the place where he was lying, and hung his overcoat on a nail over him. While they were in this relative position, Walker noticed the absence of one tooth in the front part of Hillmon's upper jaw, and remembered it at the time because his son Oliver has lost a tooth in exactly the same place. Oliver Walker remembered the same circumstance — the absence of the tooth — because of having himself lost a tooth from the same place. Wm. Hogan remembered a defective tooth. Tinnette Korkadel, of Valley Falls, was a schoolmate of

Hillmon's, and for many years an intimate friend of the family. She remembered that as a boy Hillmon had a black or discolored tooth on the left front of the upper jaw. Hillmon was once very attentive to her. James T. Cameron knew Hillmon when both were farmers in the same neighborhood. They once had a conversation with reference to the missing tooth. Cameron swore positively that the tooth next to the upper left-hand eyetooth was gone. Mrs. M. J. Dart, who had seen Hillmon and Mrs. Hillmon at her house, swore positively as to the missing tooth. Mrs. Faxon was at the house of Wm. T. Faxon, whom she subsequently married, when the first Mrs. Faxon was ill. Sallie E. Quinn was a domestic in the employ of Mrs. Faxon at that time. One day she received a call from Mr. Hillmon, and Sallie asked Mrs. Faxon what she thought of her choice. Mrs. Faxon replied that she liked him much, but that it was a pity that he had lost a front tooth. Wm. T. Faxon on that occasion noticed the absence of the tooth, and as he had been buying false teeth for his wife, made some remark as to how much it would cost to put a false tooth in Hillmon's mouth. This remark caused his wife some annoyance, as she considered what was said as a complaint about the expense which she had thus incurred. Mr. and Mrs. Faxon swore positively as to the missing tooth. Josiah Wilson knew Hillmon near Tonganoxie. He swore positively that Hillmon had a tooth out of the left front of the upper jaw. Claude Holliday knew Hillmon intimately, and remembered the absence of the tooth. He mentioned one time in particular when the absence was more than usually noticeable, because Hillmon laughed. George A. Nichols and his wife, Hillmon's sister, formerly Mary E. Hillmon, both testified positively to the absence of a tooth from their brother's upper jaw on the left side, front. Mr. Nichols

had known Hillmon since 1865, and had been his most intimate friend. He first noticed the entire absence of a tooth in 1872, but before that had noticed for many years that a tooth was discolored. W. W. Nichols, brother of G. A. Nichols, knew Hillmon intimately, and swore that one of his upper front teeth was either out or defective. Dr. Miller, in making his examination of Hillmon for insurance, noticed the absence of a tooth from the left front of the upper jaw. Jefferson Schleppey, cousin to Hillmon, testified to the absence of the tooth.

(Not in Evidence.) — Dr. Howe, a Lawrence dentist, now living in the City of Mexico, says that some time before the Hillmon affair became notorious, two men called upon him to have an artificial tooth made for the position in front and next to the eyetooth, on the left side of the upper jaw. He did not know Hillmon, but identified Brown as the other of the two men. His books were destroyed, so that any entries which he might have made could not assist him in identifying the men. The plate was never called for, and Mr. Howe lost what he had in the job.

(Comment.) — The cross-examination of all these witnesses elicited the fact that there were many persons with whom they were intimately acquainted, the condition of whose teeth they could not tell. They were asked about the merchants with whom they dealt and other people with whom they were well acquainted, various questions as to teeth, etc., the majority of which questions they were unable to answer as definitely as they were swearing on the subject of Hillmon's lost tooth.

(In Evidence.) — A small item in the testimony of identification related to the hair. One of the Walters sisters testified in a general way that her brother's temples were bare. A witness for the plaintiff

swore from the looks of the pictures that the hair of the dead man grew over the temples. Hillmon's hair was an ordinary brown. Walters had hair almost black; so had the corpse. The testimony as to the quality of Walters' hair and Hillmon's was mixed, some saying one way and some another — the difficulty evidently being that no two witnesses had the same standard of comparison.

Another item of importance was the fact that the clothes of the dead man were slightly too small for him. This was observed by the members of the coroner's jury, the undertakers, and the physicians.

Another important branch of the testimony of identification was the vaccination testimony. Dr. Stuart vaccinated Hillmon on the 20th of February, and on the 25th the vaccination was found to be "working" well. The dead man was killed on the 17th of the following March, 27 days from the date of the vaccination. The vaccination scabs on the dead man's arm were found to adhere closely to the arm, and had to be removed, if at all, with force. The area of the vaccination was cut out by Dr. Stuart from the arm of the dead man and preserved in alcohol. It was of no possible use to anybody, and so was thrown away when Dr. Stuart removed from Lawrence. The defendant maintained and the physicians testified that the course of a healthy vaccination would have left the arm practically well in a period of twenty-seven days. As the vaccination scabs showed the vaccination to be a perfectly healthy one, so far as could be determined by careful examination, the physicians for the defendants, Drs. Miller, Mottram, Morse, Stuart, Branstrup, Alexander, Jones, and Hibben, gave it as their opinion that the vaccination marks on the dead body could not have been from the vaccination of Hillmon done on the 20th day of February. All these physicians, as



well as several called by the plaintiff, testified that an unhealthy condition of the body or an accident might have prolonged the life, so to speak, of the vaccine sore, and it was this remote general possibility which was relied on to nullify the defendants' testimony on this subject.

(Comment.) — The physicians were practically a unit on the subject of vaccination. All maintained that the progress of a perfectly healthful and uninjured vaccination sore was definite and certain; that an injury, like a blow, or any gross impurity of the blood, would prolong the sore; and that any sore so prolonged would have a different appearance from the perfectly natural vaccine sore. The sore on the dead man was a perfect vaccine sore, as sworn to by the four physicians who saw it.

(In Evidence.) — Another important branch of the testimony of identification was that in relation to the condition and contents of the stomach of the dead man. Brown and Hillmon, according to the testimony of the former, had eaten a meal of bacon, bread, and coffee about an hour before sundown on the afternoon of the killing. The physicians, testifying for the defendants as above named, gave it as their opinion that the occurrence of death at the length of time mentioned after eating, in cold weather, would cause evidences of undigested food to be found in the stomach. The post-mortem examination only revealed a small quantity of mucus. The physicians agreed that digestion under some circumstances could go on after death — that is, given food and gastric juice in a stomach not too cold, a chemical action would take place which would result in the dissolution of the food. Such action would take place in any receptacle as well as in the stomach. The greatest range of temperature given as permitting this chemical action was between zero and boiling

point, Fahrenheit. It was also shown that if the food in the stomach of the dead body had become decomposed — particularly if it had become decayed and gaseous — the rough riding from Medicine Lodge to the railroad station at Hutchinson, and from Hutchinson by cars to Lawrence, might have dispersed such gases by the process described as analogous to the process of perspiration. The majority of the physicians gave a good deal of latitude to all their opinions on this subject of digestion, although the majority were clearly of the opinion that if the meal described had been eaten as described, and the man killed as stated, in a condition of unusually cold weather as proven, the chances would be largely in favor of the stomach showing signs of undigested food, particularly as the stomach itself was in good condition.

(Comment.) — The testimony on the subject of digestion was very interesting, but was certainly not very tangible and conclusive for the jury. It would undoubtedly be summed up by a strictly impartial observer as having the effect of showing that the theory of the defendants was a very plausible but not conclusive one.

(In Evidence.) — Another important branch of the testimony of identification related to the respective measurements of Hillmon and the dead man. A certified copy of Hillmon's enlistment in the army at 18 years of age shows him to be five feet eight inches high. His discharge a year later showed the same height. In his application for insurance in the Mutual Life, Hillmon gave his height as five feet eleven inches. All other policies were copied from this — at least in the matter of height. Dr. Miller, examiner for the Mutual Life Insurance Company, testified that Hillmon called at his office, and stated to him that he had made a mistake in giving his height. The Doctor then measured him in the presence

of Selig, and made a memorandum on a blank leaf of his office ledger as to the result of that measurement, which was five feet nine inches. The memorandum in the ledger was written out in full, dated, and sworn to as having been made at the time of the measurement, and as accurately recording the results of that measurement. The memorandum itself was not admitted as evidence, but the Doctor was permitted to hold it in his hand, and from it refresh his memory as he testified. Mr. Selig was present when this measurement was made, and knew all about it, excepting that he could not swear that he actually examined the measuring-line himself as it was applied to the wall. The memorandum made was as follows:

"Lawrence, Kansas, December 17, 1878 — John W. Hillmon called on me and reported a slight mistake in his height. He, Hillmon, is five feet nine-inches, in place of five feet eleven inches, as stated in his policy for life insurance in the New York Mutual.

"V. G. MILLER."

Hillmon also stated the correction as to height to Dr. Stuart, but no memorandum was made of it. The witnesses as to Hillmon's height — to the effect that he was five feet nine inches high — were J. H. Stuart, Dr. V. G. Miller, Major Theo. Wiseman, Joseph Bebout, A. L. Selig, W. W. Nichols, Geo. A. Nichols, Mrs. Nichols, Draves of Wichita, H. D. Marshall, Claude Holliday.

Another important branch of the testimony of identification related to the scar on Hillmon's hand. W. W. Nichols swore that once when he was in camp with Hillmon in Texas, and while some general shooting was being done at a mark, Hillmon attempted to crowd a loaded cartridge into his breech-loading gun with a stick, and exploded the cartridge, the shell of it cutting a long wound around the base of one thumb, and an inch,

more or less, on the outside. This wound left a scar, which was sworn to as being very plainly seen subsequently by W. W. Nichols, G. A. Nichols, and Mrs. G. A. Nichols, Hillmon's sister, when Hillmon was making his sister's family a visit, in Washington county. H. D. Marshall and Rufus Whitney also swore to the scar.

William Brown traded shoes with Hillmon, and George A. Nichols and Jefferson Schleppey also testified as to the size of Hillmon's foot. It was a foot calling for shoes number eight or nine. The dead man's shoes mysteriously disappeared on the trip between Medicine Lodge and Hutchinson from Hillmon's trunk, Brown and Baldwin having charge of all the effects, as well as of the body.

Mr. C. W. Smith, the undertaker, and Doctors Stuart, Mottram, and Miller measured the dead body, and found it to be five feet eleven and five eighths inches long. The witnesses who testified to this part of the description of Frederick Adolph Walters were twenty-five in number. The witnesses who swore, among other things, that the photographs of the dead man were those of Frederick Adolph Walters were twenty-two in number. Among those witnesses were the entire family of Walters at Fort Madison. Four witnesses at Albuquerque identified the photographs of Hillmon as the man they had known near Albuquerque. One other witness, at Breckenridge, Colorado, swore to having seen Hillmon personally. This testimony, however, was not very satisfactory.

Levi Baldwin testified to having known Hillmon eight or ten years. The photograph of Hillmon exhibited had been in his home a long time. He traded clothes with Hillmon a short time before he went south. Could not tell exactly where the trade took place, but thought it was in Judson's house at Leavenworth. The body exhumed at

Medicine Lodge had on the same coat and vest which he had traded to Hillmon. Baldwin could not remember whether he sent Hillmon \$25 at one time and \$10 at another time, or not. Hillmon had good teeth. Baldwin testified at the coroner's jury that he did not recollect about Hillmon's teeth, but said at the trial that the tooth case was not fixed on his mind until after he saw the teeth exposed and became satisfied.

Another important branch of the testimony of identification was the scar on the back of Hillmon's head, sworn to by George Lewis, the barber, whose habit it was to cut Hillmon's hair so as to hide the scar; Mr. V. P. Newman, a blacksmith, who stood by on one occasion while Lewis was so cutting the hair; and Jefferson Schleppey, Hillmon's cousin. The dead man had no scar on the back of his head.

Another item in the identification was the finding of a mole on the dead man's back, which was sworn to positively by the Fort Madison witness as being exactly in the location of a mole on the back of Walters.

Physicians Miller, Mottram, Morse, and Stuart testified that judging from the skin, hair, teeth, and appearance generally of the dead body, it was that of a man about 25 years of age. This opinion was right if the body was that of Walters, wrong if it was that of Hillmon.

(Comment.) — The method of cross-examining the witnesses on the subject of their remembrance of the tooth peculiarity, though easily understood by one who gives the subject careful attention, is very effective with the casual observer, the point of it being that because a man remembers a certain thing he must necessarily remember every other thing of equal importance. If the matter be carefully considered, however, it soon appears that about the only rule which can be laid down for the explanation of

what is remembered, is that a man remembers what he remembers. The mind is a sieve. It loses more than it holds. We see and hear, and do a multitude of things daily, all of which might be remembered, but most of which are forgotten. The fact that one fails to remember an occurrence of last month is not proof that he does not remember a similar occurrence of ten years ago. Most of our memories are latent, and we are aware of them only when some special circumstance recalls them to mind. If one be asked to name all the acquaintances seen yesterday, the list will be very brief; but after it is finished, if he be asked a more leading question (for example: Did you not see John Doe, or Richard Roe?) the answer may be yes, although without such reminder the fact might have been forever beyond recall. It is fair to presume that in the minds of the jury this style of cross-examination utterly blotted out the overwhelming evidence of thirty or more reliable men on the subject of the teeth.

*Mrs. Hillmon, Buchan, and Brown.* (In Evidence.) — A very important branch of the testimony consisted of that given by Mrs. Hillmon, John H. Brown, Hillmon's companion at the time of his disappearance, and Hon. William J. Buchan, of Wyandotte. A large part of the testimony of these three is so closely interwoven as to make it convenient to present all together. So far as Brown was concerned up to the time of the disappearance, there is little to be said about him except that he was much like Hillmon in his general characteristics, though, it seems, was in every way a much weaker man. He had been a miner with Hillmon in Colorado, and had traveled with him in Texas on his various long trips. The two trips west from Wichita were made in Brown's company. Brown testified that he and Hillmon had on the first trip traveled from Wichita to Medicine Lodge; thence to Sun City; thence to a

town on the Santa Fe road; thence to Great Bend; thence to Hutchinson; thence back to Wichita. Between the return to Wichita and the departure for the second trip Brown testified that Hillmon returned to Lawrence. On the second trip the two men went from Wichita to Kingman; thence to Harper City; thence to Medicine Lodge; thence to Sun City; thence to Elm creek, finally to Crooked creek, where the disappearance took place. Brown testified that he arrived at Crooked creek on the 16th of March, and that while in camp during the next day a man called during the forenoon. In the afternoon Brown and Hillmon had been shooting with a gun at a mark, and after they were through Hillmon put the gun back in the wagon, with the muzzle sticking out. About bedtime Brown went to get ready for bed. He took hold of the barrel of the gun and pulled it over his right shoulder. The hammer caught on the wagon, and the gun was discharged. Brown testified that he dropped the gun, turned, and went to Hillmon, who was twelve feet distant, and caught him before he fell, and swung him around away from the fire. He then got a horse and went three quarters of a mile to a house and told what had occurred. The man of the house returned with him to the camp. The man's name was P. B. Briley. He was the same man who was at the camp in the morning.

The next morning Esquire Pad-dock held an inquest. They then took the body and went to Medicine Lodge, where an inquest was held. The next day the body was buried at Medicine Lodge. After Levi and Alva Baldwin, Colonel Walker, Major Wiseman, and Tillinghast came from Lawrence, Brown went to the grave to help take up the body. He returned with the body to Lawrence. Brown testified that when they left Wichita on the last trip a man stayed with them all the time they were at Cowskin creek. This

man joined them about three miles out from Wichita. The stranger left, and was not with the two men at camp when the disappearance took place. When the inquest was held at Lawrence, Brown, after giving his testimony, left town in a hurry, and returned to the vicinity of Wyandotte, where Brown's father lived. Brown's father applied to State Senator W. J. Buchan, at Wyandotte, for help for his son. This was in March, 1879. The elder Brown explained the difficulty in which John had become involved, and asked Buchan to go to Lawrence and try to manage the matter. This Buchan did, without result. Some time later, Reuben Brown, brother of John Brown, called on Senator Buchan, and asked him to go to Lexington to see John. At Lexington Buchan and Brown discussed the matter fully, and Brown stated that the job was as bad as it could be, and he wanted Buchan to see the agents of the insurance companies, as he, Brown, wished to turn State's evidence and get out of the difficulty. Brown went across the street from the railroad track and wrote the following letter:

"Mrs Hillmon i would like to now where Johny is and How that business is and what i shall doe if any thing. Let me now threw my Father.

"JOHN H. BROWN."

Senator Buchan testified that this letter was written by Brown in order to get information out of Mrs. Hillmon about her husband. Buchan again saw Brown at Parkville, and found Levi Baldwin trying to get Brown to sign proofs of death. Baldwin told Brown that he would not have to go on the stand, as the theory of the insurance companies was that the body was that of Frank Nichols, and that was as good a thing as he (Baldwin) wanted, as he could produce Nichols in court. Buchan told Brown that he would be compelled to go and testify,

which he said he would not do. He again proposed to turn State's evidence, which fact Buchan had previously reported to the insurance companies.

On the 4th of September, 1879, Buchan went again to Parkville, and asked Brown to put his statements in writing. This Brown did, and afterward went before Justice McDonald and swore to the statement. This statement or confession was as follows:

"STATE OF MISSOURI, COUNTY OF PLATTE, SS.:

John H. Brown, of lawful age, being first duly sworn according to law, deposes and says: My name is John H. Brown. My age is thirty years. I am acquainted with John W. Hillmon. Also Mrs. S. E. Hillmon, and Levi Baldwin, of Douglas County, Kansas. Have known John W. Hillmon for about five years. Have been with him a good deal for the past two years. Was with him last March at Wichita, and on the trip from there to and around Medicine Lodge, in Barber county, Kansas, where it is claimed that I killed him on the 17th day of March, 1879. Along about the 10th day of December, 1878, John W. Hillmon, Levi Baldwin, and myself talked about and entered into a conspiracy to defraud the New York Life Insurance Company and the Mutual Life, of New York, out of some money to be obtained by means of effecting a policy or policies on the life of said John W. Hillmon. Baldwin was to furnish the money to pay the premiums, and to keep up the policies in case they had to be renewed. Our original arrangement was to get Hillmon's life insured for \$15,000, but it was afterwards changed to \$25,000. Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find a subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance money aforesaid. We had no definite plan of getting the subject, but to in some manner get one; the final termination of the matter was the last idea thought of. Our first trip out from

Wichita the last days of December, while the snow was on the ground, we expected to find a subject that would appear to be Hillmon frozen to death, and that could not be identified only by the clothes and papers found on it, and so I could pass it off as Hillmon.

"We went from Wichita to Medicine Lodge; then direct to Sun City; from there to Kinsley; from there to Great Bend, on the Santa Fe Road; then to Larned, and on to Wichita via Hutchinson. Hillmon and myself were entirely alone on this trip. Iliff, of Medicine Lodge, saw Hillmon on the trip. We put up at his stable. I then stayed at Wichita until the 4th of March. Hillmon, in the meantime, went to Lawrence to see his wife and get some more money. He returned about the 1st of March, and on the 5th we left on our second trip. We went due west to Cowskin creek, then west to Harper City, then to Medicine Lodge, on by Sun City, and beyond some miles. Then we turned northeast down Medicine river to a camp on Elm creek, about eighteen miles north of Medicine Lodge, where Hillmon is claimed to have been killed. We got there about an hour before sundown, and stayed in camp until the next evening. We overtook a stranger on this trip, the first day out from Wichita, about two or two and one half miles from town, who Hillmon invited to get in and ride, and who he (Hillmon) proposed to hire to herd and work for him on the ranch as proposed to be located. This man was with us during all this trip. Hillmon proposed to me that the man would do to pass off for him. I contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life; and I protested, and said that was going beyond what we had agreed, and something I had never before thought of, and was beyond my grit entirely. But Hillmon seemed to get more deeply determined and desperate in the matter. Pains were taken not to have more than two of us seen together in the wagon. Sometimes

one and then the other would be kept back out of sight. On his trip up to Lawrence, Hillmon was vaccinated. His arm was quite bad. Hillmon kept at the man until he let him vaccinate him, which he did, taking his pocket-knife and using virus from his own arm for the purpose. He also traded clothes with him, Hillmon first giving him a change of underclothing, then trading suits — the one he was killed in. The suit he was buried in was a suit Hillmon traded with Baldwin for. This man appeared to be a stranger in the country, a sort of an easy-go-long fellow, not suspicious or very attentive to anything. His arm became very sore, and he got quite stupid and dull. He said his name was either Berkley or Burgess, or something sounding like that. We always called him Joe. He said he had been around Fort Scott awhile, and also had worked about Wellington or Arkansas City. I do not know where he was from, nor where his home or friends were. I did not see him at Wichita that I know of. I had but very little to say to the man, and less to do with him. He was taken in charge by Hillmon, and yielded willingly to his will. I dreaded what I thought was to be done, and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon, and tried to deter him from carrying out his intentions of killing the man.

"The next evening after we got to the camp last named, the man Joe was sitting by the fire. I was at the hind end of the wagon, either putting feed in the box for the horses or taking a sack of corn out, when I heard a gun go off. I looked around, and saw the man was shot, and Hillmon was pulling him away around to keep him out of the fire. Hillmon changed a daybook from his own coat to Joe's, and said to me everything was all right, and that I need not be afraid, but it would be all right. He told me to get a pony, and go down to a ranch about three quarters of a mile, and get some one to come up. He took Joe's valise, and started north. This was about sundown. We had no arrangements about communicating with

each other. He first promised to do so, but I told him I did not want to know where he was; that in case I should, I might find out some other way. I have never heard a word from him since. At Lawrence, Mrs. Hillmon gave me to understand that she knew where Hillmon was, and that he was all right. The man over whom an inquest was held at camp, afterwards at Medicine Lodge and Lawrence, Kansas, was the man, Joe Burgess or Berkley, killed by Hillmon, as related above, and John W. Hillmon I believe to be still alive. At least he left our camp, and went north, as stated above, after killing Joe. Hillmon said he would assume the name of William Marshall. Baldwin, wife, and Mrs. Hillmon knew all about this. In my testimony at Lawrence I stated the route taken, as above described, but the man who I described as being in camp with us, and who I said went off with some wagon, was Joe, the man killed. I afterwards, sometime in August, 1879, made four affidavits under great importunities from Baldwin, who came after me three different times, the last time persuading me to go with him to Kansas City, where Hon. Samuel Riggs insisted on my signing them. I don't think Mr. Riggs is aware of the facts in this case, nor the other counsel in the case.

"I make the above statements in the Hillmon case as the full and true facts in the case, regretting the part I have taken in the affair.

(Signed) JOHN H. BROWN.

Subscribed in my presence, and sworn to before me, this 4th day of September, A.D., 1879. My term expires on the 2d day of April, 1883.

(Seal.)

FRANCIS M. McDONALD,  
Notary Public."

Brown gave Buchan a power of attorney to act for him in securing immunity from prosecution, in return for his confession. Subsequently Buchan also had from the insurance companies the same sort of power of attorney to bind them to what Brown required. These authorizations were as follows:

"PARKVILLE, MO., Sept. 4, 1879.

"I hereby authorize W. J. Buchan to make arrangements, if he can, with the insurance companies for a settlement of the Hillmon case, by them stopping all pursuit and prosecution of myself and John W. Hillmon, if suit for money is stopped and policies surrendered to companies.

"JOHN H. BROWN."

"W. J. BUCHAN, Esq. — Dear Sir: On behalf of the Mutual Life the New York Life, and the Connecticut Mutual Life, I hereby authorize and employ you to procure and surrender the policies of insurance on the life of John W. Hillmon.

"H. B. MUNN.

"KANSAS CITY, Sept. 5, 1879."

The transaction, so far as Buchan was concerned, became an arbitration, with himself as arbitrator. Brown then authorized Buchan to say that he would testify in accordance with his statement or confession, provided the companies would take no steps to prosecute Hillmon, Mrs. Hillmon, Baldwin, or himself. The insurance companies, on the other hand, were bound to do what Brown required of them according to the terms of his proposition. Senator Buchan said that after the papers were signed he returned home, and next saw Brown at his office in Wyandotte. At the time of signing the statements Brown spoke of getting Mrs. Hillmon to surrender the policies. Buchan told him that if he did that, it would probably end the matter. He said he would see Mrs. Hillmon. Buchan promised Brown not to show his statements to the authorities or to reveal his whereabouts until he, Buchan, had secured their promise not to prosecute, as above described. Brown went to see Mrs. Hillmon at Levi Baldwin's house. Baldwin went to Lawrence on horseback and brought Mrs. Hillmon out by getting a neighbor to carry her part way, as the roads were bad, and taking her the rest of the way

himself. At about eleven o'clock at night Mrs. Hillmon and Brown met at Baldwin's house, and, according to Mrs. Hillmon's testimony, Brown told her that he had turned State's evidence, and could not testify for her in the insurance cases. The next morning they had another interview, and made an appointment to meet at Leavenworth on September 15th, 1879. Brown, Mrs. Hillmon, and Buchan met at Leavenworth. The policies were with Mr. Wheat, at Leavenworth. Mrs. Hillmon signed full release of all her interest in the insurance policies. She also went with Buchan to Mr. Wheat's office to demand the policies. Mr. Wheat refused to give up the policies, saying he had a lien on them for \$10,000. Mrs. Hillmon and Buchan returned to Wyandotte. Buchan showed Mrs. Hillmon the agreement of the companies not to prosecute Brown. Also Brown's statement. This statement was torn up and put in the stove, but was afterwards fished out of the stove and preserved, when it developed that there was to be a contest over the policies. Mrs. Hillmon remained in Wyandotte some time with Buchan. She afterwards went to Ottawa. Returning from Ottawa she signed a supplementary release, and afterwards stayed for about three weeks at Buchan's house. She went to Trenton, Missouri, where she stayed three weeks or a month. Buchan had nothing to do with fixing the place of meeting at Leavenworth, he going there at Brown's request. Buchan got no fees from the Browns, but did get from \$500 to \$700 from the insurance companies, including expenses. Mr. Wheat was retained by Levi Baldwin.

While absent from Wyandotte, Mrs. Hillmon wrote to Buchan the following letter:

"Saturday Jan. the 3, 1880

"HON. W. J. BUCHAN, WYANDOTTE: I am now ready to go to Colorado as soon as you send the ticket and money. I hope

rado, and parts unknown to me. I expect to see the country now. I will close. Regards to all inquiring friends; love to all.

"Your brother,  
"F. A. WALTERS."

At the same time Mr. C. F. Walters, the brother at Holden, Missouri, received a letter from him, stating that he was about to leave Wichita with a man by the name of Hillmon. Since that time, no word has ever been received by the friends or family of Walters, nor has any person with whom he was before acquainted seen him.

Some time after this, his people became alarmed by his continued silence, and began to make inquiry. His father applied to the Odd Fellows' Lodge at Fort Madison, of which his son was a member, but it did nothing for him. He then applied to the Masonic Lodge for assistance. Mr. Hobbs, a bright young lawyer of that place, was the master of this lodge. He at once applied to the lodge at Wichita for assistance. The lodge at Wichita wrote to Lawrence, and in response, pictures of the dead body which had been brought there were forwarded to it. These pictures in turn were forwarded to Mr. Hobbs, and by him shown to the father, who immediately recognized them as pictures of his son, Frederick Adolph Walters. He showed them to the members of the family, and one and all under oath identified the pictures as being that of their son and brother. The pictures were then shown to other friends, and by a large number of them identified as the picture of Frederick Adolph Walters. Several parties at and near Lawrence, where Walters worked, recognized the pictures as those of Walters. Mrs. Gilmore, daughter of the proprietor of the Central Hotel, where Walters was sick, identified the pictures positively. All members of Walters's family swore that he had very dark-

brown hair, a wide forehead, a broad German face, an aquiline nose, long hands, and extraordinarily sound teeth. He was also described as being well built, a skillful Turner, and five feet eleven inches high. He had no scars on his body except a small one, half as large as a pea, near one ankle, caused by the bite of a dog. This scar was last seen when Walters was twelve years old — a sister so testifying. He had a mole on his back. This description was exactly that of the dead man, except as to the small scar. No such scar was discovered, as Dr. Miller examined the body with a magnifying glass, and found no scars on it except a slight one on one finger. Walters was a young man of excellent habits and strong social attachments. He was on the best of terms with everybody, and had no known motive for leaving home, except for the purposes testified to and indicated in his letter to Miss Kasten.

(Comment.) — The facts are that Hillmon and Walters disappeared simultaneously. One of the two reappeared dead. The bulk of the evidence shows that the dead man was not Hillmon — that it was Walters; that Hillmon had every motive to prevent his reappearance, if alive — desire to secure the insurance money, and an equal desire not to go to the penitentiary; and that Walters, if alive, had every motive to induce his return.

The letters written from Wichita by Walters were admitted by Judges Foster and Brewer, but were ruled out on the last trial by Judge Shiras.

The Walters sisters were both kept away from the last trial by the death of their mother, and the serious illness of other members of his family.

*General Notes and Considerations.* — There has been much talk about the presumption of death in law after the lapse of seven years as being a proper dependence for the plaintiff. This could not be, as the question is not whether Hillmon



is now dead, but whether he died at the date of the killing at Crooked creek; in other words, whether the proofs of death made by Mrs. Hillmon were good.

The five Medicine Lodge witnesses who did not see three men in the wagon at any one time, are the only strong witnesses for the plaintiff, and their strength decreases on a full statement of all the facts. In the first place, the witnesses are vague. One was a teacher, and saw the wagon pass his schoolhouse. Whether he was in the building or out, or whether the school was in session or not, he was unable to tell. It seems that the testimony on this point might have been very much stronger if the facts had been as claimed by plaintiff. The Brown confession shows how the appearance of only two men was kept up.

Mrs. Hillmon exhibited a gold ring which she said Hillmon had once given her, but had afterward worn himself and returned to her before he went south. This ring did not seem to have any connection with the case, except so far as it went to prove Hillmon's love for his wife.

The counsel for plaintiff persistently crowded it before the jury that the defendants were rich and therefore powerful corporations. The changes were rung on this topic with great skill and emphasis.

When the insurance companies are asked to produce Hillmon, the answer is a demand for the Benders, or for Tascott, or for ten thousand great criminals, well known and clearly distinguished, who have escaped from under the very nose of the law. Hillmon was a common man in appearance. He was like thousands of others — miners, cattlemen, and laborers — all over the West. He had a long start and all advantages. He might have been in Mexico before the dead body reached Lawrence. But supposing him to have remained in the United States, he was but one of many millions, and the terri-

tory in which he was at liberty to lose himself was boundless. Every officer of the law knows the difficulty of finding a man who has wit and pluck and is determined not to be found. The companies have made little or no effort, knowing the great expense that would be incurred, and the comparative hopelessness of success, and believing their case was sufficiently strong without further evidence.

Major Houston, who had employed Hillmon a great deal as a cattle herder, told the writer a few minutes after taking a long look at the dead body that he could not recognize it.

#### ARGUMENTS MADE BY COUNSEL FOR PLAINTIFF.

Argument by *L. B. Wheat*. — Mr. Wheat spoke of the long acquaintance of Mr. and Mrs. Hillmon before marriage; their deep regard for each other, as evidenced in one particular by the ring with "Remember me. — J. W. H." engraved upon it; their marriage and affection for each other; his departure to look for a ranch in the southwest just after the Indian raids through western Kansas; the taking of life insurance to protect his wife, and, as to the amount (\$25,000), with the full knowledge of it by all the companies concerned. The companies' agents, like all agents, urged him to take the insurance. They considered him responsible for the premiums, and were willing to insure him. They ought not to plead the baby act now. After urging him to take it, they cannot say that the fact of his taking it was evidence of fraud. The testimony, Mr. Wheat thought, shows that Hillmon was a man of considerable means and of good character. Such a conspiracy as the defense alleges must result in lasting separation from his young wife — the blighting of both their lives forever — her lifelong misery, and his eternal damnation. He was a person of blameless life — nay, more than that, his diary shows him to

have been a Christian gentleman. But he is charged with a terrible crime — lifelong banishment, self-inflicted, from wife and kindred and friends for a few paltry dollars that he himself could never enjoy.

Mr. Wheat turned to the question of identity. The policies all put Hillmon at five feet eleven inches, but a statement is introduced that Hillmon went back to Dr. Miller, one of the examining physicians for the companies, and said he was only five feet nine inches. But the policies were never changed in that particular. These policies, these silent witnesses that the agents of the companies themselves afford, are strongly corroborated by the oral testimony of Mrs. Hillmon, who measured him, and found him five feet eleven inches, the same height as the body brought to Lawrence.

Mr. Wheat asserted that the letter from G. W. E. Griffith, the insurance agent, to Mrs. Hillmon, soon after the death of her husband was reported, asking her to call and make out an application, and Griffith's questioning of her, aided by Selig, another insurance agent, were for the purpose of puzzling her in her distressed state of mind, and getting her to make statements that could be used to beat her out of the insurance. Then later on they plied her with reasons why she should not see her husband, in an effort to destroy a witness against themselves.

Mrs. Hillmon, Arthur Judson, Levi Baldwin, John Brown, and six other Lawrence witnesses, who knew Hillmon well, testify that the body was his. A half dozen Medicine Lodge witnesses, who saw and became acquainted with Hillmon a short time before his death, were quoted where they testify that they saw the body, and it was Hillmon's. The two men only could be traced from Medicine Lodge to the place of the accidental killing, and the two men were Hillmon and Brown.

The photographs of Hillmon and the body were placed in the hands of

a jury, and attention called to the decomposition in the nose of the body in just the spot where Dr. Simmons had testified that he had treated Hillmon for an injury. Dr. Fuller testified that the nose of the body had the appearance of having been injured in that spot, and it has been shown that decomposition took place more rapidly in injured parts.

The vaccination of the arm of the body, it is claimed, was not so far along at the time of death as it should be on Hillmon, but this matter of telling the age of a vaccine sore is very uncertain at best, and the fact that the arm of the body was vaccinated in exactly the place where Hillmon was vaccinated is another strong piece of evidence in the plaintiff's favor. The insurance company's physicians carried away the scab and piece of the arm upon which it was, and now it cannot be found. It looks like suppression of evidence. At any rate, they ought to admit that the matter of vaccination is all right. The hair of the body was dark brown. So was Hillmon's. Walters's was bluish black. The temples of Walters were bare. Hair grew on Hillmon's temples, and there was hair on temples of the body. There was a scar on Walters's leg, where he was bitten by a dog. No such scar was found on the body. The body was so badly decomposed that the identification of it by the Walters family by photographs of it is out of the question. The hair on the body was fine. So was Hillmon's. Walters's was coarse.

The tooth feature of the testimony is very uncertain and unreliable. Some of the witnesses may have honestly imagined that Hillmon had a tooth out, but they were mistaken. None of them stand the test of questions in regard to other people's teeth. People who know the worth of testimony have no confidence in that offered about Hillmon having a tooth out. The same industry and expenditure put forth to get up this

tooth testimony by the defense would have produced Hillmon had he been in the land of the living, and especially had he been in New Mexico, where they say he has been.

Argument by *John Hutchings*. — Mr. Hutchings said that the plaintiff had proved by John H. Brown, the person best qualified, that Hillmon was killed; by Mrs. Hillmon, the widow, the next best qualified person, that the body was that of her husband; by Levi Baldwin, the most intimate friend of Hillmon, that the body was Hillmon's. Five Medicine Lodge witnesses who knew Hillmon well testified that the body was his at a time when the body was best recognizable. Some of these witnesses were on the coroner's jury, and close and not mere casual observers. The photograph gallery, at which the defense now sneered, was introduced by them. Mr. Hutchings entered upon an exhaustive analysis of the photograph gallery, to show that by this testimony of the defense the body was that of Hillmon. Their own witnesses testify that the body was carefully examined by physicians with magnifying glasses, and no scars found; their own witnesses testify that Walters had scars from a dog bite and vaccination. As for the tooth testimony, it was not possible for two or three dozen witnesses, after from six to ten years, to remember that he had a tooth out. It was contrary to common sense. Colonel Walker was too swift a witness. He could remember about Hillmon's tooth, but he could not tell which leg B. J. Horton had lost, though he has known him and seen him almost every day for many years. W. W. Nichols was a wretch who came here from Washington county for \$148 and fees and expenses to give testimony calculated to make his wife's brother a murderer. He excoriated Tillinghast, Selig, and Griffith, the insurance agents, for attempting to entrap Mrs. Hillmon into a description of her husband before

his body arrived. These insurance companies, with boundless wealth and inexhaustible resources at their command, with agents scattered the world over, with six years to operate in, have failed to find Hillmon. They bring depositions from New Mexico, from a worthless class of fellows, instead of bringing Hillmon. Dr. Miller produces a remarkable account book, which, though not intended for that purpose, contains memorandum of Hillmon's height, dated December 17th, according to which he was five feet nine inches. Dr. Stuart testified that Hillmon afterwards came to him, and gave his height as five feet eleven. Hillmon must have been a marvelous man. One of a party of three, traveling through a settled country, camping out, and stopping at houses, he succeeded in concealing one of the party through the entire journey from Wichita to Medicine Lodge. Not only that, but he vaccinated him, made it work, kept the protesting Brown at bay, and succeeds in his conspiracy. It was a marvelous transaction.

In regard to the Buchan-Brown affair, he insisted that Buchan was not Brown's attorney, but attorney for the companies, and that he procured the statement from Brown against Brown's protest, for the purpose of enmeshing Mrs. Hillmon, and getting her to release the policies. Take the Kasten letter out of the Walters theory, and nothing remains of it. The letter does not prove that Walters was going with J. W. Hillmon — there were other Hillmons in that part of the country. It does not prove that Walters left Wichita at all. Why don't the defense bring witnesses from Wichita to show the association of Walters and Hillmon? Why don't they bring the parties with whom Walters boarded at Wichita, and find out where he went from there? Mr. Hutchings closed with an appeal to the jury for a verdict for the plaintiff.

Argument by *Samuel A. Riggs*. — Mr. Riggs called attention to the difficulty Mrs. Hillmon has had in the prosecution of this case in her poverty for five years. He characterized the taking of the insurance at Lawrence by Hillmon as an ordinary transaction of life insurance. Hillmon was of good character, and in good circumstances. It has been asserted that he mortgaged his life to the payment of premiums on a large amount of insurance. It is not unlikely that he intended to permit the policies to lapse after his trip to the Southwest. As to his financial circumstances, he was for many years in the hide business in Texas, when it was profitable. He afterwards fed 250 hogs at Wyandotte. His trip was a natural one, made at a proper time, as southwestern Kansas is a winter stock country. The Indians had raided western Kansas in September, and in the following winter he very naturally protected his young wife by insuring his life. Riggs read the account of the killing as it appears in Brown's deposition. Brown, he said, had stood up for four years in the face of the law, and asserted that his first account of the killing was true. He was here three years ago, and gave his testimony. The defense in this case was purely one of suspicion, beginning with the untrue assumption of poverty and a reckless life on the part of Hillmon. A remarkable feature of the case and one strongly in favor of Brown, is that ever since the so-called coroner's inquest at Lawrence, the defense has been in possession of a detailed statement of Brown's as to the trip that he and Hillmon had made; where they went; where they stopped; and the names of families and persons whom they met. This has never been produced in court, and for a good reason; the defense has never been able to show that at any time, anywhere on that trip, there was a third man in the party besides Hillmon and Brown.

With all their money and all their power they have never been able to find a vestige of Hillmon. Five witnesses at Medicine Lodge, who knew Hillmon well and saw the body, testify it was his. They are disinterested witnesses. We have the identification of those who knew Hillmon best. The testimony of the widow is the strongest. She sent for the body of her husband, asking that if the weather permitted it should be brought to Lawrence; otherwise it might remain there till spring. The first thing at Medicine Lodge, when the body was taken up, was the cutting open of the coat-sleeve, and finding the vaccination mark. Now, mark you, as soon as the body arrived at Lawrence it was taken possession of by the undertakers, and almost the first thing was the cutting out by the physicians of the company of the pieces of flesh in the arm on which were the vaccination scabs. It was carried away, and afterwards could not be found. Under these circumstances, it would be but fair for the defense to concede that the vaccination was all right.

Mr. Riggs spoke of the action of Griffith, Selig, and Tillinghast as a trap purposely set for Mrs. Hillmon. They tried to weaken her case by inducing her to make some statement in the description of the body which they could use against her afterward. Then the evidence of John H. Brown had to be disposed of. Brown's whole conduct bore out the theory of innocence. He stayed with the body at Medicine Lodge, and afterwards went with it to Lawrence. The so-called Lawrence inquest was an *ex parte* examination, inspired by the insurance companies. One of the chief movers, Mr. Barker, was their paid attorney. Immediately after the arrival of the body at Lawrence, Mrs. Hillmon went to see it, but was not allowed to do so.

Mr. Riggs detailed the connection of Brown with Buchan, and said

it was a studied attempt on the part of the insurance companies to destroy Brown as a witness for Mrs. Hillmon. We have been asked why we did not take Al. Baldwin's deposition. Look at Brown's deposition here. He was cross-examined for nineteen days. That was a notification to us from the defense that we were not to be allowed to take any more depositions. Mr. Riggs did not think it remarkable that a poor, weak woman, confronted by the statement of Brown, rendering him worse than useless as a witness for her, and in the hands of a shrewd attorney like Buchan, should be induced to release the policies. A strong point, and one that destroys the Walters theory with evidence in which there can be no mistake, is the fact that Walters's temples were absolutely bare, while those of Hillmon had hair on them corresponding with the temples of the body, as shown in the photograph and testified to by Lamon, the photographer.

In finishing, Mr. Riggs urged the jury to mete out justice to the plaintiff, and nothing more, in the unequal contest which she had sustained with these great and powerful corporations, the insurance companies.

ARGUMENTS MADE BY COUNSEL FOR DEFENDANTS.

Argument by *J. W. Green*. — Mr. Green urged that it was not incumbent upon the defense to show that the body was that of John W. Hillmon, whose life was covered by the policies. The companies are worth millions. This \$25,000 is not a drop in the bucket, and would hardly be worth contending for if it was not for the fact that it involves conspiracy, fraud, and cold-blooded, atrocious murder. Hillmon was a wild, roving fellow. He herded cattle out here in Leavenworth county, went to Texas and Colorado, and drifted aimlessly about for years. Then he suddenly took a notion to have \$25,000 in-

surance on his life. The premiums amounted to \$600 a year — more than the average man earns, more than Hillmon was ever known to earn. He mortgaged his life for that sum, poor though he was. He sought the insurance, was anxious about the policies, paid a portion of the first year's premium, suddenly disappeared, was reported killed and buried. The men whom Mrs. Hillmon says she sent after the body fenced the grave and started away, when they were required by the insurance companies to take the body up. It was brought to Lawrence. The alleged widow did not go to see it for three days. She kept away from it until she feared the effect of her action would prevent the success of the conspiracy to defraud the companies out of \$25,000, and then she went to see it. Colonel Walker saw the body at Medicine Lodge. He knew Hillmon had a tooth missing. He saw that the teeth of the body were perfect, and he put his finger in the mouth to see if there was a false tooth. It was not there. The body was five feet eleven and five eighths inches in height. Hillmon was five feet nine inches. Three weeks after the killing, Mrs. Hillmon could not tell after the examination, at Lawrence, what her husband's height was, but now it is convenient to do so, and she remembers that she measured him, and that he was the same height as the corpse. Dr. Miller, of Lawrence, who testifies that Hillmon was five feet nine inches, that he measured him, and made a record which is produced in court, is a disinterested and thoroughly reliable witness. Four witnesses testify that Hillmon was five feet nine. His own statement that he was five feet eleven was taken from the policies, but he was not measured. Mrs. Hillmon could not or would not describe her husband's body before the arrival of the body at Lawrence. That was very suspicious.

As to the tooth testimony, Mr.

Green said that any number of men who do not know that a tooth is missing cannot equal one witness who does. Hillmon's schoolmates and boyhood acquaintances swear that he had a bad front tooth and the relatives and acquaintances swear that later in life he had lost that tooth. As to the vaccination, competent physicians who examined the scab on the arm of the body say that it could not have been older than 19 days, and from all appearances was only 14 days old. Yet Hillmon was vaccinated February 25th, and killed March 18th. If Walters was vaccinated at Wichita about the time of leaving there with Hillmon, the scab on the arm of the body would correspond with the scab on Walters's arm at the time of the killing, so far as age is concerned. At Lawrence Mrs. Hillmon said that the body was that of her husband, but six months later she confessed that it was not, by giving Mr. Buchan releases of the policies.

Was it the body of Walters? So his own family testify, and one of his sisters, Fannie Walters, bears a striking resemblance in features to the face of the cadaver. Those sisters testified by their tears and grief as well as by their words. Mr. Green read the letter from Walters to Alvina Kasten wherein he says that he was going southwest with Hillmon. No one had questioned the genuineness of the letter. The ring mark on the finger of the body which the plaintiff's attorneys had tried to make a point on was in all probability the mark of the ring that Alvina Kasten had testified that she gave him when they parted. Walters is traced from his home at Fort Madison to Wichita, and from that point writes a letter saying that he is going away to the southwest with Hillmon. After that he is never heard of. A body answering in description to his is produced, and his relatives and friends testify that it is his, and still we are asked to regard these as a series of coin-

cidences meaning nothing and proving nothing. Walters was five feet eleven inches in height, had dark-brown curly hair, high cheek bones, a Roman nose, light mustache, perfect teeth, was muscular, had long bony fingers and large feet. That is an excellent description of the body of the man mysteriously killed and hastily buried at Medicine Lodge. There was a mole on Walters's back, and so there was on the back of the body. The scars on Hillmon's hands and nose must have been plainly visible if the testimony is correct, and there is no reason to doubt it, and yet the doctors with their magnifying glasses could not find them on the body.

Mr. Green commented very sarcastically on the "photograph gallery" and the fancied resemblance between Hillmon and the cadaver, and pointed out the similarity between the cadaver and Walters.

Argument made by *George J. Barker*. — Mr. Barker said he believed the original plan and object of the first trip made by Brown and Hillmon in December was to find a dead body that could be passed off for that of Hillmon. This failed, and another plan was adopted, which was the murder of Walters and the palming off of his body for that of Hillmon. Mr. Barker bore down with considerable stress on the letters written from Wichita by Walters to his intended and to his sister, wherein he said he was going away with Hillmon. What did Hillmon want of Walters? Walters had no money and no stock. Hillmon had no use for him except the terrible purpose for which he did use him. The three men did not leave Wichita together. Brown testifies that three or four miles from Wichita they picked up a man. This man in all human probability was Walters. The second trip to Medicine Lodge consumed much more time than the first. It was on this trip that Walters was prepared for slaughter. He had to be vaccinated. That was prob-

ably done in the camp on Cowskin. In a covered wagon with one seat a third man could easily be concealed. There were few people along the route to see them. They stopped in lonely places. Mr. Barker called the attention of the jury to the diary taken from the pocket of the dead man, from which he read, and said it had evidently been written to read and to be the means of identifying the person upon whom it was found as John W. Hillmon. Two days after the killing, Brown coolly writes to Mrs. Hillmon, tells her he has killed her husband, and asks what he shall do with the ponies. Here is a man who carries \$25,000 on his life; he is buried at Medicine Lodge, away from kindred and friends; his widow at Lawrence is kept in ignorance for several days. Brown waits around Medicine Lodge a week. Levi and Al. Baldwin come down there. They do not take the body up, but build a fence around the grave of this man with \$25,000 insurance on his life. The hat had been burned up when the killing occurred; the shoes were lost on the way to Hutchinson. These two important articles of identification were thus disposed of. The body was taken up at the instance of the insurance companies and taken to Lawrence, where people who knew Hillmon might see it. In regard to the tooth and height testimony, Mr. Barker said that it was not possible that Colonel Walker, Dr. Miller, Ollie Walker, Hillmon's sister and brother-in-law, could be mistaken. In describing the missing Fred Walters, the Walters family had described the body almost exactly. Hillmon and Brown were three months trying to find a cattle ranch. No question of identity was raised at the Barber county inquest. Updegraff, the hotel keeper, who thought he knew Hillmon, and who evidently did know him as well as any of the Medicine Lodge witnesses, showed on cross-examination that he had only

seen Hillmon a few times and could not give any satisfactory description of him. So it was with many of the Lawrence witnesses. Insurance agents at Lawrence did just right in suspecting that something was wrong, and acting upon that hypothesis.

What interest had the Walters sisters in giving their testimony as they did? They had nothing at stake except identification of their brother; they are not after \$25,000 insurance. Walters's sisters should know him if anybody did. There is no reason why he should remain away all these years. All the ties of nature, mother, sisters, father, sweetheart, all bind him to home. They ask us why we don't produce Hillmon? He is hid and has the best of reason for being hid; his hands are red with blood. We ask them, where is Walters?

If a man ever tells the truth, it is when he talks to his minister or his lawyer. Brown made the confession to his own attorney that Hillmon had killed Walters, but does not give the right name of the person killed. He did not want to bring the wrath of the Walters family down on him. Can honest, intelligent jurymen find a verdict on the testimony of such a man as Brown after he said what he did to his attorney? He robs a woman of her husband and then brands that husband as a murderer. His perfidy is boundless and his testimony wholly unreliable. This is the man who is the principal and vital witness for the plaintiff. Mrs. Hillmon saw the dead body, and stoutly asserted it was her husband. Six months afterwards she acknowledged that it was not, by surrendering her policies. Had she known that to have been the body of her husband, would she not have scorned the proposition of Buchan that she release the companies? Levi Baldwin, her friend and adviser, would never have permitted her to come to Leavenworth and give those releases.

Mr. Barker closed with an appeal to the jury to do justice as between corporations and a woman. He hoped they would not allow their sympathy to be played upon at the expense of equal and exact justice.

Argument by *Charles S. Gleed*.—A man's acts must be construed by the light of his motives. In considering what he does it is necessary to look further—for his motive in doing it. And, conversely, in assuming a motive we must look further to see that the resulting act is in accordance with it. No test will more surely crush the body of any friend than this test of motive. Now let us see briefly what effect this test has on the case in hand.

What was Hillmon's motive in settling on his life an insurance of twenty-five thousand dollars? He was little beyond 'passing rich with forty pounds a year.' Sixty dollars a month for insurance was beyond his depth. Could he have had the slightest expectation of dying immediately? Could he have had the slightest expectation of keeping up his payments? And here let me call your attention to the fact that this insurance was effected on what is known as the "Tontine" system—by all odds the worst system for a poor man, as by the failure to pay any given premium when due, the whole policy lapses, and the payments are forfeited. I ask you, Can you ascribe any motive to this extraordinary proceeding other than the motive of fraud?

What was Hillmon's motive in going, in the dead of what he has himself described as an unusually cold winter, into the empty spaces of western Kansas? He says he went to look for a stock ranch. Have you any such belief? Would you do the same thing? Would you drive day after day over the bleak prairies of western Kansas next January looking for a stock ranch, having no money to buy with if you found one? If you were looking for a stock ranch, would you travel miles

and miles along the Santa Fe road? I ask you can you ascribe any motive for this unusual proceeding other than the motive of fraud?

What was Hillmon's motive in writing this peculiar diary which has been read in your presence? It takes this man thirty odd years to discover that he needs a diary. He begins suddenly, writes briefly, ends suddenly, and with great formality signs his name to the document, and then carries the book for a considerable time without apparent reason. Was not this book written to be found on the body of the murdered man? Can you discover any motive in this unusual proceeding other than the motive of fraud?

What is Hillmon's motive, if he is alive, in keeping out of sight? The instinct of self-preservation will keep him hidden forever. An outraged public yearns for him, and those whom he has attempted to defraud have set a price upon his head.

What was Brown's motive in so precipitately burying the body of his friend at Medicine Lodge? The weather was cold, the distance was comparatively short, the team was in his possession, the young bride and younger widow, was supposed to be mourning at her home in Lawrence, and all the instincts of a man and a friend would naturally have prompted him to do the direct reverse of what he did. Can you ascribe any other motive to this unnatural proceeding than the motive of fraud?

What motive have John Brown and Alva Baldwin for staying away from this court? The first, although he knew Hillmon well, and was present at Medicine Lodge when the coffin was opened, has never been called upon to testify. The second prefers the jungles of Arkansas to the witness stand in Kansas. He makes a better appearance in the pages of a tediously-taken deposition than he would on the witness stand under the scrutiny of your



eyes. Alva Baldwin knows that the body he saw at Medicine Lodge was not that of Hillmon, and John Brown knows that he is party to a conspiracy — accessory to a murder.

What was Brown's motive in making the confession which I have read to you? The counsel for the plaintiff insults your intelligence by saying that this man who had braved the dangers of prairie and desert and mountain, this man who had his liberty, this man who knew ten thousand avenues for the coward's escape — they insult you, I say, in saying that this man made this statement contrary to the facts in the case because the man whom he had employed as his attorney told him there was, somewhere in the vague vicinity, a warrant for his arrest. Do you imagine for one moment that if that man had killed Hillmon as he said he had, if he knew that Hillmon was dead and innocently dead, if he knew that his confession meant to brand his friend as a murderer and rob his friend's wife of twenty-five thousand dollars, he would have made it and sworn to it, just because somebody said that somewhere was a warrant for his arrest? If he had been innocent, have you any doubt that he would have defied all the sheriffs and all the jails and all the courts of justice on the face of the earth? Can you discover in this remarkable proceeding any other motive than the motive of fraud?

What was Mrs. Hillmon's motive in attempting to return to the insurance companies the policies which they had issued to her husband? She had seen her dead husband in his coffin; she knew the insurance money had been earned; she knew that she was a widow; she knew that she was poor; and yet, in unconditional surrender, without confiding to her attorneys, or her friends, without receiving consideration, she does all in her power to abandon her rights. You, gentlemen, have seen this woman, and you know that she

knows her business too well to be thus hoodwinked. What motive can you discover in this strange proceeding other than the motive of fraud?

What was Mrs. Hillmon's motive in her treatment of Senator Buchan? She swears here to you that she believed Buchan was trying to brand her husband as a murderer, and to rob her of twenty-five thousand dollars; and yet she complies with all his wishes, she stays at his house as his guest, and then she writes to him such letters as those which have been read to you. Can you, gentlemen, explain the horrible inconsistency of this business? Can you explain it on any other ground than that of a guilty conscience? Can you discover in it any motive other than the motive of retreat from fraud?

What motive had Baldwin in not restraining Mrs. Hillmon from the step which she proposed to take? Ought he not as a friend to have insisted on her keeping away from Buchan, or at least should he not have insisted on her consulting her attorneys? What motive can you ascribe for his apparent indifference other than the motive of avoiding the consequences of his share in the fraud?

What were the motives which induced the parents, brother, and sisters of Frederick Adolph Walters to solemnly swear to their brother's death? Would they not gladly believe him alive? You saw them on the stand. Did you ever hear truth more clearly spoken? Did you ever see sincerity more clearly stamped on people's faces? Can you believe that these people were swearing for money? Can you ascribe to their statements any motives other than the motives of conviction?

What motives do you ascribe to Dr. Miller, Dr. Mottram, Dr. Stuart, Dr. Morse, to Colonel Sam'l Walker and his son, to Hon. J. W. Green, Dean of your State's University

Law School, the then County Attorney of Douglas county — what motive do you ascribe, I say, in their conduct of the coroner's inquest, their treatment of the cadaver, and their subsequent efforts and evidence on behalf of the defense? These men are above reproach in their private characters; they are leading churchmen, leaders in society, honorable soldiers, and good men by whatever test they are examined. Dare you, by giving a verdict for the plaintiff, brand these men as perjurers and conspirators? Dare you say that for thirty pieces of silver, by the sum more or less, which they might receive from the insurance companies, they would blacken the whole record of their lives by an infamous proceeding like this? Dare you ascribe to them as a motive for all they have done, avarice and cupidity?

What motive has Frederick Adolph Walters for remaining hidden? Father, mother, brother, these sweet sisters whom you have seen here, a lover — these call him, if he be alive, from his hiding place, and demand his appearance.

What motive had William J. Buchan in his connection with the matter? This man who has been twelve or fifteen years in the State Senate, and who has made more of the laws of this State than perhaps any other man in it; who has for his friends and admirers the leading men in the State; whose money and business are ample; whose public and private life have never been impeached — this man could not have had the motive ascribed to him by the counsel for the plaintiff, the motive of getting a small fee in return for robbing a widow and extracting perjury from his client. The idea is an insult to your intelligence.

What motive have the insurance companies in beginning and continuing this contest? None, I submit, but that of a desire to defeat an attempted fraud. A reputation

for being poor pay is a thing which no insurance company can stand. To advertise to the world that it will always contest a claim where it has a shadow of ground on which to make such contest, is to drive any insurance company out of business. The trouble and expense of this litigation, added to the undesirable advertisement which such litigation gives, far overbalance the amount directly involved. The only motive which the companies can have in prosecuting this case is that of discouraging the sort of crime of which this is a sample, and which to-day is one of the most prevalent of all forms of fraud. In both life and fire business the gravest frauds are attempted daily. In Kansas, the fraud on life insurance companies (including the Hillmon cases) are best exemplified perhaps by the Winner and McNutt case, these two men being now in the penitentiary for burning one Seiver in a house at Wichita, the body being passed off as that of McNutt, who was insured. It is a notable fact that this affair was invented in Leavenworth county, only a few miles from the home of Hillmon and Baldwin. Near Leavenworth lived a man at least up to three years ago, who was supposed to have jumped from a boat on the Hudson river and drowned, and to whose widow the insurance money due on his life was paid; for fourteen years that man lived quietly and securely within a few miles of the city. The case of Jacob Smith, of Atchison, who set fire to his packing houses for the insurance, is remembered by all. In the little town of Eudora, Douglas county, some five years ago, a Dr. Clause insured his house and its contents for three thousand dollars. The property was burned and heavy insurance was paid over, but the finding of a watch, which was scheduled as lost, aroused the suspicion of interested parties, and enabled George J. Barker to force from the doctor a confession and a complete restoration. The

whole property insured was worth four hundred dollars. Not long ago the Travelers' Insurance Company, of Hartford, Connecticut, had a case where a man secured heavy insurance on his life, built him a small workshop or laboratory in the vicinity of Baltimore, where he was one day, so the papers said, elaborately and completely cremated. From a certain suspicious circumstance the company contested the case, and for three or four years braved the indignation of honest people generally, who believed the death to have actually occurred. Finally, as a result of a quarrel between the supposed dead man on the one hand and the wife of a mutual friend on the other, the man put in an appearance and all parties were punished. During all the time of this conspiracy the supposed dead man was but a few miles' distance away. These very brief illustrations are sufficient to clearly point out the fact, for fact it is, that no one interest in our country to-day is so persistently beset by plots and conspiracies as the insurance interest. . . .

JUDGE BREWER'S CHARGE [at the second trial].<sup>1</sup>—Gentlemen of the Jury: I congratulate you that this case is drawing so near to its close. And I congratulate the parties in this case that they have been permitted to try their case before such a jury. I repeat no idle compliment when I say that it has been a common expression of the many, who from time to time, have visited this court room during this trial, that we have an exceptionally fine, intelligent jury to try this case. Some of you are men of state reputation for character; all of you are men of mature years. Some of you have got beyond the meridian of life, and none of you can afford to barter your own self-respect, the character which you have earned and well earned in this state, for the mere paltry desire to

please or favor one party or the other.

At the outset I need no more than state that this case is one of peculiar interest. The many who, from time to time, have gathered here to listen to the testimony as it has fallen from the lips of the witnesses, indicate that there is an interest outside of the mere question of pecuniary interest to the parties, that there is a curiosity and a feeling which has brought them here to listen, and yet of them all who have been here from time to time, or who may have read in the papers the story detailed by these various witnesses, of council, witnesses, and parties, you and I are the only ones who, hearing all the testimony and the arguments of council, the whole detail of this case from its inception to its close, have looked at it or could have looked at it with the single thought that it is for us to settle what is the very truth of this controversy. It has developed before you that this case has run many years. The amount of the controversy, the interest that is felt, all compels, if possible, a verdict, a decision at this time. But while it is for the interest of all that if possible this question should now be settled, it is far more important that each individual juror should be loyal to his own convictions. It matters not what casual remarks you may have heard dropped from outside parties, or what you may have seen in the papers. The question comes home to you, and should come home to each one of you, that "I and I alone have listened to this story as told by these various witnesses, and that no man but myself is responsible for the verdict which must be rendered." I deem it not inappropriate to say that I shall feel it my duty to keep you together a reasonable time for consideration, deliberation, and the weighing of this testimony, but I

<sup>1</sup> [A newspaper report of the charge was supplied for this work, by courtesy of Mr. Gilbert Porter, of the firm of Messrs. Isham, Lincoln, and Beale, of the Chicago Bar.—Ed.]

have never been a judge to attempt anything like a thumbscrew to coerce a verdict against the will and judgment of any jury. This is a case wherein there can be no compromise. It is not like an action for damages, where one juror may say that, "Although I think the plaintiff is entitled to so much, I am willing to throw off a little to adjust my views to the views of my fellows." There is no halfway house here. There is no compromise. Either this plaintiff's husband was killed on the 17th of March at Crooked creek and she is entitled to a full verdict, or else that body there produced was not the body of her husband, and she ought to go out of court, and the verdict should be for the defendants.

I deem it proper, in view of the importance of this case, to comment at some length upon the various classes and forms of testimony that have been presented. I think you will accord to me the belief that it comes not merely from an assumption by virtue of the position that I now hold, but that out of a somewhat protracted experience in the sifting and weighing of testimony and in determining the relative bearing of various forms of testimony upon the matter in issue, I may be able to throw out some suggestions which will help to guide you towards the truth. Yet while I feel that it is my duty to make these suggestions, I want most emphatically at the outset to say that it is not my judgment that is to control; it is yours. I do not want any man on this jury to think that the judge has an opinion this way or that upon the final ultimate question. I have and shall cautiously refrain from any disclosure of any such opinion; and so far as I may express opinions upon this and that matter of testimony, if you do not think that my views are sound and right, reject them; for I want to impress upon you that it is your judgment in this case that determines the verdict. You are

not bound in any manner by the mere say-so of a witness, or the opinion of an expert like a physician. You may, and ought to, use your own common knowledge. You come from various walks in life; you represent different pursuits; you are gathered here from these various walks in life to give the benefit of your own general knowledge of facts and things; that by the concurrence of these varied opinions we may ascertain what is the general judgment as to the truth.

With the plaintiff lies the *burden of testimony*. It is incumbent upon her to prove the truth of the allegations she makes. As the law phrases it, the preponderance of testimony must be on her side. But that preponderance does not mean counting up so many witnesses on the one side, and counting so many on the other. It does not mean in this — which is a mere civil suit — that she must prove her case beyond a reasonable doubt, as the state would have to do if it charged a person with crime. It means simply that the preponderance, the weight of the testimony, shall be on her side; that as you look upon any question, as you look upon the ultimate facts to be decided before you can find a verdict in her favor, you must say that you believe that that is more probably true than false; that as between the two questions whether this was the body of John W. Hillmon that was there found, or not the body of John W. Hillmon, you believe it was the body of John W. Hillmon, and that that belief is sustained by a preponderance of evidence.

You are the judges of the *credibility of witnesses*. As I said a moment ago, you are not bound by the mere fact of a man coming on this stand, and who says a thing, to believe it. You don't count up the number of say-so's on one side and the number of say-so's on the other and say that this is or is not a fact. You judge an individual

here on this stand just as you do an individual off the stand. Do not think that there are any cast-iron rules around your judgment which fetter and hamper it when it would be free and untrammelled outside the jury box. As you measure a man, as you weigh his statement outside the jury room, listening to anything on the street when he tells you of anything seen or heard, so you measure and weigh him here. And if I enumerate some of the things which go to affect the credibility of witnesses, I commend these suggestions simply to your judgment.

One's *interest* affects his testimony. A person who makes or loses by this or that fact, coming upon the stand will naturally, although honest in purpose and thought, color the statement and the testimony which he gives to suit his own interest. And that you will find, I submit to you as your own experience, to be true of the best men. When they are asked to tell their tale in reference to any fact which interests them, by which they make or lose money, they will, while they will not insert a thing which is absolutely false, tell those things which make for their side and omit those things which make against their side, and they will color their narrative of those things which help them to suit their interest. That, I submit to you, is a part of human experience. Feeling has the same effect that interest has. It is not always a question of dollars and cents. Ofttimes, from one reason or another, perhaps unknown and undisclosed, one witness or another has deep feeling for or against this or that party. Such a witness, I submit to you, despite the best intention, will put his views in accord with his feelings most strongly.

Then you will notice, as you have noticed in this case, that some witnesses have that peculiar temperament which compels them to say, "I know." Others come forward and say "My best judgment is so and so,"

"I think this is so and so." Well, I submit to you whether the former is entitled to more credence than the latter. It is a part of common experience that some when they see a thing or believe a thing, believe it absolutely. They do not recognize the possibility of a doubt or an opposite side. Others, more cautious, are simply willing to give their best judgment; and I submit to you, whether in your experience through life, they who speak cautiously, they who give to you that which they say as simply their best judgment, are not, in the general average of things, more likely to be true than these positive natures who are apt to grasp a fact speedily, be positive, and recognize no possibility of a doubt.

Then, you measure the story of the witnesses by the *probability of the story*. If one comes before you and details facts which are in accord with human experience, which are natural and probable, you instinctively, involuntarily, give more credence to that witness than when one comes before you and tells something which is out of the ordinary course of nature. You want to have his testimony strengthened; you want to hear somebody support it, for you say, "This, on the face of it, seems strange; that, on the face of it, seems natural."

Then, you may measure anybody, on or off the stand, by the *manner in which they testify*. Some carry on their face that impress of truth which no person can witness without according belief to it. Others, by their manner, show that they are either telling an untruth or that they are telling matters of which they are not certain, and it is your prerogative, as you have done — and I say it to your credit that I have never seen a jury during a protracted trial watch more cautiously and carefully the various witnesses who have been before them — it is your prerogative, as it is your duty, to weigh every witness who has sat in this box, and

determine for yourself whether that witness was seeking to tell the very truth and whether he was talking of things of which he had a clear and distinct recollection or was simply giving a vague impression, drawn perhaps from many sources.

Then there is another question I want to call your attention to. You have doubtless in your life noticed that men will *recollect facts* when they cannot recollect dates. It is often thought by counsel that if they can catch a witness in a misstatement as to a date, they have impeached his testimony as to a fact. But I put it to your own recollection, to your own experience, whether out of 1000 men you ever saw a single one that, unless there was something to impress the date, could actually state it. You have every one of you noticed that Judge Foster, the district judge, has been in attendance since this court commenced; of that fact you are certain; you have no doubt of it, but can one of you tell the day, would you be certain as to even the week of these four weeks of trial as to which he first appeared? And yet, if somebody cross-examining you in the days to come as to that fact, should ask was it the first week? was it the second week? Was it Monday, Tuesday, Wednesday, Thursday, Friday, or Saturday? and you should say: "I do not know; I think it was Thursday or Monday," would you think that thereby your certainty, your recollection was thereby impeached? Indeed, a witness, unless there is something to impress the date, or some memorandum, or unless he can put the fact alongside of some certain date about which there can be no question, is seldom able to positively assert the date. So I submit to you whether your general experience does not tell you that a date is of all things the most uncertain to recollect, the most impossible for a witness to tell. And while he may be certain as to this or that fact which he sees, the time at which he

sees it is a matter which is past his certain statement.

There is another matter. If you and I are witnesses of any transaction, you may see one circumstance, I another; one series of facts may impress you, another series of facts may impress me. I go on the stand and tell what I remember; you go on the stand and tell what you remember; each of us may be perfectly truthful, each of us may endeavor to give the whole truth and each of us may honestly forget things which the other has remembered.

These are rules of evidence born of the experience of many generations, and I submit to you, whether they do not concur with your own experience and judgment. There has been thrown out in the argument here suggestions on the one side and the other of the conduct of the parties, charges of conspiracy; and reflections have been on both sides cast upon the conduct of various agents and parties in respect to this transaction. It matters not to you and this case, whether either side has in all things conducted itself according to the strictest rules of decorum and propriety. It may be that it was an unusual thing and a weak thing for this plaintiff to leave the home of her friends and come to Leavenworth and sign those releases. It may be that it was an ungentlemanly thing for the agents of the insurance companies before the body had reached Lawrence to write to Mrs. Hillmon, seek an interview, and strive to elicit facts. Be that as it may, that is not the question for you to settle. All these things come in and are properly let in evidence only as bearing upon the ultimate fact, the single fact which you have to determine.

The amount in controversy is large. On the one side you are told that there is a poor woman; on the other side rich corporations to whom a mere matter of \$30,000 or so is trivial. While counsel on both sides disclaim any desire to

influence by outside matters, yet you see that there comes to every man the thought that on the one side there is a poor woman, upon the other side wealthy corporations. You see also the thought which has been suggested that these are foreign corporations, living and residing in the distant States, contesting with a citizen of your own State, and appealing to jurors of this State, whose sympathy may naturally be with their fellow citizens, for justice. I speak of this because these matters, while not pressed upon your attention, are incidentally thrown out. I trust you are true men, who sympathize with a poor woman. I would despise a man, and I would not let him sit on a jury that I controlled, if I did not believe he had much sympathy for any woman in poverty or distress. I believe you are proud of this State, and would not have the good name of this State or the good name of its jurors sullied by any act of yours. I would not have a juror sit on a case tried before me, if I could help it, whom I did not believe had that loyalty to his own State. But above all these questions, beyond all these considerations, is that loyalty which every one of you ought to feel, and I do not doubt does feel, to his own convictions; and whether your verdict shall be for this poor woman or in favor of these rich corporations, or, as some may say, for the good name of the State or against it, I believe, I trust, I am talking to men who respond to that feeling, that you are each one going to do that which shall be the true answer to your own convictions, whichever way they may lead you.

Now, *what is the question?* The plaintiff in this case says that prior to March, 1879, her husband took out policies of insurance to the amount of \$25,000 in these three several companies defendant; that on the 17th day of March that husband was killed on Crooked creek, near Medicine Lodge; that that

body was brought from Crooked creek to Medicine Lodge, and from Medicine Lodge to Lawrence, and there buried. And the question in the case, and as I have had occasion to say to you several times during the progress of this trial, the single, paramount, ultimate question is: "Was that body thus brought from Crooked creek to Medicine Lodge and to Lawrence the body of John W. Hillmon?" That is the question which you must answer, and that is the single, ultimate question which you must answer. It is not a question as between two bodies. It is not a question whether this is the body of John W. Hillmon or Frederick Adolph Walters. This is not like the case told in Scripture of the woman claiming one body, one child. It is not a question for you to settle whether the preponderance of testimony shows that it is the body of Walters or the body of John W. Hillmon. The question is: "Is this the body of John W. Hillmon?" And if such a thing as this should happen, that any one of you jurors sifting and weighing this testimony should come to the conclusion that you are not satisfied that it is either the body of Hillmon or the body of Walters, then your verdict must be against the plaintiff, for with her rests the assertion that it is the body of John W. Hillmon. . . .

At the outset we have this fact: That John W. Hillmon, prior to the 17th of March took out \$25,000 insurance. It is claimed by the insurance companies that this is a significant fact. They have said to you that that is an enormous amount for a man circumstanced as he was, to take out; that on the face of it, it indicates in the inception, a wrong purpose, and coupling that with the fact that immediately after taking it out, he goes into an unfrequented and lonesome country and meets his death, presents a combination of suspicious circumstances, which, in the inception, characterize

the transaction. On the other hand, the plaintiff says that her husband was recently married; that within three months of their wedding starting out upon a legitimate business transaction, and going into a country but recently visited by hostile Indians, a country in whose locality might be expected danger and risk, he simply did that which the promptings of conjugal love required. Uncertain whether from the country he would return alive, fearing accident to himself there, and unwilling that the woman to whom he had so recently pledged his loyalty and faith for life, should be unprovided for, he had taken this simple and reasonable precaution for her future benefit. Now, this is a matter for you to pass upon. You have heard the arguments of counsel as to one thing and another, whether a man would ordinarily take such a trip at such a time, whether that was the best time to make the investigation contemplated, and all the circumstances of his pecuniary condition, his past life, his present surroundings; and the question for you in that respect is to say whether in the inception of this matter there appears that which impels you to say that it indicates wrong, or was the simple and natural action of a loving husband.

We pass from the inception of this case to what I may call the direct testimony.

One John H. Brown testifies before you that he was the sole companion of John W. Hillmon; that on the 17th day of March, 1879, by accident, the gun in his hands went off and John W. Hillmon was killed. He says he was the only person there present, the only witness to that transaction, and there is no other witness that pretends to have been there. His testimony therefore comes before you as what we call "direct testimony." If his statement is true, there can be no question but what it was the body of John W. Hillmon and this plaintiff is entitled to recover. As against

that, first, as to the man himself it appears that sometime in September thereafter he signed and swore to a statement contradicting the testimony which he gives. Naturally, one who tells two stories is entitled to little credence. If I come before you to-day and tell you that I saw a thing take place so and so, and to-morrow I come before you and say that it is not so, it took place in a different way, the thing was entirely opposite to that which I told you yesterday; involuntarily you would say: "Well, I do not know that either story is true. You have no regard for truth if you can thus tell one thing one day and the opposite to-morrow." If I heap upon that an oath to-day and swear that this thing took place so and so, and to-morrow I heap upon that statement another oath exactly the reverse, stronger would be the feeling, because I neither have any regard for truth nor feel the obligation of an oath. If this statement of John Brown's stood simply alone opposed to his testimony here, with no explanations, nothing indicating how it was obtained or why he tells different stories, I would unhesitatingly say to you that you ought to reject every vestige of what he says, and that no verdict ought to be sustained for a moment which rested upon the solitary testimony of a man who swears one thing to-day and the opposite to-morrow. In his testimony he tells how and why he made that statement, and you have the testimony of Reuben Brown and of W. J. Buchan as to the circumstances under which that statement was made.

The next matter of testimony to which I draw your attention is that which runs along the line of general resemblances, general recognition. That really is divided into two classes here. There is the general recognition of the body, and the other that recognition which comes from seeing photographs thereof. There is a vast amount of this testimony.



Many witnesses have come before you here who say that the body lying there in the coffin was the body of John W. Hillmon. Others have come before you and say that it was not the body of John W. Hillmon; that it was the body of a stranger, and that they were acquainted with Hillmon in his life. Other witnesses, by deposition or in person, have come before you and looked at the photographs taken of that corpse, and say "those are photographs of the body of Adolph Walters." All the testimony which runs along that line, whether given at Medicine Lodge, Lawrence, or in Fort Madison, is a mere matter of general resemblance and general identification. As to that I submit to you whether that testimony is not of a weak character? It is true that if one of you was called upon to describe a face which you had seen here, you might not be able to pick out every feature and describe it so that somebody else could thereby identify it. And it is at the same time doubtless true that you would know the face. I think some of the counsel have said in their argument, and I think well said, you go away from this court room; you have been here trying this case sixteen days; you and I have met day after day; you have seen my features and my face; and I doubt not if you should meet me anywhere in the months and years to come, you would remember me; but yet, if next week even, somebody should call upon you to describe the features, the face of Judge Brewer, so that he could identify me, I think you would be puzzled to do it. I think when you came to describe my eyelids, my nose, my face, my mouth, you would make a description which would, perhaps, answer for half the people in this room, and yet the certainty of your knowing me cannot be questioned. Those who saw Hillmon in life, and those who saw Walters in life, doubtless have a distinct recollection of their

features and their faces; but a dead body is not a live one. All of you have looked upon the dead doubtless many times. There is a change which comes at death. That voiceless and at the same time perfectly intelligible reply, which comes from the living face to any inquiring gaze, and which, for lack of any better term, we call expression, is gone. It is motionless, silent. The features may be there; and if you were so familiar with the person in lifetime that the features, the form as distinguished from the expression, that which lights up the face of the living one, was clearly imprinted upon your memory, you might distinguish. And when you see the photograph, it is not even the cold form that you look upon, but it is simply a picture, a representation. The form of the features may be there. If there is any mark, if there is any particular feature which is significant, you may identify it thereby; but that testimony which comes from a mere recognition of a resemblance, a general resemblance of a dead body, is very unsatisfactory. And that is true whether you see the body one day or more. It is true under all circumstances; becomes more true as the features change by decay. I do not mean to say that these witnesses are not honest; I do not mean to say that they do not believe what they testify to.

And yet there are one or two things which ought to be borne in mind. If you go to look upon a corpse expecting to see a friend or one you have known in lifetime, unless there be something which at the instant arrests your attention so as to satisfy you that it is not the body of that friend or the person that you expected to see, almost involuntarily you say, "Yes, I have seen his body." You have been many times, doubtless, beside the coffin of some friend. You expected to see his form. You give it a glance and turn away, "Yes, I have seen his

body." Or it may be a stranger you have seen but a few days before. You glance at it, and unless there is something which arrests your attention, something which at the moment satisfies you that that is not the body, with the expectation of seeing such a body there, and there being nothing to challenge the resemblance, you pass away and say, "Yes, that is the body." The same way, on the other hand, if some one tells you that there is a body that is not the body of a person you knew, you naturally would go looking for matters of dissimilarity, points which will distinguish that face from the face of the one you knew. Looking for such things, you will often find little trouble in seeing marks of dissimilarity. And yet while I say this in criticism upon this testimony as to general resemblances, it is fair to say that in the concurrence of many voices there is often force which does not come from one alone. You glance around the room here to-day and let your eye rest upon any individual. You recognize him partially, casually. There is nothing to make a definite impression in your mind. You are called down the street to see a dead body. One of you is called and asked, "Is that his dead body?" "Yes." Well, that is faint testimony. And yet if you twelve men, one by one, separately, come and say, "Yes, that is his body," there is a strengthening. Even this weak testimony is thus entitled to consideration. So here in the multitude of witnesses who think they see and say they recognize a resemblance, there is that which is entitled to consideration. But I do not tarry upon that because other matters, I think, are of more moment.

And here let me call your attention to this distinction. There may be what you call resemblances, and what on the other hand you call dissimilarities, the one being affirmative and the other negative. Now, mere resemblances may not be very sig-

nificant, or indeed of any consequence. There is testimony on the part of one of the doctors that Mr. Hillmon had a wound on his nose. You heard his testimony. You heard the testimony of the witnesses as to the condition of this corpse. Now, if you should find that upon Hillmon's face during his lifetime there was such a scar and that such scar was also found upon the body of this corpse, that is something not very common. You would feel as though there was something there to bind the two together. So on the other hand you heard the testimony that upon the back of the body of Adolph Walters there was a mole, and it is the testimony of the doctors that there was a mole on the back of the corpse. This is something which is not so common as a ring mark. This similarity of marks tends to bind the two bodies together. All these matters, which are mere matters of similarity, resemblance, they become more and more strong as they become more and more rare in the common experience of men. But the other branch of this testimony is identification by dissimilarities. There if the dissimilarities are proved, the testimony becomes strong. If the body in that coffin was free from a certain mark which it is proved existed upon the body of Hillmon or upon the body of Walters, and you are satisfied of the truth of that, there can be but one conclusion—that that is not the body of either. Dissimilarities cannot be covered over—cannot be set aside. If they are proven to exist, they compel belief. Now, I do not feel called upon to go through in detail all these various dissimilarities which are spoken of by the testimony or discussed by counsel—the height, the teeth, the mark on the heel, the mark on the nose, the mole on the back, the vaccination. All I can say in reference to them is that if as between this dead body and either Hillmon or Walters you are satisfied that the testimony

shows that any dissimilarities exist, anything which could not in the ordinary course of events be covered over by time and years, why, you are inevitably driven to the conclusion that it is not the body of either. The defendants say that Hillmon had a tooth gone; black in earlier life, and finally disappearing. The plaintiff says that he had a perfect set of teeth. If it be true that one of his teeth was gone, why, there can be but one conclusion. If you believe the plaintiff's testimony and the testimony of her witnesses that these teeth of Hillmon's were perfect, then this mark of dissimilarity vanishes. If on the other hand you believe the testimony the defendant introduces, that John W. Hillmon did have a missing tooth, that is one of those things that there is no way of getting around. So as to all these matters on the one side or the other, of alleged dissimilarity. Whenever you come to a conclusion that dissimilarity is proved, that the body as it lay there in the coffin was destitute of marks which were on the body of either Walters or Hillmon, just so soon as you come to such a conclusion so must your conclusion inevitably be that that body was not the body of either one.

Now, I come to another branch in this case, and that is the *expert testimony*. Doctors have been introduced before you to testify to three matters: First, as to the course of vaccination; second, as to the effect of such a wound as is described in the head of this body; and third, as to the process of digestion and the probabilities of food remaining in the stomach and being found there after death. Now, in reference to these, which are matters of scientific testimony, if as to any of them there is absolute certainty, if you are satisfied from the testimony, for instance, as to the wound, that such a wound in the head would drop a man with instant paralysis, that there would be no staggering backwards or forwards, no motion,

but that he would drop paralyzed instantaneously, and that it was an absolute certainty, then such testimony as that would come right against the account which is given by the witness Brown. If you should be satisfied that the food of the character named and taken in the stomach of the body at the time named would remain there for days and weeks, and that as a matter of absolute certainty, why of course you would say, "It cannot be that the testimony which Brown has given is true." And so with reference to the vaccination. If a doctor can, from looking at a vaccination sore, tell within a day or two, or two or three days, of the time that vaccination sore has been running, and it is shown that the time was less than elapsed between the time that Hillmon was vaccinated and the death, you would instantly say: "Brown's testimony cannot be true; that cannot be the body of Hillmon; the testimony of Brown cannot be true, because here is this physiological fact; this will not deceive; it never deviates from the truth for anything." But if on the other hand you are not convinced that this claim of some of the doctors is well founded, if you are not satisfied that the inevitable, the universal effect of such a wound in the head would be instantaneous paralysis of the body, if you are ready to believe that it might or might not depend upon the many circumstances of which the physicians cannot positively speak, why then, simply all you can say — and so in reference to these other matters of scientific testimony — if the doctors' testimony satisfies you that the probabilities are against the facts, then all you can say is that the probabilities are against the story told to you. That is all you can say about it.

Now I will pass to one other fact, and that is the letter which was written by Adolph Walters, from Wichita, in the early part of March,

1879. In all questions of conflicting testimony upon a certain fact, we reach instinctively back of any dispute, back of any controversy, to the written messages that come to us antedated — anything before the trouble. Mr. Hutchings, I believe, one of the counsel for the plaintiff, said if that letter was stripped from the case, there would be nothing on which to hang a suspicion. That letter comes to us certainly before this dead body was found. It tells its story from the fingers and mind of Walters, sixteen or seventeen days before this body was found. Does it prove that that body was the body of Walters? Whatsoever it tells, and whatsoever significance might fairly come from it, it is something which it seems to me no human mind can resist. In it he says — I do not mean to be understood as quoting the exact words: "I am going away for some months. I have hired to a man named Hillmon. We are going out to hunt a sheep ranch, through Kansas, New Mexico, and Colorado. He promises me better wages than I can get elsewhere. Otherwise I might join the crowd that is going to Leadville." What does he mean? What inference may we fairly draw from it? Was it a truthful statement on his

part as to his having made such a contract? of his intentions for the future? or was it mere excuse and cover for an intended disappearance? If it was a mere cover for an intended disappearance, it signifies nothing. If it was a statement of the actual fact, who was this Hillmon? Was he John W. Hillmon, the assured, the husband of the plaintiff in this case? or was it somebody else? If it was this Hillmon, was this contract carried out or abandoned? Did he go with him, or did he not? If he did not, where did he go? If he did, was he the one John Brown speaks of? And I believe he speaks of some one in both his statement and his testimony previously. These are questions for you to consider. Is this one of those mysterious and inexplicable coincidences which sometimes happen in life? or is it a sort of a guide board at the corner where two ways meet, pointing in the line of truth? That is a question of fact which comes home to each of you.

Consider all the facts in the case. Fear not. Be just; and may that infinite Being, who from His unseen throne in the center of this mystic universe, who sees and knows the very fact, help you to be strong and guide you to truth.



In the name of God amen

Wrote of Nobility of Washington the bearing of the and  
mind. and the title to be my last will & testament

Which by the death is a bequest of all my property -  
back of person and went to Lizzie Hayes - consist of my 8. 10. 12.

WASHINGTON,

D.C.

**390. THROCKMORTON v. HOLT.** (Reported by the Washington *Post*.)

Probably no case in the history of the local bar has excited a more widespread interest than the contest over the alleged will of Judge Holt, which has been on trial in Judge Bradley's court for the past five days. This interest is in a large measure due to the high standing of the alleged testator, who was Judge Advocate General of the United States and Postmaster General, and in his first capacity was closely identified with the trial of the conspirators who plotted the death of President Lincoln. And it is in an equal measure ascribable to the mystery which surrounded the appearance of the will and its mutilated condition, the paper being charred and torn and without a seal, and the further fact that the witnesses to the instrument were President Grant, Gen. Sherman, and Mrs. Sherman. The will is dated Feb. 7, 1873. It bequeaths everything to Miss Elizabeth Hynes, a niece and ward of Judge Holt's first wife, and a person of whom he is known to have been very fond, and to the daughter of Maj. Charles B. Throckmorton, who was named for him, Josephine Holt Throckmorton, and whose godfather the testator was; Mrs. Throckmorton was cousin to Judge Holt's second wife. Judge Holt died on Aug. 1, 1894, at the age of 87, leaving an estate of some \$180,000. His first wife, Mary L. Harrison, had died in 1846; his second wife, Fannie L. Wickliffe, in 1860; and he was childless. The surviving next of kin, who would inherit, were nine in all, the children of one sister and two brothers; one of them Wm. G. Sterett, lived in Washington; another, Washington Holt, lived out of town. Nearly a year elapsed after the death of Judge Holt. No will being found in the meantime, the estate was being administered in the interest of certain blood relatives, including

Washington Holt, his nephew, and about \$9000 had been divided among the heirs-at-law, when unexpectedly, within a few days of the legally constituted limit, the mysterious will of 1873, naming Luke Devlin, a clerk in the War Department, executor, made its appearance in the office of the Register of Wills in a large white envelope addressed in a disguised hand.

The will had been burned in places, but not so as to destroy any vital part of the writing; the place where the seal is usually affixed had been torn off, and the part bearing the signatures apparently separated from the body by long wear, the whole having been pasted on a new sheet of paper to hold it together. The peculiarity of the fire marks is that the edges were burned while the document was folded, while the fire marks on the face of the will were made while the paper was face open or only partly folded. If the paper on which the will was written was at one time what is known as a sheet of legal cap, with presumably a red line running down the left margin of the paper, the margin was burned off, and in that event the mysterious sender of the document presumably destroyed the words of revocation which may have been written there. This is a subtle theory, based on the presumption that there is a serious irregularity about the presentation of the will for probate.

The letter containing the document was put in the mail some time Saturday afternoon, August 24, 1895. It bears the post-office stamp at 6 P.M., and remained in the office until Monday morning, when it was delivered. It was inclosed in a large white envelope, inside of which was fitted a piece of cardboard to protect the will. It bore two 2-cent stamps, apparently carelessly or hurriedly attached, which are canceled with the letter L.

Mr. Devlin, the executor of the will of 1873, is a short, stout man of middle age, who was Judge Holt's private secretary from 1862 until some time in the seventies, during the period of his term as Judge Advocate of the United States. He is by all regarded as a man of high integrity. He is at present employed in the record and pension division of the War Department in a responsible position.

Judge Holt lived in a fine old mansion at the corner of New Jersey avenue and C street southeast, opposite the Varnum Hotel. It is a fine piece of property, where the weeds are now ranking in blissful innocence of scythe or mower, with ivies creeping over the front steps. Here he lived for many years with his servants after the death of his second wife, a Miss Hynes, and he died on the 24th of August, 1894. The property is now in charge of two servants, man and wife, Charles and Frances Strother, colored, who occupy the rear and show strangers through the house who are sent up by the real estate agent, for the mansion is for sale. Frances Strother is an intelligent and buxom colored woman of about thirty. Her mother was for fifteen years cook in the house. Her name is Ellen Christian. There was a housekeeper, Martha Thomas, who served Judge Holt for fourteen years. Both Mrs. Christian and Mrs. Thomas are at present at Hampton, Va. Strother was the coachman for eight years, and two years ago married Mrs. Christian's daughter Frances. These, with the Judge, constituted the household for many years.

The trial of the will contest began on Monday, May 18, 1896. The two tables in front of the bench were occupied by the parties to the suit, their attorneys, and members of the press. At the long table to the right of Judge Bradley sat Maj. Throckmorton; next to him his wife, and between the latter and

Miss Lizzie Hynes, sat Miss Josephine Throckmorton, who forms the central figure of this interesting group. She and Miss Hynes are the direct beneficiaries under the provisions of the will. Major Throckmorton is a tall, military looking man, dressed in a gray suit, light spats, and black shoes. He has a florid face, gray hair, and a gray mustache, twisted into sharp points at the ends. Mrs. Throckmorton is a handsome woman who dresses becomingly in black and wears her gray hair brushed back from her forehead. Her face is very fair, and betrays the keen interest she takes in the proceedings. Miss Hynes is upward of forty, dressed neatly in subdued colors, and never manifests more than a passive interest in the testimony or the arguments of the lawyers.

The cynosure of all eyes in the court room is Miss Throckmorton. She is a tall, unusually attractive girl, with a benevolent expression of countenance which may be termed beautiful; bright, dark eyes, and light brown hair. She dresses plainly in dark colors, but with marked good taste, and evidences in her manner the grace and refinement of good society. At the other table yesterday sat Washington Holt, the nephew of the deceased, and principal heir-at-law, with a suggestion of Speaker Reed in the side view which the casual observer is able to obtain of him as he sits facing the Judge. Next to him sat his daughter, about eighteen years of age, and Mrs. Holt, a handsome woman with bright eyes. Back of these, the principal figures in the case, were seated a number of persons who are interested, remotely or otherwise, in the case. Mr. Devlin, the executor of the will, sat for the greater part of the day behind Maj. Throckmorton, and manifested a sharp, nervous interest in the proceedings. He was repeatedly called to the stand, and underwent a searching inquiry into certain state-



ments made by him to a representative of *The Post*, which he answered in his short, brusque way, for that is one of the characteristics of the executor. He is a short, dumpy man of about forty-five years, with a fat, smooth face, and light eyes and hair. He wears gold glasses, and seldom changes the firm, set expression of his countenance. Mr. Devlin is not a nervous person, and the deep interest he takes in the case is not manifested by ordinary physical symptoms, but the intensity of his expression.

On both sides distinguished legal talent is engaged, the attorneys for the legatees under the will being J. J. Darlington, ex-Congressman Ben. Butterworth, and Blair Lee. For the other side are A. S. Worthington, Jere M. Wilson, J. C. Heald, James C. Poston, of Louisville, and Attorney McChord, of Kentucky, the personal representative of Miss Hynes.

*Monday, May 18, 1896.*

The first witness called by the attorneys for the legatees was Senator *Sherman*, who identified the signatures of Gen. Sherman and Mrs. Sherman as genuine. They then put on the stand Col. *Fred. D. Grant*, who identified the signature of his father, President Grant. Judge *Henry L. Burnett* declared that, in his opinion, the signature of Judge Holt attached to the paper was that of the deceased. The caveators so early in the proceedings gave an indication of their line of attack by trying to establish the fact that Judge Holt was too careful a lawyer to draw a will in the language of the contested instrument. On cross-examination Judge Burnett, however, stated his opinion that while the deceased was well grounded in the principles of the law, he was not so well informed in the technical rules. He was rather an eloquent jury lawyer, witness said. *Tecumseh Sherman*, of New York, identified the signature of his mother as genuine.

The will was then offered in evidence. The caveators objected. The very condition of the paper, Mr. Worthington argued, showed that it had been revoked. He asked where was the signature and the seal spoken of. After a spirited argument Judge Bradley ruled in favor of its admission, and the caveators gave notice that they reserved an exception to the ruling.

*Luke Devlin*, the executor of the will, was then put on the stand. He testified to his employment in the office of Judge Holt during the latter's incumbency of the office of Judge Advocate. Became acquainted with him in 1862, and compared the decisions that left the Judge Advocate until 1869. From 1869 until 1876 he was a clerk, and had charge of correspondence. His relations were not wholly official in character, but at times social. He met Judge Holt several times at the residence of Mrs. Throckmorton. Met him once in two or three months up to 1878.

These questions were objected to. Mr. Darlington said that the opposing counsel, it would seem, were trying to adduce that the will was in the custody of the witness. "Your honor," said Mr. Wilson, "we propose to show that he did have the will in his custody."

Witness then testified as to his further relations with the deceased. He saw him once or twice after 1875 — the year of his retirement from the office of Judge Advocate — in his parlor, when he called socially. In 1878 the servants on one occasion when he called at the house told him that the Judge had company. In the year in which the will is dated he was a clerk in his office and private secretary to Gen. Blair.

*Tuesday, May 19.*

Mr. Luke Devlin, executor under the alleged will, took the witness chair in the morning.

"Mr. Devlin," asked Judge Wilson, "is this your handwriting?"

handing the witness a paper. Upon receiving an affirmative answer, "I wish to offer this in evidence," announced the attorney.

"I object," interjected Mr. Darlington.

"This," said Mr. Wilson, addressing the court, "is an application for letters of administration on the estate of the late 'Billy' McGarrahan. There is a certain phraseology in it strikingly similar to that in the contested paper; also marked similarities in the handwriting."

But Justice Bradley ruled that the paper could not be admitted on cross-examination, although it might properly come in later, if competent. Judge Wilson noted an exception, then asked Mr. Devlin if he had called at Judge Holt's residence after his death, or attended the funeral. Mr. Devlin replied to the first question that he did not, and did not go to the funeral, because he could not learn the hour when it was to be held.

Mr. Wilson's questions were the most interesting because their trend was clearly evident. There was breathless silence when he asked Mr. Devlin if there were any envelopes like the one received in which the will was inclosed, at the same time handing him the identical wrapper on which was crudely printed the address to the register.

"They are not in use in the Bureau in which I am employed," replied Mr. Devlin. "Of course, I cannot say as to other offices."

Mr. Blair Lee asked Mr. Devlin as to his relations with Judge Holt, and received a reply to the effect that he always took care of the Judge's mail, while in his office when the Judge was out of town. He spoke of an estrangement between Gen. Blair and Judge Holt, and said also that he had been advanced in office by Judge Holt, after Gen. Blair had asked Mr. Devlin to become his private secretary. A letter recommending Mr. Devlin

"to whom it may concern," and written by Judge Holt, was offered in evidence.

At the close of Mr. Devlin's testimony, Miss *Josephine Holt Throckmorton*, one of the beneficiaries under the testament, took the stand. The witness is about thirty years of age, with brown hair, well-cut features, and handsomely formed. She was gowned tastefully in a figured costume, and wore a jaunty hat with purple flowers. She corroborated Mr. Devlin's testimony, practically, when she said she had not heard of the contested will until Mr. Devlin sent her a telegram, announcing its appearance in the Register's office. There also she first saw it. Miss Throckmorton testified that her father was Maj. Charles B. Throckmorton, U.S.A. She lived at various army posts with her parents, but was born in Washington. She spent the year from May, 1876, to May, 1877, in this city. She was one of the persons named in the will.

When Mr. Darlington at this point suggested that no more witnesses were then ready, Mr. Worthington said he wanted all the witnesses on the other side to be presented before the counsel for the caveators placed any on the stand. If Mr. Darlington's prima facie case was announced as concluded, he would oppose any future attempt to introduce direct evidence in support of the validity of the will. The caveat had claimed that the whole paper was a forgery; the other side must prove it genuine. They had already gone beyond the bounds of this part of the case, for opportunity had practically been given Mr. Devlin to testify that he had not written the will. "And yet," Mr. Worthington said, "there is more reason now to believe that Mr. Devlin wrote the will than that Judge Holt did so."

The court decided that the counsel for the beneficiaries must produce full evidence in support of the

validity of the will. So Miss Lizzie Hynes was recalled, having testified the day before. She told in a lengthy examination that she was well acquainted with the alleged testator, had corresponded with him for forty years, and knew his handwriting from having seen him write. She identified the paper as having been written by Judge Holt. He had not written to her himself in the latter part of their correspondence, but had always signed the letters dictated to others.

Mrs. *Mary McC. Ray*, a niece of Miss Hynes, who said she had also been in frequent correspondence with the Judge, identified the handwriting in the will. Mr. Worthington closely questioned the witness as to alleged disagreement between her husband and Mr. Washington D. Holt on account of money, the apparent purpose being to suggest unbiased testimony.

Mrs. *Throckmorton* was then put upon the stand to identify the handwriting and signature. She said she was a cousin of the first wife of Judge Holt. She had corresponded with the alleged testator, having heard from him last in 1881. She had destroyed some of the letters. Just here, because Mrs. *Throckmorton* attempted to tell why Judge Holt had not answered two letters written by her in the early '90s, counsel had a tilt. Mr. *Darlington* wished the evidence to go in to foil the intention of the caveators' attorneys to let it be inferred that there were strained relations between Judge Holt and the *Throckmortons*. The explanation was not made.

Maj. *Throckmorton* also identified the handwriting of Judge Holt, Mr. *Butterworth* conducting the brief direct examination. He said he had last heard from Judge Holt in 1870. With a view to showing the credibility of the witness, the Major was sharply cross-examined as to the court-martial of 1892, when, according to his statement, he was

convicted of conduct unbecoming an officer. Sentence of dismissal was commuted to suspension and later set aside. Mr. *Worthington's* questions were not to Mr. *Darlington's* liking, and another tilt resulted. Mr. *Worthington* was allowed, despite the protest of the other side that it was incomplete, to put in evidence the findings of the court-martial. Duplicating pay accounts constituted the burden of the findings. But under the redirect examination of the caveatees' attorney, the Major related in full his side of the case, although Mr. *Worthington* objected. Maj. *Throckmorton* said that he was owed \$300 by some one at David's Island, N.Y., who had pledged himself to deposit that amount subject to the Major's order in a New York bank before June, 1891. It was not done, but he did not know it until after he had drawn against the bank. Soon afterward, however, he paid the checks. As to the alleged duplication of pay accounts, the Major declared that he held the accounts as security, and they were presented by mistake, but no one lost by the transaction.

Additional cumulative testimony was here given by Mr. *Devlin* as to the signature of Judge Holt. Another witness, in the person of John C. *Hesse*, who was in the War Department in 1862, testified to the handwriting.

Miss *Throckmorton* was again recalled, and said: "This is my godfather's handwriting; it is his signature."

Cross-examined, Miss *Throckmorton* said she saw Judge Holt in 1885 and in 1876 in his room. She received letters from him before 1876. So did her parents. Miss *Throckmorton* said she had seen him write letters.

"When did you ever see him sign his name?" asked Mr. *Wilson*. "In 1881 and at other times," replied the witness.

The Judge used sand to blot his

letters, Miss Throckmorton said, and once or twice she had done this for him. She thought she had destroyed all the letters received from her godfather from time to time. She had never turned any of them over to other people.

Mr. Wilson's pressing questions seemed rather to weary the witness, and when the attorney asked, "Now, did Judge Holt always respond to your letters?" she replied, "Most certainly he did," with something of triumph in her voice.

"When you speak of your godfather," asked Judge Wilson, referring to the witness' frequent characterization of the alleged testator by that term, "do you mean Judge Holt?"

"Of course," returned the young lady. "Would you prefer to have me speak of him only as Judge Holt?"

"Oh, no, please yourself," replied Judge Wilson, blandly.

Maj. Theophilus Gaines, who was associated with Judge Holt during the war, identified the handwriting in the alleged will. The Major could not exactly tell when he had last seen Judge Holt's writing or seen him write. He received no written communication from him after 1866. Witness then recalled that a few days ago he had seen a paper in the Judge's handwriting in possession of Gen. Butterworth.

"Then," interposed Mr. Worthington significantly, "you had not seen any of the Judge's writing for thirty years?"

*Wednesday, May 20.*

The greater part of the day was consumed by Messrs. Darlington, Butterworth, and Lee in trying to establish the genuineness of the writing.

Rev. Butler thought the will was in Judge Holt's handwriting. He had seen a sample of his writing that morning in a letter written by Judge Holt to Mrs. Butler. He admitted having no distinct recollection of receiving any letter from the de-

ceased at any time, but he had written one to him about 1865, referring to the Surratt trial. Mr. Wilson objected to the testimony as incompetent. Mr. Worthington offered Mr. Butler a letter—one written by Judge Holt to Mrs. Ray, referring to Lizzie Hynes—and asked him to identify that. The witness said he was not an expert in handwriting and would give no opinion. There was some wrangling among the attorneys over the propriety of offering the letter, but Mr. Darlington waived objection.

"Why are you so positive in saying that the writing in the body of the will is in Judge Holt's handwriting," inquired Mr. Worthington in a tone of mild astonishment "and then say you are not an expert?" Mr. Butler was dismissed.

Then Representative Hitt was summoned, and he was taken in hand by his old colleague of the House, ex-Congressman Ben Butterworth. Mr. Hitt delivered his testimony with almost elocutionary distinctness. He knew Judge Holt for more than thirty years; often saw him write documents during his term as Judge Advocate General; often received notes and letters from him. He was, therefore, somewhat familiar with his writing. Mr. Hitt was handed the will. He looked at it a long time, with his hand raised to his spectacles. Then he said very gravely:

"That is the writing of Judge Holt as I remember it. I speak merely of the writing, not the signature."

"How long since you saw him write?" asked Mr. Wilson, sharply. A long pause ensued. "It is fully ten years—since I saw him write," said the member from Illinois, though, he added, he had received letters from him subsequently. "I have one of his notes now."

"What date?" asked Mr. Wilson.

"July 25, 1890," promptly responded Mr. Hitt.

"You confined yourself carefully to expressing your opinion regard-

ing the body of the writing," resumed Mr. Wilson; he wanted to know if the will had any of the characteristics of Judge Holt. But this was promptly objected to by Mr. Darlington. In arguing the point Mr. Worthington said it was not a question whether the handwriting was Judge Holt's, but whether this paper was his last will and testament, and to prove that they might have to go deeper than the handwriting. On their part, Mr. Butterworth argued, the attempt was made merely to show that it was Judge Holt's mechanical performance, and for that purpose the witnesses had been brought here to testify. Mr. Darlington held that it was not necessary for them to show that certain phraseology in the will was not characteristic of Judge Holt. The point was argued by Mr. Wilson for the opposition, but the court sustained the objection, and the attorneys for the heirs-at-law reserved an exception to the ruling.

Mr. Hitt testified, in reply to a question by Mr. Wilson, that he used to be familiar with Judge Holt's handwriting in official documents thirty years ago.

"His writing was variable," he continued, "it was characteristic, but so variable that I would not know, and do not now know, that he wrote it," pointing to the document in his hand.

"That's all," exclaimed Judge Wilson, with self-satisfied emphasis.

"The last note," continued Mr. Hitt, in answer to a question from Mr. Butterworth, "I received in 1890. As he advanced in years his writing showed the signs of age," added in reply to Mr. Wilson.

The next witness was *S. M. Yeatman*, who testified to his familiarity with Judge Holt's handwriting from the frequent examination of old documents in the War Department, where he was employed.

"That signature," he said, closely looking at the will, "seems to have

been written by Judge Holt. In my opinion it was written by Judge Holt." He spoke of several styles of signatures. This seemed more upright.

"Those you speak of lean to the right?" asked Mr. Worthington.

"Precisely," said the witness, "but there is a similarity in all his signatures. I think I have a signature up there just like this."

"Think you can find one?" came from Mr. Wilson; "we will be obliged to you if you will have one ready."

"If you will make a requisition on the Secretary of War," said the witness, "I will be glad to accommodate you."

Mr. Yeatman was allowed to step down, and Mr. *Frank T. Howe*, of the Washington Star, testified to the handwriting briefly, after which Mr. *A. E. H. Johnson*, a solicitor of patents, was called. He had been confidential clerk to the Secretary of War during Judge Holt's incumbency of the office of Judge Advocate General, and from his familiarity with his writing judged the will to be his. On cross-examination, he admitted that he identified the document by writing which he knew before 1869.

*Clarence F. Cobb*, for thirty-two years a clerk in the War Department, testified that he compiled the correspondence between Gen. Brice and Judge Holt for the former in Baltimore. The two, he said, had a mutual admiration society and used to write to each other a great deal, both being extremely proud of their diction. He examined the will last February for about an hour and believed Judge Holt had written it. On cross-examination he said he had known Devlin about town for some twenty-five years, but he was not employed as an expert in handwriting to examine the will.

Mr. Devlin was recalled and took his seat with a demure air. In reply to questions from Mr. Worthington he said that he telegraphed to Miss

Throckmorton in New York of the finding of the will. The same day he called on Mrs. Throckmorton, the grandmother, who resides at 52 B street northeast, in this city. He was asked where he secured Miss Throckmorton's address in New York. He replied that he had gone to the War Department and there obtained Maj. Throckmorton's address. After a close cross-examination as to his movements on that day, which elicited no features of special interest, the court took a recess until 1 o'clock.

After dinner Mr. Devlin was again put on the witness stand. He was asked by the attorneys for the heirs-at-law if he knew the reporter of *The Post* who had interviewed him. Witness remembered a young man calling on him.

"Did you say to him," asked the attorney, "'I have formed two ideas in explanation of it (the whereabouts of the will), and I think one of these is correct. I think I know where the will has been all this time and why it was not produced sooner, but I intend to keep the information to myself. In fact, I had reason to believe that such a will was in existence, and I wrote to Maj. Throckmorton before it was found, telling him my idea about it?'"

"I may have had some theory about it," said Mr. Devlin, "and expressed myself to that effect. But I deny having said to him that I wrote to Maj. Throckmorton about it." This was delivered with marked emphasis. "I have never read the article from which that is a quotation," he added.

The remainder of his cross-examination was devoted to developing information of his movements on August 28, 1895, and the time he sent the telegram to Miss Throckmorton. Mr. Devlin was finally allowed to step down, but in passing by the table occupied by the attorneys, Mr. Darlington whispered a few words to him, and he resumed the stand to correct a statement.

He had not written to Maj. Throckmorton about the will, as alleged in *The Post* interview, he said, but had written to Miss Throckmorton. That was about Christmas, 1894.

"So you wrote to Miss Throckmorton about it before the will was found?" asked Mr. Wilson sharply. "Yes," said Mr. Devlin.

"You say you never read the interview in *The Post*?" asked Mr. Darlington. "That is correct," said Mr. Devlin brusquely; "I wrote to Miss Throckmorton in reply to a letter from her."

A question from Mr. Darlington as to the nature of that correspondence was objected to by Mr. Wilson and sustained.

Register of Wills *McGill* briefly testified to the condition of the will.

This ended the testimony in chief on behalf of the will.

Then the attorneys for the heirs-at-law put on the stand the most important witness of the day, Col. *Thomas S. Barr*, from Governor's Island, N.Y., Assistant Judge Advocate General. He testified in a fine sonorous voice, with studied enunciation and a deliberate manner. In reply to a question he said he had studied law and was a member of the bar. He had known Judge Holt well. He had reported to him a few days after the assassination of Lincoln and was on duty until April 1, 1870, with the exception of three short details. He had had frequent, almost daily, opportunity to see his handwriting and his signature. His style and manner of composition were familiar.

The will was then handed to the witness and he examined it long and carefully.

"My impression is," he said at last, in a deliberate manner, "that Judge Holt never wrote that paper. It is similar in some respects, but taken as a whole it is altogether unlike anything I ever saw of his."

He was asked if there were any characteristics which distinguished

the document, and replied that there were.

"What are they?" asked Mr. Wilson. But Mr. Darlington objected, and the question was temporarily withdrawn.

Witness continued that Judge Holt's manner of punctuation was very correct. "I think he used a full share of commas," he said.

Mr. Wilson then asked him if Judge Holt would have been likely to use the expression in the will: "Lizzie Hynes is to inherit hers at my death."

Col. Barr was unfamiliar with such expression in wills as drawn by lawyers, but was stopped from pursuing the subject further by an objection from the other side.

The intention was to show that the phraseology of the will was not such as would be employed by experienced lawyers like Judge Holt, and Mr. Worthington asked for an immediate ruling on this point because of the importance of the question involved. He thought phraseology and other characteristics of a testator were material questions, but Judge Bradley sustained the objection, and several technical points made by the heirs-at-law were also overruled.

In reply to a question Col. Barr said that Judge Holt had the clearest power of expression he had ever known, and he was the finest rhetorician he had ever met. As to accuracy, he said, he exercised very great care in regard to reports prepared by him, often suggesting a change of phrase. He had never read an incorrect expression from him.

*Thursday, May 21.*

The heirs-at-law in the Holt will case scored a strong point in their favor yesterday when Judge Bradley ruled that testimony showing the character of the relationship existing between Judge Holt and the Throckmortons toward the close of the testator's life, was admissible as evidence.

This ruling affords the attorneys who are assailing the will a full opportunity to prove that the relationship existing in 1873, the year in which the will in evidence is alleged to have been drawn in favor of Miss Josephine Throckmorton and Miss Lizzie Hynes, no longer existed during the closing years of his life, at least as to the first of the two beneficiaries, and may be regarded as the turning point in the case.

The point at issue was decided when the attorneys for the caveators put on the witness stand Mrs. Emma S. Briggs, at one time a well-known Washington correspondent, writing under the name of "Olivia." She testified that she stood in close and friendly relations to Judge Holt for many years, and was acquainted with Maj. Throckmorton and his family in times past. The question arose when Attorney Wilson asked her to state what she knew of Judge Holt's treatment of them and with what sentiments he regarded Miss Josephine's mother and grandmother.

The examination of Col. Barr was continued yesterday, and he was the first witness on the stand. The counsel for the legatees indirectly showed that the witness has not been on an amicable footing with Maj. Throckmorton since the latter's court-martial. Col. Barr's recall to the witness stand yesterday led to a spirited contention between counsel as to the admissibility of evidence tending to show whether Judge Holt would have asked the President of the United States and Gen. and Mrs. Sherman to attest his will, thus subjecting them to the embarrassment of testifying before the Probate Court. The decency of the District bar, Mr. Worthington argued, had always held it a question whether a subpoena was competent to issue from a local court summoning the President to testify in a case. He held to the theory that the slip of paper containing the names of President Grant and the

other witnesses to the will was a separate slip of paper over which the will of Judge Holt had been forged.

Mr. Worthington asked the witness what were the characteristics of Judge Holt when he was associated with him in 1870 in his deportment toward his superior officers.

He was a man of retiring manner and great modesty toward his superiors, said the witness, and he saw him but seldom with the President. The question whether his relations were such that he would probably have asked them to be witnesses to a will was objected to as involving a question, not of fact, but opinion. Objection sustained. The witness was then taken in hand by Mr. Darlington, who asked the witness what a caveator and a caveatee was, to which he made reply which he afterward corrected of his own accord.

Witness said he was admitted to the bar in 1859. He had no animosity for Maj. Throckmorton, but did not speak to him. He did not know the heirs-at-law.

He was then cross-examined as to business movements early in life, and said he came to Washington from Massachusetts, giving up his law practice there, and entered the Treasury Department as a clerk at \$1200 a year. He was asked when his relations with Maj. Throckmorton ceased. He replied that it was at the time of Maj. Throckmorton's court-martial, in which he figured as an official.

Mr. Darlington then asked him if he had not called on Maj. Throckmorton, as a friend, and conversed with him, about the time of the court-martial, and then gone on the stand to testify against him. The witness replied that he had done so, but not until after he learned that Maj. Throckmorton had destroyed certain documents.

"Did you not offer him your hand?" asked the cross-examining attorney.

The witness replied that he simply

ceased to speak to him after that. He was asked if he had not written him friendly letters. "No friendly letters," said the witness. "I may have written him official letters." He was asked with whom he had conversed regarding Luke Devlin. With the counsel and the Assistant Secretary of War, replied Col. Barr. He had talked to Devlin on Wednesday, and Devlin had said: "This is an unpleasant case."

"Have you any letters written you by Judge Holt?" asked Mr. Darlington. The witness replied that he had. He remembered one dated 1875, and was asked if he had any correspondence with the testator since that time. He remembered receiving a communication from Judge Holt in 1889, while in Washington, but it was only a short note.

"With that exception, did you receive any letters after 1875?" asked Mr. Darlington.

"Possibly — a few," said the witness. He was asked if he had practiced law in late years. He had practiced in the Supreme Court in a few official cases, he said.

"Have you tried any civil case in the past thirty-six years?" asked the attorney. The witness replied that he had not.

On re-examining the will he said he would not swear that it was not Judge Holt's handwriting, but he would say that the signature was not, in his opinion, that of Judge Holt. He had great doubt of its regularity. The body of the writing was ragged and unlike the testator's as a whole. It had an unfamiliar appearance, its character being unsymmetrical. He pointed out some of the details, and the will was closely examined by the jury, Mr. Darlington passing it along. The attorney tried to induce the witness to particularize, but he declined to be led, confining his criticism in the main to the appearance of the writing in general. He specified the unfamiliar appearance of the



letter "T" and said he never saw Judge Holt write a "W" as in this will. The paper was again shown to the jury. He also criticized the use of the abbreviation "Majr." for Major. He criticized the phraseology of the will as wholly unlike such as Judge Holt would have employed.

Mr. Darlington handed the witness a letter dated September 29, 1873, addressed "My Dear Cousin," purporting to be signed by Judge Holt, but Mr. Wilson quietly arose and asked that it be handed to him. He examined it and then objected, but Mr. Worthington explained that there was an agreement to submit Judge Holt's handwriting on both sides, with reservations, and withdrew the objection. Mr. Darlington tried to induce the witness to draw comparisons between the will and the letter, but voluntarily abandoned the effort out of deference to his agreement, and submitted the Holt will of 1848. He asked no questions, however, and soon after allowed the witness to step down.

Ex-Postmaster General *Horatio King* was then put on the stand. He said he would be eighty-five next June if he lived. He came to Washington to find an opening in the newspaper business, and not finding anything, he entered the Post-office Department in March, 1829, at \$1000 a year. He graduated to First Assistant Postmaster General, and as such was Acting Postmaster General, until 1861, when he was appointed Postmaster General, serving from March 7 that year until he resigned with the Cabinet. He was first assistant under Judge Holt, when the latter was Postmaster General. He was often in conference with him on official matters on which there was any doubt. Became perfectly familiar with his handwriting and was very intimate with him until near his death. During his illness, four or five years before his death,

hardly a day passed that he was not a caller at his house and chatted with him. Had much correspondence with him, and has now some twenty letters signed by Judge Holt, the first being written in 1863 and the last in 1888. Would not say that he had ever seen Judge Holt write.

Mr. Wilson then handed him the will for examination. He asked him if it was Judge Holt's writing.

"Unquestionably, it is not," fell from the venerable witness' lips.

"Now, tell the jury if this is Judge Holt's signature," said Mr. Wilson.

The witness said he would not say, but in his opinion it was not, "because," he said, "the whole thing is a gross bungling fraud!"

There was a buzz and commotion in the crowd of spectators and the court officer rapped for silence. The witness had examined the will last year with Washington Holt and had then made up his mind that the will was a forgery. He said there were fifteen places where Judge Holt would have made commas and four or five places where he would have made full stops. He remarked upon the failure of the writer to use a capital letter in "will," when he did so in "Testament." He also criticized the long pauses between words. The general appearance indicated that the will was a forgery. Witness spoke of the high attainments of the testator and spoke in glowing terms of his accomplishments. He was a finished orator, he said, and a man of great intellectual force.

The venerable witness spoke in a broken voice and in a manner indicating that he had formed an opinion, and was not to be budged in his conclusions. He spoke of the testator as Gen. Holt; "for," said he, "he never was a Judge," and raised a laugh in concluding his testimony by referring to him as "Judge Holt, that never was a Judge."

Before the witness was turned

over to the tender mercies of Mr. Darlington, Mr. Wilson moved to strike out the testimony of the witness in reference to the signature. Mr. Darlington objected, but was overruled after a sharp tilt with the opposing counsel. The witness was then subjected to a searching cross-examination by Mr. Darlington touching an interview which the attorney had with him regarding the will three or four months ago. Mr. Darlington tried to establish the fact that the witness had then pronounced the will genuine from a photographic copy of it. Witness did not specifically deny it, saying that he thought it to be genuine for a while, but did not think so now. He was asked if he did not tell Charles Jones that the will was undoubtedly Judge Holt's.

"If I did," said the witness, gravely, "I made a terrible mistake."

He was also shown the letter addressed "My Dear Cousin," which Mr. King said appeared to be in Judge Holt's handwriting. When shown the will of 1848 he said he would not inferentially swear that it was Judge Holt's writing.

*Emma S. Briggs*, who has been a resident of Washington since 1859, said her acquaintance with Judge Holt began when Andrew Johnson was inaugurated. She was a correspondent, a journalist, during her acquaintance with Judge Holt, and had exchanged letters with him; he had also visited her home. She was a great admirer of his style, and her relations were those of "a very ignorant woman who was anxious to learn something" to such a very able man as Judge Holt. She thought she had some letters written her by Judge Holt dating to 1885. He wrote a letter of introduction for her in her presence in his house.

She was then shown the will, and asked if, in her opinion, it was in the handwriting of Judge Holt.

Mrs. Briggs studied the document a long time. Then she said:

"I do not think that it is." She did not believe that the signature was Judge Holt's.

"Were you acquainted with any of the Throckmortons?" asked Mr. Wilson.

"I was in years past," said the witness. She was then asked what she knew of the treatment by Judge Holt of the members of the family, or what he had said of Mrs. Throckmorton, the elder and younger. This was objected to by Mr. Darlington as inadmissible evidence, and an hour was consumed in technical arguments by counsel, touching the admissibility of parole declarations of Judge Holt, showing his intention to revoke the will.

In an exhaustive explanation the Court ruled that the evidence was admissible, and on motion of Mr. Wilson court adjourned until to-day.

*Friday, May 22.*

The feature of the examination was the evidence given by Mrs. Briggs under the ruling of the court, made on Thursday, that testimony showing the nature of the relationship subsisting between Judge Holt and the members of the Throckmorton family might be offered. Mrs. Briggs is said to be the first woman who engaged in newspaper work as a Washington correspondent. Her connection with the press dates back to the period of the war. She was for a short time editor of the *Washington Chronicle*, and enjoyed the acquaintance of the public men of those stirring times. She was particularly well acquainted with Judge Holt. Her husband pointed out the printed report of a speech of Judge Holt and advised her to study it if she wished to acquire a pure English style. She became acquainted with him, and, according to her testimony, became a frequent visitor at his house for the purpose of drinking in the beauties of his rhetoric and laving herself in the fountain of his diction. From this association, she declared, she came to

be known as a great writer. This relationship dated back to 1865.

Mrs. Briggs, who is an old lady, was dressed in black silk, as she resumed the stand to testify yesterday morning. The attorney for the legatees objected to any testimony which did not confine itself to Miss Josephine Throckmorton, the beneficiary, so long as the inquiry was to extend to Judge Holt's relationship with the Throckmortons; but the court ruled that the testimony might extend to the other members of the family as tending remotely to show his intentions with regard to the beneficiary. Accordingly witness was allowed to testify that she had a conversation with Judge Holt regarding the Throckmortons about 1881. In reply to the question what was said, witness related that she was at Judge Holt's house on one occasion and inquired about the health and whereabouts of Mrs. Throckmorton.

"I do not know the Throckmortons," was Judge Holt's reply; "and that," added the witness, "is the only time I heard him mention the Throckmortons."

She then related the White House episode and the incident of Judge Holt turning his back upon Maj. Throckmorton.

"I was so surprised, so astounded," said the witness, with considerable declamatory effect, "that I had to sit down."

"Did you have any talk with Judge Holt respecting the will?" asked Attorney Wilson.

"I did," said the witness; "it was at his own house." She had just read the press accounts of the breaking of Tilden's will, she said, and she suggested to him to be careful to adjust his affairs so as not to place them in a similar jeopardy, whereupon Judge Holt counseled her to exercise a like care.

"In my own case," he said, "my nephew, my brother's son, Washington Holt, will attend to my affairs, and I know it will be done all right."

Mr. Darlington objected to this testimony as not admissible. Such declarations, he said, were easily obtainable and difficult to disprove. Judge Bradley, however, overruled the objection because of the unique circumstances environing the whole case. Soon after Mr. Darlington took the witness in hand.

On cross-examination, she testified that she had lived in Washington since 1859. Before that she lived in Iowa.

"When did you live in Chicago?" suddenly asked the attorney. The witness answered that it might have been during the latter years of the fifties.

"Where were you born?" asked Mr. Darlington abruptly.

"In Cuyahoga County, Ohio," said the witness.

"When?" asked the counsel.

"I have no remembrance," was the reply. The attorney tried to jog her memory, but witness declared that she had no information on the subject. Her father or mother never had told her, and she had no other data. The testimony created a good deal of amusement, which was promptly suppressed by the Court.

"You spoke of your husband," resumed the counsel.

"I did," said the witness.

"When did he die?"

Witness said in 1873. She was asked when she became a correspondent. Did not remember, but it was during the time of the war. She mentioned the *Philadelphia Press* and the *Burlington Hawkeye* among the papers for which she had written. She really could not call it a business, that in which she had been engaged while writing. It was during the time of Andy Johnson's trial or a little before that. She also worked for the *Washington Chronicle*, she said.

"As what?" asked the attorney. She started as a book-reviewer, and said she wrote occasional editorials, and for a short time had complete

editorial control of the paper. She thus gained access to public men, and became acquainted with Judge Holt.

"You knew the Throckmortons?" asked Mr. Darlington.

"Certainly, and real good, lovely people they were," said the witness.

"Where did you meet them?"

She thought several minutes. "I can tell where I didn't meet them," she answered with sudden emphasis.

"Where?" asked Mr. Darlington.

"I never met them at Judge Holt's," declared the witness forcibly.

She could not recollect how long ago she knew them, but in the cross-examination she fixed the date when she first called at Judge Holt's at about 1865. From that time to the last time she called there she never saw the Throckmortons at his house.

Counsel asked how, under these circumstances, she came to inquire about the whereabouts and the health of Mrs. Throckmorton, reference being had here to the mother of Major Throckmorton.

"If you were a newspaper correspondent, Mr. Darlington," sagely replied the witness, "you would not inquire." She told the counsel that newspaper people were likely to make inquiries of such a nature, and explained that her knowledge of the acquaintance between Judge Holt and the Throckmorton family came to her from Mrs. Throckmorton, the elder.

Mr. Darlington here changed the direction of his inquiries by asking witness:

"Was not Judge Holt a widower when you met him?" "He was."

"And continued so long as you knew him?" pursued the counsel. "He did," replied the witness, adding, guardedly, "to the best of my knowledge," which created a ripple of merriment in the crowd.

"How did you go to the White House on the occasion of the reception of which you speak?" asked Mr. Darlington.

Witness said they went in a carriage.

"Who drove you?" asked the attorney.

"How should I know or remember the colored man who drove us?" asked the witness, in a mildly remonstrative tone.

"What?" asked the attorney, in surprise, "you did not know Judge Holt's servants?"

Witness protested that her relations to Judge Holt were not of so close a character that she knew all the details of his household, but rested solely upon a mutual admiration and worship of the beauties of English literature. She could not tell under whose administration this occurred. Did not know whether it was under that of President Hayes. Never told Julius Truesdell, a reporter, that it was during the Hayes administration. Never told Miss Josephine so. She related an interview which she and the latter had, when Miss Josephine had complained of a statement in the paper that Judge Holt had turned his back upon her papa.

"It is true," witness had declared, "for I was on Judge Holt's arm at the time."

"Did you see Major Throckmorton after that?" asked the attorney.

Witness thought she called on the Major at Governor's Island once after that. She saw Mrs. and Miss Throckmorton, but was told that the Major was in New York.

"How long did you visit at Judge Holt's house?"

"There never was a time," witness said, "that I didn't go there when I could." She emphasized that her visits there were prompted by her admiration for English literature.

"Any interruption to your visits?" asked Mr. Darlington. Witness grew dramatic, and exclaimed with great emphasis, rising in her seat: "Never — never — never!"

"Ever have any trouble with the

servants?" "Never—that I recollect."

"You say you visited Maj. Throckmorton's wife and daughter at Governor's Island?" "Yes."

"When was that?"

A long pause ensued. "It was during the time that Maj. Throckmorton was stationed there," witness finally said; but she did not recollect clearly.

"You took lunch there?" "I did."

"Did you not ask Miss Josephine, in the presence of her mother and a servant (naming the same), when she had last seen Mr. Holt?"

Witness said she did not think so. Thought they had asked her when she had last seen him.

"I know I did not," witness added, "and would not have done so, from motives of delicacy."

"You did not say that you had ceased visiting the home of Judge Holt because the servants were impertinent?"

Again the witness waxed dramatic, arising to her feet and in a ludicrously solemn tone, exclaiming: "Never—never—never!"

The attorneys for the heirs-at-law then submitted a deposition from Mrs. *Barney B. Ricketts*, of California, touching statements alleged to have been made by Judge Holt regarding Mrs. Throckmorton, the elder. About four years after 1873—the date of the will—she heard him express himself with great bitterness regarding her, and again on the occasion of the Yorktown centennial.

Mrs. Briggs was put on the stand again by Mr. Darlington and shown the will. The general look, the whole thing, the "W" and other signs were unlike his, she said. They were entirely unlike the letters she had of his. She said there was a "something" about it that was as unlike as two faces. She admitted she couldn't swear to her own writing. There was a difference in the "t's" used in the will, and witness pointed

out a number of seeming discrepancies.

She was handed several letters signed by Judge Holt for identification, but declined to express positive opinions. On reexamination, she stated that she had cultivated Judge Holt, to acquire his style, and had studied English literature under his instructions. Witness thought the testator was a very careful writer, and very exact in his punctuation and capitalization, and through her study of his style she declared she had acquired the reputation of being a great writer.

She was asked as to the handwriting and composition of the will, which she said were not those of Judge Holt. This was objected to by Mr. Darlington, and a long technical argument ensued, which was not finished when the court adjourned for the noon recess. After dinner Judge Bradley overruled the objection.

Witness was shown the will, and asked by Mr. Darlington to point out the absence of commas and other punctuation marks. After some study she pointed out the absence of a period and a comma. She thought she had thus pointed out all the peculiarities of punctuation, except that the employment of a dash for a comma struck her as different from anything she had ever seen of his writing. She pointed out a "t" which was drawn like an "l" as anomalous in his handwriting. Witness did not mean to say that she had received letters from Judge Holt every year for thirty years, but "off and on" within those years. The testator's writing she said, was not so slanting as in letters of Judge Holt's in her possession. The chief characteristic of Holt's style was forcibleness. He was not a verbose man, and used no superfluous words. Never used a word which could be omitted.

*Samuel Hodgkins* was employed in the War Department after 1863 in the Secretary's office, and had

excellent opportunities for becoming well acquainted with the handwriting of Judge Holt. Handled many of his official papers after 1870, some letters, but mostly indorsements in his handwriting, and bearing his signature. Thought he could find papers in the War Department indorsed in Judge Holt's handwriting. Shown the will, witness said:

"In my mind it is not Judge Holt's." Witness had no doubt that the body of the writing was not his; he had doubt as to the genuineness of one of the signatures, and thought it was not Judge Holt's. Witness formed his opinion from the general appearance of the writing. "Judge Holt," said he, "wrote what I call a cramped, scratchy hand, while this is written in an easy, flowing style."

Witness then pointed out particulars which he thought differed from the writing of the deceased. He thought every word showed an effort. He could not analyze his meaning letter by letter, but to his mind the writing looked like an imitation, and showed relaxation at irregular periods. Mr. Darlington offered other writing of the testator, and attempted to show by the witness that the same freedom of hand was evident in other writing of his. The witness thought some words were written by the same hand that wrote the will, but Mr. Worthington objected to these questions. Mr. Darlington said he proposed to introduce evidence of this kind to prove that the testator wrote a free hand. The court allowed the questions to be asked, and witness gave his opinion on several papers purporting to be in Judge Holt's writing. Shown the will of 1848, with the words: "This will is wholly revoked — J. Holt," indorsed on the wrapper, witness said the writing was not in Judge Holt's writing, but the signature was.

On redirect examination witness said he had no familiarity with the handwriting of Judge Holt in 1848.

Col. *Patterson A. Hosmer*, of Washington, became acquainted with Judge Holt, October 2, 1862, while Judge-Advocate-General; was under his orders till latter part of 1865; had numerous opportunities to become acquainted with his writing; had correspondence with him on official business as late as 1876, and has a note of January, 1876. His characteristics in respect to his composition, his accuracy, and style of expression, he said, were marked by great care, both in speech and writing. Witness was shown the will, and said he was unable to believe that it was Judge Holt's handwriting, either in body or signature. He did not think it was. Witness had renewed his knowledge of Judge Holt's handwriting from a note addressed to his wife, bearing date of 1876. He did not believe the will was his composition.

He pointed out alleged discrepancies in the writing of the will and noted three variations in the signature of the will different from the signature attached to the letter which his wife had received in 1876.

Court then adjourned until Monday morning.

*Monday, May 25.*

Mr. Worthington began the proceedings when court opened by placing in evidence the envelope in which the will was received at the Register's office, the piece of pasteboard contained in the envelope, and the order of the court issued in September, 1894, stating that the heirs-at-law had applied for letters of administration, and commanding all persons having objections to lodge to appear before the Orphan's Court. An inventory of the property, exclusive of real estate, of Judge Holt, amounting to \$130,664.90, was also submitted.

Mr. Worthington then read the deposition of Consul General *John J. Barclay*, of Tangier, Morocco, stating that the deponent last saw Judge Holt at his home in this city

in November, 1893, upon which occasion Judge Holt had stated that he had made a will leaving certain pictures to Mrs. Barclay.

The first witness who took the stand was Col. *William Winthrop*, U.S.A., retired, who was ordered to report for duty under Judge Holt in 1864, when he was Judge-Advocate-General. He remained in his office as senior assistant until Judge Holt's retirement in 1875. Col. Winthrop told a good deal about the nature of the work in his office; how he had become thoroughly familiar with the handwriting of Judge Holt, and with his characteristics and ability as a lawyer. In reply to questions by Mr. Worthington, he also stated that Judge Holt's relations with Luke Devlin, who was appointed a messenger and afterward promoted to a clerkship, were as friendly as possible under the circumstances, but that he was never aware of any business or social relations between them.

When the alleged will was handed to Col. Winthrop, and he was asked whether, in his opinion, it was in the handwriting of Judge Holt, he replied:

"There is a certain resemblance between this and the handwriting of Judge Holt, but I am inclined to believe he never wrote this paper." He went on to point out details upon which he based his opinion. In four cases, a letter was made to resemble a capital, when it was not, and the word "will" was spelled with a small "w," and the word "testament" with a capital "T." This was at variance with Judge Holt's precise methods.

Under a rigid cross-examination by Mr. Darlington, witness said his interest in the case was due to his having been a personal friend of Judge Holt, and, though he had been in consultation with Messrs. Jere Wilson and Washington Holt, he expected no fee for his services.

Asked as to the chief characteristics of Judge Holt's style of composi-

tion, he said it was a little formal and a little florid. It could not be called verbose, although he illustrated a good deal. Mr. Darlington then handed witness a letter, dated December 9, 1876, addressed to U. S. Grant, which Col. Winthrop thought was in Judge Holt's handwriting. Mr. Darlington pointed out a superfluous comma, and questioned witness concerning it, whereupon Mr. Worthington objected, and was sustained by the court. Witness identified another document, dated September 29, 1873, as being the handwriting of Judge Holt, and then Mr. Darlington asked:

"Do you wish to be understood as asserting that Judge Holt never omitted commas?" "No, but his style was based on the old school, and he seldom omitted them," replied Col. Winthrop.

Witness expressed the belief that four or five lines on the bottom of Luke Devlin's discharge from the army were in Judge Holt's writing.

The will of 1848, subsequently revoked, was then shown him. He said that, while it was written fifteen years before he ever met Judge Holt, it appeared to be in his writing. Mr. Worthington objected to Mr. Darlington cross-examining the witness concerning the will, until it was placed in evidence, which Mr. Darlington proceeded to do by reading it to the jury. It was rather a lengthy document, prepared with great precision, making express provision for his various relatives and dwelling at length upon the disposition of the slaves which were to be emancipated. It also left \$1000 to the American Tract Society. The testator also recommended Kentucky State bonds, in which some of the legacies were to be paid, as "a safe and most convenient form of investment." His brother was appointed executor and the will bore date of April 9, 1848.

Mr. Darlington then proceeded to cross-examine the witness as to the chirography in the will of 1848

and the alleged will of 1873, pointing out all sorts of dots, dashes, and commas, which the witness attempted to explain, and which resulted in opening up a broad field for speculation as to whether Judge Holt would have used a small w for will and a capital T for testament, or a small c for city and a capital W for Washington, or a small e for Episcopal and a capital c for church.

Col. Winthrop, on redirect examination by Mr. Worthington, testified regarding his last interview with Judge Holt, and the fall which resulted in his death, and after the wrapper on the will of 1848 had been placed in evidence.

He resumed the stand as soon as court reconvened at 1 o'clock, but Mr. Worthington introduced a conveyance of a farm in Kentucky from himself to his niece, Amanda Holt, and Col. Winthrop was released. The document was dated subsequent to the date of the alleged will, and in connection with it, a letter from Judge Holt, to his nephew, dated May 31, 1884, was read. The letter was one of instructions as to filling out of the conveyance, and went very carefully into the most minute details, showing that the writer had the utmost regard for the technicality of the law.

The greatest interest had been manifested in Col. Winthrop's testimony at the beginning, especially by Miss Throckmorton, who occasionally raised her eyebrows in surprise, but it became monotonous in its sameness after a time, and there was a general sigh of relief when *Francis G. Saxton* was called. His testimony, however, was substantially a reiteration of what Col. Winthrop had testified to. He has been a clerk in the Judge-Advocate-General's office since September 2, 1869. Luke Devlin was there at that time, and went out, according to witness' recollection, before Judge Holt's retirement. The witness told about his duties and his familiarity with the handwriting of Judge Holt.

He showed the jury the position in which the Judge held his pen in writing, and added: "He almost invariably began by putting the pen down squarely on the paper, and wrote altogether with his fingers, without any arm movement." The witness stated that he had hunted with Mr. Dobson, another clerk in the office, for some of Judge Holt's indorsements on reports, and these indorsements were offered in evidence by Mr. Worthington. Several of them were dated during the month of February, 1873, the date of the alleged will.

Upon the alleged will being handed to him, and in reply to the usual question, witness said: "At the first glance there is something about this paper that is very like Judge Holt's writing, but on looking at it more closely the similarity disappears. In my opinion it is not Judge Holt's writing or signature." Further on he said he did not think it was Judge Holt's language, and the differences in detail were brought out under close examination by Mr. Darlington.

Replying to a question by Mr. Darlington, the witness said: "In the writings of Judge Holt, about the date of the alleged will, he commenced the J in his signature with a dot, made by putting his pen down on the paper before he began to write. Then the mark running across the foot of the J to the top of the H in the will is quite different from any of his writings about that time. In all that I have been able to find about that time, this line starts down and then comes up again, almost making a D out of the J. This line (pointing to the will) is almost straight."

Mr. Saxton proved a most valuable witness for the heirs-at-law. Just as Mr. Darlington was preparing to confront him with the will of 1848, in which these characteristic "jabs," as he called them, were lacking, he went on to explain that there was a great difference in the



handwriting between the two periods. Mr. Darlington then handed him Luke Devlin's discharge, and asked:

"Do you find these jabs here?"  
"Yes, sir, you will find it there very distinctly," was the reply.

Various other writings of Judge Holt were shown the witness, all of which he was inclined to think were written by the Judge. He stated in answer to Mr. Darlington's question that he searched the files for Judge Holt's writings at the request of some of the attorneys on each side, including Gen. Butterworth.

Mr. Darlington wanted to know if it was not true that Gen. Butterworth had found signatures of Judge Holt in the Judge-Advocate-General's office, in which the mark on the J was different, but the witness did not remember. Years ago he said the loop of the J was different, but at the time of the alleged will that peculiar feature was there.

The next witness called was a Miss *Willie Greene Sterett*, a dainty little miss of thirteen. She replied to all questions without the slightest reserve, and sometimes the innocence of her answers brought smiles even to the faces of the litigants on either side, who had been sitting there all day absorbed in the evidence, making an occasional sarcastic comment when it did not meet with their approbation.

She first told about her brothers and sisters, and then what she knew about the relations of her own family with Judge Holt.

"Did you live near Judge Holt?" asked Mr. Worthington.

"Well, he lived on New Jersey avenue and we lived on H street; I don't know whether you call that near."

"Did you go to see him often?"

"Not so very often; we were afraid we might bother him."

"How did he treat you and your sister?"

"Oh, very nicely, always."

"Can you tell us anything he ever did to show he was nice?"

"Well, he used to take us on his knee, and he always gave us something to eat. Yes, and he gave us money, too; sometimes 50 cents, sometimes a dollar, and once he gave us \$2.50 apiece."

She then told how Judge Holt used to come to her parents' house in his carriage and take herself and her mother and her sister driving.

"How did he treat your mother?" asked Mr. Worthington.

"Well, of course, he didn't treat her like he did us, but he was very nice."

Judge Holt, she said, had always treated the different members of her family with the same kindness, and she had never observed any coolness between them. She was at the Judge's house a few days after his death, and while there she had found a piece of paper in one of the closets in the Judge's room, while she was looking for postage stamps.

"Oh, you are a stamp fiend, are you?"

"No, not now," hastily explained the child, as if she had been accused of a dreadful crime.

"How large was the paper?"

The little witness indicated with her hands that it was about 2½ inches square.

"Could you read what was on the paper?"

"Why, of course," with a rising reflection and an injured air.

Mr. Worthington here explained, in view of anticipated objection, that this particular piece of paper had been placed in a valise belonging to one of the heirs, and the valise was stolen, while he was on his way from the South to Washington. The papers were burned by the thief.

The little girl then added that the paper was inscribed: "Will, January 1, 1886," and that there were two names on it, one of which was Roundtree, without any initials, while the other could not be deciphered.

Cross-examined by Mr. Darlington, witness said she did not remember whether she was living at Judge Holt's at the time she found the paper.

"I know I was looking for stamps," she said, "and I knew he had plenty of them. They all looked the papers over and were through with them."

"Who had looked them over?"

"Why, the heirs, I suppose; they were all trying to find the will."

"Where did Judge Holt keep his papers when he was alive?"

"I couldn't tell you to save my life."

Little Miss Sterett bore up well until the ordeal was over, but when she got back to her mother's side, she began to cry. She is attending school at Staunton, Virginia, and was put on the stand yesterday in order to allow her to go back to her studies.

*Emma Board*, who had been a servant in the family of Washington Holt, at Holt's Bottom, Kentucky, next testified. She said that Judge Holt visited his nephew every spring and fall until his health got bad. He had always treated the members of the family very kindly, and frequently sent the two daughters presents.

At one time, when she was fastening the Judge's collar, he had told her he would not live long, and advised her to remain in the family of his nephew, and she would be taken care of, as he had provided for them in his will.

She did not remember the date when she had last seen Judge Holt, but it was not long before she left the family of Washington Holt, a little more than three years ago. Her testimony was not affected by cross-examination.

*William H. Dobson*, another clerk from the office of the Judge Advocate-General, did not think the will was written or signed by Judge Holt. Cross-examination brought out that he had never seen Judge Holt write, and could only base his opinion from the fact that

he frequently came in contact with his signature. Mr. Dobson fell upon the absence of the dot before the J and the wrong direction of the loop, as promptly as had his predecessors. But he had the additional honor of discovering a new distinction. The o and the l in Holt were not connected, and in all of the Judge's signatures he had ever seen these two letters were joined. The same array of authenticated writings of Judge Holt were shown him, which he duly identified as genuine. He swore there were no signatures in the Judge Advocate's office in which the o and l were not connected.

But there were more clerks in the Judge-Advocate-General's office, and the next one to appear was Mr. *Albert L. Smith*. He did not think it was Judge Holt's writing, either. The authenticated documents were Judge Holt's. He knew Luke Devlin, but had never observed any relations between him and Judge Holt, except such as would naturally arise from the association of Judge Advocate and messenger.

"Have you any recollection of Devlin's keeping an autograph album?" asked Mr. Worthington, as the occupants of the court room craned their necks in anticipation. "Yes."

"What use did he make of it?" "He was getting the signatures of people of note."

"Do you remember anything concerning any of the signatures in particular?" "I do remember his coming to me with a signature on a piece of paper and asking whether it was not pretty good for President Lincoln."

"What else did he say?" Mr. Darlington here lodged an objection, which was promptly sustained by the court. After Mr. Darlington had cross-examined the witness briefly regarding the characteristics of Judge Holt's signature, court adjourned for the day.

*Tuesday, May 26.*

The deposition of *Robert S. Holt*,

of Tacoma, Washington, a nephew of Judge Holt, was first submitted by Mr. Worthington for the heirs-at-law. The deponent simply testified to the warm relations existing between his father and Judge Holt, while a large number of letters from Judge Holt to deponent accompanied the deposition, to show that these friendly relations were continued with the son. The letters were all read after Mr. Darlington's objections had been overruled, and they evinced the most affectionate regard for the nephew, and the deepest interest in all that concerned him.

After the reading of these letters, Mrs. *Iglehart*, sister of the deponent, Robert S. Holt, was sworn. She testified to her first meeting with her uncle, Judge Holt, while she was on her wedding trip in this city in 1874. She was here again ten years later, and was entertained at Judge Holt's house. She had corresponded with Judge Holt both before and after her marriage, and the correspondence was placed in evidence. There was a large number of letters, extending over a period from early in the seventies until as late as 1887, and the reading of them occupied considerable time. All were couched in the most affectionate terms, and those written about the time of her marriage contained advice as to how to make her husband happy. All of them were precise, going into the most minute details even down to seemingly trivial subjects. They sounded like the outpourings of a lonely old man of refined and delicate nature, weary of life, yet anxious to strew happiness in the pathway of those in whom he took an interest. One which he wrote in reply to the announcement of the arrival of a young stranger in the *Iglehart* family, was especially touching. In another letter he said: "There is no prospect of my years of isolation terminating short of the grave."

As Mr. Worthington came to the

close of each letter, after "your affectionate uncle, J. Holt," he would add: "With a jab to the J." At last he omitted the final clause, and Mr. Darlington said:

"Wait a moment, Mr. Worthington, you haven't told us about the jab to the J."

"No, sir," thundered Mr. Worthington, "because there is no jab. That letter was written about the time he stopped making jabs, and the man who forged that will did not know it."

He then proceeded with the reading of the letters. In congratulating the *Igleharts* upon the arrival of a second son, and referring to the announcement that the boy had been named Joseph Holt, the writer said he hoped he had been named after Judge Holt's grandfather, the head of the house. "His record is complete," the letter read, "and can never be changed. I do not think it wise to name children after the living, whose records are unfinished. In this respect man is like a snake; he can never be accurately measured until he is dead."

Upon learning that the child had been named after himself, Judge Holt wrote entreating its mother not to burden him with the name of Joe. He thought nicknames were coarse vulgarisms. He finished by telling the parents to teach their children to love nature, to regard life as something sacred, and to love flowers as the smiles of God.

In concluding his examination, Mr. Worthington handed Mrs. *Iglehart* the alleged will, and asked whether, in her opinion, it was the writing of Judge Holt.

"I shouldn't think it was; it doesn't look familiar at all."

Mr. Darlington began his cross-examination by asking: "Are you prepared to point out any particular dissimilarity?" at the same time handing her the will of 1848.

"I cannot say anything about the

details," responded the witness. "You are trying to confuse me, and I am not going to have it." All effort to get the witness to indicate any points of dissimilarity failed.

After recess Mr. Darlington read a number of letters from Mrs. Iglehart to Judge Holt, complaining that he had never been to visit her, and also another letter under date of April 3, 1887, in which she told him she was grieving because of a piece of property near her home in Kentucky which was worth \$20,000, and which could be bought for \$10,000, that amount being \$3000 more than they could raise. The letter added that the place would be nice for the children.

"Did you get a reply to that letter, or did you ever hear from Judge Holt afterward?" asked Mr. Darlington.

"I never wrote with any intention of his getting the property for us," replied the witness, "and I don't remember whether I received any more letters from Judge Holt." On redirect examination, however, Mr. Worthington placed in evidence correspondence during the year 1888.

The next witness called was *Martha Scott*, a colored woman who was a servant in Judge Holt's house from 1881 until the time of his death. After she had told about the other servants employed at the house, and described the arrangement of the rooms, Mr. Worthington asked:

"Are you acquainted with the elder Mrs. Throckmorton, Maj. Throckmorton's mother?" "Yes."

"Did she ever call at Judge Holt's house?" "Yes."

"What happened when she called there?" "He always refused to see her."

"How often did she call?" "Sometimes about once a week. She used to give me her name, and when I went up and told the Judge he always told me to say he wouldn't see her. She was an old lady and I tried to treat her as nice as I could,

so I used to tell her the Judge couldn't see her; then she used to say 'poor thing,' and go away."

"Did you keep on taking her name up after the Judge told you he wouldn't see her?" "Well, after a while, when the Judge told me not to bring her name up any more, and she used to insist on my taking it up, I used to pretend to go up, and then go back and tell her he wouldn't see her."

"Did you ever see Maj. Throckmorton or his wife?" "Maj. Throckmorton came there once, but I did n't know him; he called there afterward with a stout lady. The Judge sent word down he wouldn't see them."

The witness testified that this was about four years before Judge Holt's death. She stated that Miss Josie Throckmorton, the Major's daughter, and one of the legatees, also called to see Judge Holt. The latter saw her the first time in the parlor. She called again one evening when Mrs. Washington Holt and her family were visiting the house and Judge Holt saw her in the dining room.

"I did not see her again," continued the witness, "until after her father got into trouble. When she called again Judge Holt wouldn't see her, but she asked for Ellen, the cook, and Ellen went up and persuaded Judge Holt to see her. Some time after that a lady called when Judge Holt had gone to Willard Hall to see a doctor, and when Judge Holt came back he said it was Miss Josie Throckmorton."

"Did Judge Holt ever give you any instructions regarding the family besides the elder Mrs. Throckmorton?"

"Yes; he said he didn't want to see any of them; they were all enemies of his."

Witness, in response to questions, said Miss Lizzie Hynes, the other heiress under the will, had frequently visited Judge Holt's house, once with Mrs. Ray, and that the re-

lations between them were very cordial. She had never seen Luke Devlin, the person named as executor in the alleged will. Judge Holt's nephew, Washington Holt, and his wife and daughters also frequently visited the house, and the most cordial relations had always existed. Judge Holt could not have treated the daughters any better if they had been his own children. He always greeted them most heartily when they arrived and showed evidences of grief when they went away.

Judge Holt had always told witness that if anything happened to him, she was to at once telegraph Washington Holt, whose address he gave her on a card. In response to Mr. Worthington's question the witness said that once when Miss Mary Holt was visiting this city and was not stopping at Judge Holt's house, she used to call to see him about every other day and remain as long as two hours. At the time of one of these visits she was caught in a rainstorm with no wraps or overshoes, and Judge Holt was so much worried that he sent witness to where Miss Holt was stopping to find out whether she had reached home safely without taking cold. The members of Washington Holt's family were equally affectionate in their treatment of Judge Holt. Witness had also seen Mrs. Iglehart at Judge Holt's house, and the Sterett family had begun to come there as soon as they moved to this city. Among all of them the most friendly and cordial relations existed.

Mr. Worthington's examination took a mysterious turn at this point and gave the audience reason to hope for sensational developments, which, however, did not materialize yesterday.

"Where did Judge Holt do his writing?" "In his room."

"Do you know how many ink-stands he had on his desk?" "Only one."

"What color was the ink?" "Black."

"Did he do his own writing up to the last?" "No, he had one of the servants do it after his eyes got bad."

Witness then testified to the fact that at the time of the fall which resulted in Judge Holt's death she was away on a vacation. The fall was on a Wednesday and she returned in response to a summons. Judge Holt died on Saturday. Judge Holt had told her often to take charge of his watch and bunch of keys as soon as he died, and keep them until the arrival of Washington Holt, for whom she was to telegraph immediately, as his business was all in Washington Holt's hands. One day in the month of May before his death he rang the bell and told her to go upstairs and see if a flag in a certain trunk was moth-eaten. He said he wanted the flag wrapped around his body after death, and at the same time told witness that arrangements for his funeral were in his will, which would not appear until after his death. Judge Holt had often told her not to get impatient at being obliged to wait on him day and night, as she would be well rewarded in the end.

"Do you remember any conversation you had with him about a ladder?"

"Yes, he always used to lock the door on the inside, and he said that if he should die when we were not in the room, we were to get a ladder and get in his window, and I was to secure his watch and bunch of keys and keep them until Washington Holt arrived."

"During the last year of his life do you recall his being disturbed at any time during the night, and calling for the servants?" "No; except when he was sick he used to ring the bell."

"What keys were they which he kept referring to?" "A bunch of keys which he carried in his pockets."

He always kept the closets in the library and his desk locked."

"When he died, who got those keys?" "I took them and put them in my trunk and gave them to Mr. Washington Holt when he arrived."

"Did those keys ever pass out of your custody before that; or did you yourself approach the closets or desk to unlock them?" "No, sir."

"Was the flag wrapped around his body as he requested?" "Yes, sir."

"Did you tell his relatives that he had left a will in which arrangements for his funeral were mentioned?"

"Yes; I told Washington Holt, and gave him the keys as soon as he arrived. They searched all over the house for the will."

On being questioned further as to people who had visited the house, witness named a number of persons, and also told about Mrs. Throckmorton having sent Judge Holt some strawberries and cream, which the Judge had promptly sent back. No papers had been burned in the house after the death except some pamphlets. She saw the small piece of paper which Col. Sterett's little daughter had found, and had a copy of it made which she sent to Washington Holt.

Mr. Darlington then began his cross-examination. He was very particular about the exact location of the closets in Judge Holt's room, although he developed nothing important. He had the witness go over the list of visitors at the house again. This brought Mrs. Throckmorton up again. This time the witness said Mrs. Throckmorton came with a bunch of flowers, but Judge Holt sent word that he did not want them; that he had flowers in his own yard. The cross-examination brought out no new features. Mr. Darlington, too, asked the witness whether at any time there had been unusual noises in Judge Holt's room on any night, but the witness could not remember any. He also brought up the ladder inci-

dent, and wanted to know whether at Judge Holt's death they had to get into his room by means of a ladder. The witness replied that they had not. During the closing days of the Judge's illness she had remained in the room nearly all the time, and at his request had kept the door locked. Before that he used to lock the door himself.

*Wednesday, May 27.*

There was the usual large audience assembled when Mr. Darlington resumed his cross-examination of the colored servant, *Martha Scott*. After questioning her as to her duties at Judge Holt's house and her whereabouts both before and since her residence there, Mr. Darlington recurred to her statement that Judge Holt had issued orders that he would not receive members of the Throckmorton family, and asked:

"Did he not decline to see other persons besides the Throckmortons?" "Oh, yes; sometimes when he was not feeling well he would not see his best friends."

Mr. Darlington then questioned the witness closely as to the visits of Miss Throckmorton, and in connection with one of her visits, said:

"How did you know that Maj. Throckmorton was in trouble at the time of one of her calls, as you say?" "The Judge said so afterward."

"Now, did you ever hear him say Mrs. Throckmorton was his enemy?"

"Yes, sir; I don't know how many times. He said they bedeviled him and he didn't want to see them."

"Did you ever hear him speak unkindly of Miss Throckmorton?"

"No, sir."

"You never saw him kiss her?"

"Oh, no, sir," replied the witness in a surprised tone, amid a general titter, while Miss Throckmorton blushed a trifle.

Replying to further questioning concerning events about the time of Judge Holt's death, witness

testified that the Throckmortons were the only people that Judge Holt had given a general order not to admit. She had never heard Judge Holt say he would not allow Mr. Sterett in his room. Mr. Sterett had said his wife wanted to come and stay with the Judge constantly, but the latter had said he did not want her all the time. Judge Holt, she stated, was a most methodical man, and when he sent her to either of the closets for anything he was always able to tell her exactly where to find it. He had never sent her for papers of any sort. Asked concerning the funeral of Judge Holt, witness said she did not remember that any person who was present had to go back to his house and put on his ministerial robes, because no minister had been provided.

Mr. Darlington then came back to the visits of Miss Throckmorton, and it appeared that the witness had become somewhat confused concerning her last call. "A week or two before that," she said, "a young woman who was disguised called on the Judge. She wore an old waterproof, an old lady's bonnet, and a thick veil. She did not ring the bell, but knocked at the front door. She told me Judge Holt used to know her when she was a child, and when I told her he was out she stepped into the parlor and waited an hour and a half. I watched her close, because I thought it was queer, but she kept her veil on all the time, and I only saw as far as her nose as she was leaving. The next time a young lady called who looked something like the one that was disguised I asked her if she was not Mrs. Throckmorton's granddaughter. She said she was not, but she would not give her name."

Replying to Mr. Darlington, the witness said she did not know Ann Tully, who used to be Miss Throckmorton's maid. Mr. Worthington then proceeded to reexamine the witness, asking her whether she

knew Luke Devlin. The witness had testified on Tuesday that she did not, but yesterday Devlin was in court, and as Mr. Worthington pointed to him and asked the witness whether she had ever seen him, he stood up, and the witness answered that she had not. She added that she had never refused him admission at Judge Holt's house, although he might have called there without her knowing it.

Mr. Worthington also brought out the additional fact that the elder Mrs. Throckmorton called at the house after Judge Holt's death and asked to see the body. "I wouldn't let her in," said the witness, "and I told her Judge Holt had never wanted to see her when he was alive, so I was not going to take the responsibility of letting her see him without the consent of his relatives."

Dr. F. R. Frazier, of Philadelphia, a professor of chemistry and a well-known expert on handwriting, was then called. His testimony occupied the rest of the day, and was mainly technical. He had been professor of chemistry in the University of Pennsylvania and for twelve years professor of chemistry in Franklin Institute. He began investigating the question of disputed documents in 1878 in the Whittaker will case, and the following year took up the application of composite photography to the study of documents. He had written a number of pamphlets on the subjects. . . .

Dr. Frazier stated that he had had in his custody certain letters written by Judge Holt to his niece, Mrs. Iglehart, and had made the most careful comparisons between them and the disputed will. He proceeded to tell all about these comparisons, and nobody who heard him will dispute the assertion that they were thorough and in detail. He stated that he had taken certain lengths between salient points in twenty-four signatures, and measured them for comparison with the signature to the

alleged will. The results he had tabulated on a large sheet of paper, which he subsequently read, and the measurements embraced apparently every possible point of distinction.

The witness answered some preliminary questions by Mr. Darlington, which threw some light upon his method of procedure.

"In simulating writing," he said, "the pictorial effect appeals at once to the eye, and if a person is experienced, he can make a very good imitation which, to the general eye, would seem a good reproduction of a signature. Consequently the points on which to test the genuineness of a signature are not open to the eye and cannot be easily seen."

A full description of the method of taking composite photographs of a number of similar objects was then given for the benefit of the jury, Dr. Frazier explaining that he had so photographed the twenty-four signatures to Judge Holt's letters.

By the time the witness had finished his description of the method of taking composite photographs, which method he had applied to handwriting, a recess was taken, and when court reconvened, he began to give the results of his work. The average length from the stem of the "J" to the stem of the "t," in the twenty-four signatures to the letter, he found to be seventeen and five tenths millimeters. In the composite photograph of these twenty-four signatures the distance was seventeen millimeters, while the distance in the signature to the alleged will was seventeen and five tenths millimeters. He gave at great length the results of other measurements, in some of which the differences were almost imperceptible, while in others they were considerable. While all this was going on Judge Bradley closed his eyes and apparently took more than forty winks, while the spectators yawned, and some of them took their departure. . . .

When all the measurements had

been gone over, Mr. Worthington asked: "Now, from these measurements which you have made of different parts and angles of these twenty-four signatures and of the signature to the disputed will, what do you say as to whether or not the hand which wrote these twenty-four signatures wrote the signature to the disputed document?" A. "I believe that the signature to the document is not by the hand which wrote the twenty-four signatures to the letters of Judge Holt."

Q. "Why?" A. "I believe it because, although the resemblance in measurement was great in such portions as could be determined by the eye, in those parts which could not be easily determined by the eye the differences are greater than I have hitherto found compatible with genuineness of a document."

"In your experience what have you found to be the value of such comparisons as you have made of things not to be seen by the eye?"

"In the few cases in which the matter has been placed beyond all dispute by the final determining with certainty of the case, I have found in all cases that I can recall where such comparison was made that the characteristics observed of ratio and angles which are not visible to the eye are those which remain most constant, and I may say that the same thing is true in regard to changes in the handwriting of a man from youth to old age, or from sickness to health."

Dr. Frazier testified to various general differences which he had observed in the writing in the will and the authenticated writing of Judge Holt. He then said, referring to the will: "In my opinion the pen which wrote this document was a steel pen, held in such manner that the hollow of the pen was inclined to the right rather than toward the person; that the stroke was heavy and the pen under greater control than in the case of the undisputed writings of Judge Holt."



Mr. Worthington asked whether in the opinion of the witness the body of the will was written by the same hand as that which wrote the letters, and the reply was: A. "I believe that the body of the alleged will was not written by the hand which wrote the genuine letters. I have personally no doubt about it."

The cross-examination was undertaken by Gen. Butterworth.

Quite a lengthy discussion resulted as to the statement of the witness that the will was in two fragments when he first saw it, and Gen. Butterworth tried to get his opinion as to whether it had been cut or worn into two pieces, calling his attention to a letter J which crossed the line of separation. Witness said the J could not have been more perfect if it had been written when the paper was whole. In reply to a direct question as to whether the document could possibly have been prepared on two separate pieces of paper, he replied:

"I can only say that I believe it to be possible that this was done. The fact that the tail of the J crosses the line is strong evidence that it was not done, but the fact that the ink stains extend below the line and not above the t is strong evidence that it was." He went on to explain that there was slight evidence of stains above the "t" in Holt, but it seemed to be too high to have come from the ink in the signature.

Gen. Butterworth wanted to know whether scorching the paper would not have had a tendency to make it break, particularly upon folding it, and the witness replied that the paper would probably have broken, but not in so straight a line. Judge Bradley asked whether his microscopical examination had disclosed whether the paper was cut or worn in two, but witness was not able to answer positively. He said it looked to him too smooth for a break, and proceeded to examine it again under

the microscope, but without further developments.

The witness rather resented some of Mr. Butterworth's questions, and said very emphatically that it was not his desire to make Judge Holt's signature out to be twenty-three millimeters long when it was only twenty-two; that he didn't care a straw which side won the case, and only wanted to present the facts as he found them.

"Then you would be surprised to find another expert going over the same ground and differing with you entirely?" A. "Not at all."

*Thursday, May 28.*

When the case was resumed yesterday morning Gen. Butterworth continued his cross-examination of Dr. Frazier, and tried hard to upset all his scientific theories and explanations by a series of questions. Time and time again he seemed to have the witness concerned, but every time the latter came up smiling with a new theory, opening up still another broad field for scientific investigation. Nobody understood what was going on, with the possible exception of the witness, but Gen. Butterworth stood his ground, and looked wise until the last moment.

At one time, after propounding a question to which the suave witness replied in the negative, Gen. Butterworth ventured the remark:

"But that is certainly the logic of your position." "I beg your pardon, but it is neither logic nor is it my position." And then came another theory which made the preceding ones appear like simple addition.

The question whether the will was written on two separate and distinct pieces of paper was brought up again, and after it had been discussed at considerable length again, Judge Bradley asked the witness:

"I wish you would state, from your examination of the line between the upper and lower sections of the paper, whether the paper was separated before it was pasted on the

backing or otherwise." "I believe there were two pieces before it was pasted on the backing."

"Have you any reasons for this statement?" asked Gen. Butterworth.

Had he? Well does Gen. Butterworth know it now. He had fifty, and every one of them involved fifty minor ones. They all hinged on the fibers of the paper, which did not seem to interlock. There were all sorts of theories about the effect of moisture, and heat, and paste, and folding, and handling upon these fibers, and after going over them the witness looked calmly at Gen. Butterworth as if to bid him bring on his next interrogation.

The General mildly suggested some slight possible discrepancy, and after disposing of it in about three columns of agate, Dr. Frazier added:

"I will just state one thing which I think will explain what you are trying to get at." "But I know what I am trying to get at," gasped Gen. Butterworth in frantic despair.

Then followed a long argument, in which Judge Bradley took a hand, as to whether Judge Bradley meant that paste was to be "put" on the paper or "dropped" on it, and when it was finally straightened out, Gen. Butterworth groaned: "That's all, doctor," and sank helplessly into a chair as the court took a recess.

Mr. Worthington brought up the deposition of *Robert S. Holt*, a nephew of Judge Holt, after recess, and read such portions as were not touched upon when it was first presented. Deponent related all his personal history, and told how he began to correspond with Judge Holt. He had at first felt a trifle bitter toward him for allowing feelings concerning the Civil War to interfere with his regard for the nine children of his brother, but felt more kindly disposed toward him after they began to correspond. He had no reason to cultivate his

uncle's friendship, and the latter made all the advances. Replying to cross interrogatories, deponent stated that in 1873 he was a boy living at Evansville, Indiana, and had never met his uncle. He felt that if his uncle's indifference grew out of his feelings over the war, he had no concessions to make himself. He had always felt that his mother should have received counsel and advice from her husband's brother, being left a widow with nine children, eight of them under twenty-one. Deponent had always been entirely able to take care of himself, and while he may have written to his uncle regarding his material welfare, it was with no idea of receiving assistance, as there would never have been any excuse for its being offered. If any such interpretation was put on any of his letters, it was unjust and improper.

After the reading of the deposition *George H. Johnson*, a negro, Secretary Carlisle's butler, and apparently the product of the "old school" himself, was called. He was coachman and general servant at the Holt residence from 1878 until 1884. His testimony gave a slight hint as to the difficulty between Judge Holt and Mrs. Throckmorton, the elder. He knew Mrs. Throckmorton, and until about 1880 Judge Holt, he said, used to go and see her, but about that time they had a falling out.

Q. "Did it have any relation to a visit Judge Holt made away from home?" asked Mr. Worthington.

A. "Yes; he had been away in Kentucky, and when he came back he went over to see Mrs. Throckmorton. When he came back he asked me if I had been waiting on Mrs. Throckmorton during his absence. I told him yes, and he said, 'Well, I never want you to wait on her any more, and never do I want you to allow her to come on my premises.'"

Q. "Was he in his ordinary frame of mind?" A. "He wasn't a man

to be out of his mind, but he seemed to be quite angry."

The witness explained that during Judge Holt's absence from home Mrs. Throckmorton used to have the use of the carriage. Mrs. Throckmorton used to call at the house afterward, but Judge Holt would never see her.

The witness knew Maj. Throckmorton by sight, but did not know his wife. He saw the Major at the house once after the difficulty between the Judge and Mrs. Throckmorton. He had also seen Miss Josie Throckmorton and her brother at the house when she was quite small and about a year after the quarrel.

Q. "What happened when they came to see the Judge?"

A. "I went up and told him they were there, and he told me to tell them to get away from there, that he would not see them. When I told them what he said they would sometimes play around the house for two hours afterward. Judge Holt told me afterward that they were enemies of his and he didn't want to see any of them."

The witness stated that Mrs. Throckmorton used to come about once a week after the trial for six or eight months, and after that only once in a while. The rest of his testimony was practically the same as that given by Martha Scott. He knew Miss Hynes, Washington Holt and his family, and Mrs. Iglehart. They had all stopped at Judge Holt's house and were treated with every possible consideration. He had never seen or heard of Luke Devlin. Judge Holt used to visit his nephew, Washington Holt, and when his relatives visited him he took his meals with them in the dining room, though at other times he took them in his bedroom. He also knew Mrs. Briggs. He had driven her and Judge Holt to the White House once while Mr. Arthur was President.

Mr. Darlington subjected the witness to a rigid cross-examination, trying hard to ascertain the dates

of the different events which the old servant testified to, but without success. He could only trace one event from its connection with another, and nothing could shake him. Mr. Hayes was present when he first went to work for Judge Holt, and he used to drive the Judge around to see Mrs. Briggs.

Mr. Darlington proceeded to question Johnson about an alleged interview he had with a reporter in Franklin Square.

Q. "Didn't you tell this reporter that Judge Holt had found out while he was in Kentucky that Mrs. Throckmorton had abused Mrs. Washington Holt?" A. "I told him it was reported that was the case."

Q. "How did you find that out?"

A. "At the house."

Q. "In this Franklin Park interview did you not say that the Judge had said that not a dollar of his money should go to any of his people who had abused him for his loyalty in the war?" A. "No, sir; I don't remember Judge Holt making such a remark."

Q. "Did you tell the reporter that you did not know of any heirs except Washington Holt?" A. "Yes, sir; I had never heard of any others."

He went on to state that he did not tell a reporter that he knew something would be left to Miss Hynes, and that he first knew of the Sterett family during the latter part of Judge Holt's life.

Q. "After the Judge's death how long was it before the Holt heirs got into communication with you?"

A. "I never heard or saw anything of them until about two weeks ago."

Q. "Did you tell the reporter they were surprised not to find a will?" A. "Yes."

Johnson denied having said that the house had been ransacked by any one, however. He did not remember having had a conversation with a *Post* reporter, and did not remember saying that he was sent

for by Mrs. Washington Holt, who expressed surprise at not finding a will. This concluded the cross-examination, and in response to Mr. Worthington witness said that while Mrs. Washington Holt was ill at Judge Holt's house he had taken money to the physician who attended her, and that the money came from Judge Holt.

Another of Judge Holt's servants, *Ellen Foster*, an elderly colored woman, concluded the testimony for the day. She was in his employ from 1881 until the time of his death. Her testimony was the same as that given by the other servants, differing only in detail. She told of the elder Mrs. Throckmorton's visits to the house, and stated that upon one occasion she had got into trouble for letting her in.

Q. "Will you tell us whether Mrs. Throckmorton ever saw Judge Holt when she called?" asked Mr. Worthington. A. "No, he told me several times not to bring her name to him any more, but I always carried it."

The witness did not know Maj. Throckmorton and failed to recognize him when he stood up in court. She remembered Miss Throckmorton's visits and repeated the story of her visit there when Judge Holt refused to see her. After Martha Scott had brought the message back Miss Throckmorton had asked the witness to go to Judge Holt and tell him she only wanted to see him five minutes, and he had then consented to see her. Miss Throckmorton looked distracted and when she came down she looked as if she had been crying. The witness had heard that it was some trouble about her father.

The story of the veiled lady was also told by the witness, but she threw no more light on her identity than did Martha Scott. She also knew Washington Holt and his family, Miss Hynes, Mrs. Iglehart, and the Steretts, who were all well

treated when they visited Judge Holt's house, but Luke Devlin still remained unidentified and unheard of. She stated that Judge Holt was very much worried at the time Washington Holt received his second stroke of paralysis, but he had remarked that the family was well provided for. Col. Sterett, she said, used to come into the house without ringing the bell, walking through the kitchen. She used to see him and Judge Holt sitting in the yard talking and laughing, but whether they were laughing at Col. Sterett's jokes or Judge Holt's she did not know.

The direct examination of the witness had not been concluded when the case was adjourned until Monday morning, owing to the fact that Saturday is a holiday. Judge Bradley cautioned the jury not to discuss the case or to permit others to discuss it in their presence.

*Monday, June 1.*

Unless the jury in the Holt will case are the most skeptical twelve men on the face of the earth they must be pretty well convinced by this time that Judge Holt entertained the most affectionate regard for his relatives from about the time he is supposed to have made the mysterious will disinheriting them one and all up to the hour of his death. There is not a shadow of doubt about it in the minds of any of the spectators who have been watching the progress of the trial, because, outside of the testimony of Dr. Frazier, the expert in handwriting, the entire efforts of counsel for the heirs-at-law have been directed toward proving this fact. A dozen witnesses have sworn to it, and scores of letters written by Judge Holt to his nephews and nieces and their children have been read, all breathing love and affection. In fact, from the tone of these letters it would appear that the old gentleman devoted the greater part of his life during the later years to making his relatives happy.

The examination of *Ellen Foster*, who was one of Judge Holt's servants, was concluded yesterday. Ellen Foster went over in detail the same old story regarding the visits of Judge Holt to Kentucky, the visits of the family of Washington Holt to this city, and of the affectionate relations existing between Judge Holt and his family. She remembered the finding of the piece of paper by Willie Sterett containing the words: "date of will, January 1, 1886," and the name Roundtree. She had never heard of any one by that name, and had never seen the alleged will.

Mr. Darlington cross-examined the witness, questioning her particularly regarding the people who were admitted to Judge Holt's room during his final illness. Nothing of importance was developed, however. She stated on redirect examination that from what she saw she was sure Judge Holt thought more of the members of Washington Holt's family than any one else in the world. He had special cups and saucers reserved for them, which nobody else was permitted to use.

Mrs. *Margaret E. Bowmer*, a daughter of Judge Holt's sister, Mrs. William Sterett, and sister of Col. Bill Sterett, was next called. She had known Judge Holt since she was a child, as he frequently visited at her mother's house. With the exception of Judge Holt all the members of her family were Southern sympathizers in the late war. No unpleasant feelings resulted, however. In 1878 or 1879 she had a misunderstanding with Judge Holt and did not see him afterwards. A number of letters which she received from Judge Holt prior to that time were introduced. Mr. Darlington lodged an objection, but it was overruled. The letters were written in an affectionate tone, evincing a tender interest in all the members of the family. Mrs. Bowmer stated that in 1876, while on her way to the Centennial celebration she had

stopped at Judge Holt's house. Mr. and Mrs. Washington Holt were in the party, and while the ladies stopped at Judge Holt's house Mr. Holt and her husband stopped at a hotel. She was shown the alleged will, but did not think Judge Holt wrote it.

On cross-examination the witness was asked by Mr. Darlington the cause of the difference between her and Judge Holt, and she replied that it was owing to some criticism which he understood she had made concerning him. Mr. Darlington then produced a letter in Mrs. Bowmer's handwriting addressed to Judge Holt, and dated subsequent to the misunderstanding. The writer sought a reconciliation with Judge Holt, but in response to a question she stated that she had received no reply.

The next witness examined was Miss *Mary Holt*, a daughter of Washington Holt. She was born in 1871, and first saw Judge Holt in 1876, when he visited her father's house. In 1879 she came to Washington with her parents, and stayed at Judge Holt's house for several months. She felt just as much at home here as she did in her own house. Judge Holt frequently took her out driving, and also to the theater. He gave her fruit and candy; in fact, he never went out without buying her something. She visited Judge Holt with her parents in 1881 and 1882. While here her mother was too ill to walk, and was carried up and down stairs every day. Dr. Busey attended her. Again, in 1886, while on her way to Philadelphia to school, she stopped at Judge Holt's house. He was very kind to her, and told her that if ever she wanted money, not to write to her parents, but to ask him for it. She never thought of asking him for money, however. While at school Judge Holt wrote to her about every two weeks, and she spent the following Christmas at his house with her parents. She

saw him every year after that, but when she was here in 1893, he was very ill, and she did not stop at his house, but visited him every other day at 10 o'clock, remaining until 1.

Replying to Mr. Wilson's question, the witness said Judge Holt used to supply her with what money she needed, and added: "He used to beg me to go down town and buy things I liked, but I did not do so until he insisted on my buying a ring or a pin. He was not very much pleased with it because he said it was not such a pin as he wanted me to have; I only bought a small one."

Q. "What connection did he have with your going to school?" A. "Well, Uncle always paid my school bills; he said I could either study here or in Europe, but my parents did not want me to go to Europe."

After the witness had stated that Judge Holt had visited her father's house in Kentucky twice a year as far back as she could remember, Mr. Wilson asked:

Q. "What did Judge Holt do to beautify the place when he came there?" A. "Oh, he had the house built, besides summer houses and carriage houses and other things."

Q. "What, if anything, did he say he wanted done with the old homestead?" A. "I heard him say many times that he never wanted it to pass out of the family; that it was the only place he loved, and the only place that was home to him."

The witness then identified a number of letters written by Judge Holt to her father, and after Mr. Darlington's objection had been overruled they were read. One of them inclosed a draft for \$50, which Judge Holt asked to have distributed among the servants as his Christmas present. Another contained \$200 toward a monument which had been erected in the family burying ground.

Judge Holt's letters to the witness were also read. She was only a child when the first were written,

and they were such letters as would interest a child, telling her about his cats and dogs, and about his pear tree, which was loaded with fruit. In one he told her she ought to clear a place in the snow every morning and feed the birds. Later on the letters were in a more serious tone, congratulating her on her progress at school. One was in answer to a letter in which the witness had told him about a heron her father had shot, and over which the Judge seemed to have grieved. He said: "Do not you think it would have been far more beautiful skimming over the lake or wading with its long legs in the water, than lying bloody and dead? Beg your father not to use his gun again in that way." In still another he referred to sending them various articles, among other a brick from Mount Vernon. He added: "It is undoubtedly an English brick, for at that time bricks were not made in this country."

A letter he wrote to her upon the occasion of her visiting Niagara asked her to purchase souvenirs of the visit to "the value of the inclosed bill."

Q. "How much was that?" asked Mr. Worthington. A. "Twenty-five dollars."

There was a general titter, and Gen. Butterworth made notes on a tablet in front of him.

Q. "He sent you more than one bill, then?" suggested Mr. Worthington. A. "Yes, I presume he did."

In another communication he called his grandniece's attention to the fact that while her composition and spelling was generally very accurate in her last letter in speaking of "losing time" she had spelled the word "loosing." He advised her to refer to the dictionary and she would find that the two words were entirely distinct. He also called her attention to the fact that she spelled "stopped" with only one p. Again, he said, referring to the

general tone of the letters he received: "I have a great fondness for details; generalities, however glittering, do not satisfy me."

After all the letters to Miss Mary Holt had been read she was asked to identify a big batch of them addressed to her mother, and at this proceeding the spectators began to depart, leaving those interested the only occupants of the court room.

The various lawyers for the heirs-at-law took turns at reading the letters, hesitating and stumbling over the different phrases and making the operation doubly tedious, while Gen. Butterworth engaged himself in comparing the chirography of the will with that of some of Judge Holt's letters. The letters to Mrs. Holt began in 1876, and were affectionate in tone as the most tender and loving father could have written to his daughter. The writer evinced the deepest interest in the most trifling details concerning her welfare, and seemed particularly concerned regarding the health of his niece. A reference to a newly painted fence was rather amusing. He wanted to know how it looked, and added: "If it gratified you, it seems to me that you would have been likely to mention it in order that I might share your gratification." His love for his niece was forcibly illustrated in a letter which he wrote after being informed of her improved health. "My heart is singing a new song," said he, "and clapping its hands. Hallelujah in the highest is the only thing that will express it."

About this time Judge Bradley asked: "How many more letters have you there?" "About twenty or more."

"Do you propose to read them all?" "We appreciate, in introducing these letters to show the feeling Judge Holt entertained toward his relatives, the embarrassments which might result in leaving portions of them out, but we do not wish to consume more time than is necessary."

"There is a great deal in them," replied Judge Bradley, "that is neither important nor interesting, and I think you might read the passages bearing upon the subject, and give the other side an opportunity to look them over." An adjournment was then taken until 10 o'clock this morning.

*Tuesday, June 2.*

Most of the session was devoted to corroborating the testimony of previous witnesses concerning the affectionate relations existing between Judge Holt and the members of the family of his nephew, Washington Holt. It is possible that there may be a few more people in the world who were aware of the fact that Judge Holt loved his nephew and niece and grandnieces, and the utmost confidence is reposed in the ability of counsel for the heirs-at-law to ferret them out and place them on the stand to give the same testimony that has been given before at least a score of times. The reading of Judge Holt's letters occupied all of the morning session.

The letters were those written to Mrs. Washington Holt and her husband, and, like those which have preceded them, gave quite an insight into the character of the writer. In one of them he said: "The great desire of my life is that the dear old place shall be kept in our family from generation to generation. I hope that in 1911 you will celebrate the centennial of the settlement of our family in the Bottom." This referred to the old homestead at Holt's Bottom, the residence of Washington Holt. Many of the letters referred to drafts for various sums inclosed to defray the expenses of improvements. In one of Judge Holt's letters the significant sentence appears: "I am glad you are keeping your eye turned in the direction of that swindler, Ray, and trust that you will pursue him unsparingly now and always." Mr. Worthington was not disposed to read this passage, but, in consulta-

He always kept the closets in the library and his desk locked."

"When he died, who got those keys?" "I took them and put them in my trunk and gave them to Mr. Washington Holt when he arrived."

"Did those keys ever pass out of your custody before that; or did you yourself approach the closets or desk to unlock them?" "No, sir."

"Was the flag wrapped around his body as he requested?" "Yes, sir."

"Did you tell his relatives that he had left a will in which arrangements for his funeral were mentioned?"

"Yes; I told Washington Holt, and gave him the keys as soon as he arrived. They searched all over the house for the will."

On being questioned further as to people who had visited the house, witness named a number of persons, and also told about Mrs. Throckmorton having sent Judge Holt some strawberries and cream, which the Judge had promptly sent back. No papers had been burned in the house after the death except some pamphlets. She saw the small piece of paper which Col. Sterett's little daughter had found, and had a copy of it made which she sent to Washington Holt.

Mr. Darlington then began his cross-examination. He was very particular about the exact location of the closets in Judge Holt's room, although he developed nothing important. He had the witness go over the list of visitors at the house again. This brought Mrs. Throckmorton up again. This time the witness said Mrs. Throckmorton came with a bunch of flowers, but Judge Holt sent word that he did not want them; that he had flowers in his own yard. The cross-examination brought out no new features. Mr. Darlington, too, asked the witness whether at any time there had been unusual noises in Judge Holt's room on any night, but the witness could not remember any. He also brought up the ladder inci-

dent, and wanted to know whether at Judge Holt's death they had to get into his room by means of a ladder. The witness replied that they had not. During the closing days of the Judge's illness she had remained in the room nearly all the time, and at his request had kept the door locked. Before that he used to lock the door himself.

*Wednesday, May 27.*

There was the usual large audience assembled when Mr. Darlington resumed his cross-examination of the colored servant, *Martha Scott*. After questioning her as to her duties at Judge Holt's house and her whereabouts both before and since her residence there, Mr. Darlington recurred to her statement that Judge Holt had issued orders that he would not receive members of the Throckmorton family, and asked:

"Did he not decline to see other persons besides the Throckmortons?" "Oh, yes; sometimes when he was not feeling well he would not see his best friends."

Mr. Darlington then questioned the witness closely as to the visits of Miss Throckmorton, and in connection with one of her visits, said:

"How did you know that Maj. Throckmorton was in trouble at the time of one of her calls, as you say?" "The Judge said so afterward."

"Now, did you ever hear him say Mrs. Throckmorton was his enemy?"

"Yes, sir; I don't know how many times. He said they bedeviled him and he didn't want to see them."

"Did you ever hear him speak unkindly of Miss Throckmorton?"

"No, sir."

"You never saw him kiss her?"

"Oh, no, sir," replied the witness in a surprised tone, amid a general titter, while Miss Throckmorton blushed a trifle.

Replying to further questioning concerning events about the time of Judge Holt's death, witness



testified that the Throckmortons were the only people that Judge Holt had given a general order not to admit. She had never heard Judge Holt say he would not allow Mr. Sterett in his room. Mr. Sterett had said his wife wanted to come and stay with the Judge constantly, but the latter had said he did not want her all the time. Judge Holt, she stated, was a most methodical man, and when he sent her to either of the closets for anything he was always able to tell her exactly where to find it. He had never sent her for papers of any sort. Asked concerning the funeral of Judge Holt, witness said she did not remember that any person who was present had to go back to his house and put on his ministerial robes, because no minister had been provided.

Mr. Darlington then came back to the visits of Miss Throckmorton, and it appeared that the witness had become somewhat confused concerning her last call. "A week or two before that," she said, "a young woman who was disguised called on the Judge. She wore an old waterproof, an old lady's bonnet, and a thick veil. She did not ring the bell, but knocked at the front door. She told me Judge Holt used to know her when she was a child, and when I told her he was out she stepped into the parlor and waited an hour and a half. I watched her close, because I thought it was queer, but she kept her veil on all the time, and I only saw as far as her nose as she was leaving. The next time a young lady called who looked something like the one that was disguised I asked her if she was not Mrs. Throckmorton's granddaughter. She said she was not, but she would not give her name."

Replying to Mr. Darlington, the witness said she did not know Ann Tully, who used to be Miss Throckmorton's maid. Mr. Worthington then proceeded to reexamine the witness, asking her whether she

knew Luke Devlin. The witness had testified on Tuesday that she did not, but yesterday Devlin was in court, and as Mr. Worthington pointed to him and asked the witness whether she had ever seen him, he stood up, and the witness answered that she had not. She added that she had never refused him admission at Judge Holt's house, although he might have called there without her knowing it.

Mr. Worthington also brought out the additional fact that the elder Mrs. Throckmorton called at the house after Judge Holt's death and asked to see the body. "I wouldn't let her in," said the witness, "and I told her Judge Holt had never wanted to see her when he was alive, so I was not going to take the responsibility of letting her see him without the consent of his relatives."

Dr. F. R. Frazier, of Philadelphia, a professor of chemistry and a well-known expert on handwriting, was then called. His testimony occupied the rest of the day, and was mainly technical. He had been professor of chemistry in the University of Pennsylvania and for twelve years professor of chemistry in Franklin Institute. He began investigating the question of disputed documents in 1878 in the Whittaker will case, and the following year took up the application of composite photography to the study of documents. He had written a number of pamphlets on the subjects. . . .

Dr. Frazier stated that he had had in his custody certain letters written by Judge Holt to his niece, Mrs. Iglehart, and had made the most careful comparisons between them and the disputed will. He proceeded to tell all about these comparisons, and nobody who heard him will dispute the assertion that they were thorough and in detail. He stated that he had taken certain lengths between salient points in twenty-four signatures, and measured them for comparison with the signature to the

alleged will. The results he had tabulated on a large sheet of paper, which he subsequently read, and the measurements embraced apparently every possible point of distinction.

The witness answered some preliminary questions by Mr. Darlington, which threw some light upon his method of procedure.

"In simulating writing," he said, "the pictorial effect appeals at once to the eye, and if a person is experienced, he can make a very good imitation which, to the general eye, would seem a good reproduction of a signature. Consequently the points on which to test the genuineness of a signature are not open to the eye and cannot be easily seen."

A full description of the method of taking composite photographs of a number of similar objects was then given for the benefit of the jury, Dr. Frazier explaining that he had so photographed the twenty-four signatures to Judge Holt's letters.

By the time the witness had finished his description of the method of taking composite photographs, which method he had applied to handwriting, a recess was taken, and when court reconvened, he began to give the results of his work. The average length from the stem of the "J" to the stem of the "t," in the twenty-four signatures to the letter, he found to be seventeen and five tenths millimeters. In the composite photograph of these twenty-four signatures the distance was seventeen millimeters, while the distance in the signature to the alleged will was seventeen and five tenths millimeters. He gave at great length the results of other measurements, in some of which the differences were almost imperceptible, while in others they were considerable. While all this was going on Judge Bradley closed his eyes and apparently took more than forty winks, while the spectators yawned, and some of them took their departure. . . .

When all the measurements had

been gone over, Mr. Worthington asked: "Now, from these measurements which you have made of different parts and angles of these twenty-four signatures and of the signature to the disputed will, what do you say as to whether or not the hand which wrote these twenty-four signatures wrote the signature to the disputed document?" A. "I believe that the signature to the document is not by the hand which wrote the twenty-four signatures to the letters of Judge Holt."

Q. "Why?" A. "I believe it because, although the resemblance in measurement was great in such portions as could be determined by the eye, in those parts which could not be easily determined by the eye the differences are greater than I have hitherto found compatible with genuineness of a document."

"In your experience what have you found to be the value of such comparisons as you have made of things not to be seen by the eye?"

"In the few cases in which the matter has been placed beyond all dispute by the final determining with certainty of the case, I have found in all cases that I can recall where such comparison was made that the characteristics observed of ratio and angles which are not visible to the eye are those which remain most constant, and I may say that the same thing is true in regard to changes in the handwriting of a man from youth to old age, or from sickness to health."

Dr. Frazier testified to various general differences which he had observed in the writing in the will and the authenticated writing of Judge Holt. He then said, referring to the will: "In my opinion the pen which wrote this document was a steel pen, held in such manner that the hollow of the pen was inclined to the right rather than toward the person; that the stroke was heavy and the pen under greater control than in the case of the undisputed writings of Judge Holt."

Mr. Worthington asked whether in the opinion of the witness the body of the will was written by the same hand as that which wrote the letters, and the reply was: A. "I believe that the body of the alleged will was not written by the hand which wrote the genuine letters. I have personally no doubt about it."

The cross-examination was undertaken by Gen. Butterworth.

Quite a lengthy discussion resulted as to the statement of the witness that the will was in two fragments when he first saw it, and Gen. Butterworth tried to get his opinion as to whether it had been cut or worn into two pieces, calling his attention to a letter J which crossed the line of separation. Witness said the J could not have been more perfect if it had been written when the paper was whole. In reply to a direct question as to whether the document could possibly have been prepared on two separate pieces of paper, he replied:

"I can only say that I believe it to be possible that this was done. The fact that the tail of the J crosses the line is strong evidence that it was not done, but the fact that the ink stains extend below the line and not above the t is strong evidence that it was." He went on to explain that there was slight evidence of stains above the "t" in Holt, but it seemed to be too high to have come from the ink in the signature.

Gen. Butterworth wanted to know whether scorching the paper would not have had a tendency to make it break, particularly upon folding it, and the witness replied that the paper would probably have broken, but not in so straight a line. Judge Bradley asked whether his microscopical examination had disclosed whether the paper was cut or worn in two, but witness was not able to answer positively. He said it looked to him too smooth for a break, and proceeded to examine it again under

the microscope, but without further developments.

The witness rather resented some of Mr. Butterworth's questions, and said very emphatically that it was not his desire to make Judge Holt's signature out to be twenty-three millimeters long when it was only twenty-two; that he didn't care a straw which side won the case, and only wanted to present the facts as he found them.

"Then you would be surprised to find another expert going over the same ground and differing with you entirely?" A. "Not at all."

*Thursday, May 28.*

When the case was resumed yesterday morning Gen. Butterworth continued his cross-examination of Dr. Frazier, and tried hard to upset all his scientific theories and explanations by a series of questions. Time and time again he seemed to have the witness concerned, but every time the latter came up smiling with a new theory, opening up still another broad field for scientific investigation. Nobody understood what was going on, with the possible exception of the witness, but Gen. Butterworth stood his ground, and looked wise until the last moment.

At one time, after propounding a question to which the suave witness replied in the negative, Gen. Butterworth ventured the remark:

"But that is certainly the logic of your position." "I beg your pardon, but it is neither logic nor is it my position." And then came another theory which made the preceding ones appear like simple addition.

The question whether the will was written on two separate and distinct pieces of paper was brought up again, and after it had been discussed at considerable length again, Judge Bradley asked the witness:

"I wish you would state, from your examination of the line between the upper and lower sections of the paper, whether the paper was separated before it was pasted on the

counsel for the heirs-of-law who had ever heard of the man named as executor in the alleged will. Asked where he met Devlin, witness replied that he used to run a pool room near the Baltimore and Ohio depot after Judge Holt's death, and that Devlin had come there to see him.

Q. "Did he come there to see you or to play pool?" A. "I suppose he came to see me; he asked for me."

Q. "Was that before the publication in the newspapers of this paper called the will, or afterward?"

A. "It was after."

Q. "Do you remember seeing Luke Devlin about Judge Holt's house at any time?" A. "No, I never heard or saw anything of him at Judge Holt's."

The interest of the spectators had been aroused to the highest pitch upon the appearance of the first witness who had ever seen or heard of Luke Devlin, but just at this point Mr. Worthington suggested:

"Your honor, I think this is a good place to suspend for the day." Court at once adjourned.

*Wednesday, June 3.*

Charles Strothers, who was being examined when court adjourned on Tuesday, resumed the stand. He described the desk and closets in which Judge Holt kept his private papers, gave more testimony as to the cordial relations existing between Judge Holt and Washington Holt and his family, and related a conversation which he heard while he was driving Judge Holt and Washington Holt to the depot. Judge Holt had remarked to his nephew: "I am very glad the law regarding administrators has been modified, so that when I die you can come right up and take charge of affairs without any trouble."

He spoke also of the pleasant relations between Judge Holt and Col. William Sterett. The latter used to stop at Judge Holt's house and sit out in the yard with him, telling stories which made the Judge

laugh heartily. The witness said Col. Sterett used to burlesque the nation's legislators, and he had heard them having no end of fun over Senator Pepper's whiskers. Judge Holt had also said to the witness: "Don't get impatient at waiting on an old man, Charles, and later on you will see that I appreciate it."

Strothers also identified the copy he had made of the piece of paper Willie Sterett had found after Judge Holt's death.

Q. "Can you tell us whose writing it is?"

A. "I take it to be the Judge's writing; it is similar to his."

Q. "Do you remember any papers being destroyed after Judge Holt's death?"

A. "I remember a few letters being destroyed in the kitchen yard. I burned them in a coal scuttle. I received them from Washington Holt and Col. Sterett. There were about twenty-five of them, letters from Judge Holt's family which came out of the closet in the library." The witness did not think Judge Holt ever destroyed any papers with writing on them. He used to take all the letters he received, write across the top of them from whom he received them, and put them away in bundles. Strothers examined the will, and said he did not think it was Judge Holt's writing.

Q. "Tell us now about your meeting with Luke Devlin."

A. "Well, he came down to my pool room and asked for me. He asked me whether I knew him, and I replied that I couldn't say I did. He said his name was Devlin, and said he was the man named in the will. I asked him if he thought it was all right. He replied that he did not know. Then he said, 'The Judge gave me a pretty good send off in it, and if it goes through, there is a whole pile in it for me.' After I told him I didn't know him, he said he didn't think I was the man who was there when he used to call, that it was a darker man."

Strothers said Judge Holt used to preserve the cards of people who called on him, and that he (Strothers) had looked through about a bushel of them without finding one of Luke Devlin's.

Mr. Darlington subjected the witness to a rigid cross-examination. He wanted to know if he had not looked Luke Devlin all over upon the occasion of his visit to the pool room, and then asked him if he was Mr. Washington Holt. The witness replied that he had; that the idea had occurred to him that it was Mr. Washington Holt very much improved in health, and with more hair on his head.

Q. "Did you make a copy of Judge Holt's diary?" continued Mr. Worthington. A. "Yes, sir; about six months after he died."

Q. "Did not the Register of Wills go to Holt's house and stop the burning of papers by putting them all under seal?" A. "I thought it was Mr. Wilson, of the Loan and Trust Company, who did that."

Mr. Darlington then brought out the fact that Strothers was living at the Holt house, and that he rented out a portion of the stable to ex-Detective Block and another portion to a colored man. They paid Strothers the rent, and he spent it. The witness also identified three large pictures of the house and stable. Block paid \$4 a month for his part of the stable and the other man, who was a friend of Strothers, was to pay him \$3 a month, but he did not pay it regularly.

Strothers was asked how he made his living, and replied that he had no permanent occupation. He kept the pool room part of the time, and after that did whitewashing, put down carpets, carried baggage, and did all sorts of odd jobs. He had had some connection with a policy scheme at one time. He also sold coal, wood, and ice at Judge Holt's stable, on which he had painted a sign to that effect. Mr. Darlington promptly produced the photograph,

which brought the sign out plainly, and placed it in evidence for the purpose of showing a similarity between the lettering and the lettering on the envelope, in which the will was received. The letters on the stable were rudely printed, and bore a general resemblance to the inscription on the envelope.

Strothers next identified a number of letters which he had written for Judge Holt to the members of Washington Holt's family, and Mr. Worthington handed them around to the jury, asking them to observe the peculiar formation of the periods, which he declared as "full moons, only smaller sized."

Upon redirect examination by Mr. Worthington, Strothers stated that about five months ago ex-Detective Block came and rented the stable. He used it for storing a crate of bottles. He seemed to be greatly interested in the will case and frequently talked to Strothers about it. On one occasion Block told him it would be worth \$5000 to them from the New York papers if they could secure the first accurate information regarding the will. Strothers then gave some rather significant testimony regarding Block's connection with the case. "He told me," continued the witness, "that everybody thought I had sent the will in; that he thought so himself. He said he knew I would deny it then, but that when the trial came up and I was placed on the stand he knew that I would admit having sent it."

According to Strothers' testimony Block pictured the whole court-room scene to him, and gave him an idea of what questions would be asked him and what his replies would be. He also stated that Block went all through the Holt house, taking note of everything he saw. It was a peculiarity of the Judge's that if he ever lost a key of any sort, he never had a new one made, but always had the lock changed. Block mentions especially the fact

his letters indicated that he was a decidedly pious man.

The last witness of the day was Mr. *Rice W. Hooe*, who is employed as crier in the Police Court. For about two years he lived next door to the Steretts on Capitol Hill, and frequently saw Judge Holt's carriage drive up to the door, and also saw his servants bringing presents of fruit and other delicacies.

*Thursday, June 4.*

Luke Devlin, the executor under the alleged will of the late Judge Joseph Holt, was the object of the attack of the attorneys for the heirs-at-law during most of the proceedings. No witness so far examined has given any evidence to show that relations other than those naturally existing between a superior officer and his subordinates existed between Judge Holt and Luke Devlin, and yesterday some very peculiar statements alleged to have been made by Devlin were brought out. Besides, it was shown that Devlin was a man who took particular delight in imitating other people's signatures, and that on certain occasions he signed Judge Holt's name to official documents. At the morning session a number of witnesses testified to the great apparent anxiety of Devlin to have the receipt of the alleged will made public, and their testimony also tended to show that Devlin's own account of his movements on the day the will was received, given when he was on the stand early in the trial, was not altogether correct.

Mr. *John P. Miller*, of the *Evening Star*, was the first witness called yesterday morning. He first saw Devlin on the day the will was received. Devlin took a typewritten copy of the will to the *Star* office for publication. Some time after that, Mr. Miller stated, he met Devlin on F street, and the latter told him that the first thought which occurred to him upon hearing of Judge Holt's death was what a fool he (Devlin) had been. Explaining

his remark, Devlin stated that he had been to the house a number of times and that the servants would not let him in. He said he ought to have gone in anyway; that it was just a repetition of the McGarrahan case. McGarrahan and he were close friends, and if he could have reached McGarrahan's room the night before he died, he would have been able to write his name for \$50,000.

All this testimony was objected to by Mr. Darlington, who quoted authorities on the subject. There was quite a little sparring between Messrs. Darlington and Worthington, but the testimony was admitted. The court, however, sustained Mr. Darlington when he objected to Mr. Worthington asking the witness what Devlin said he would have done if he had been able to get into McGarrahan's room. On cross-examination the witness said the interview with Devlin had never been published, as it might have had a tendency to prejudice the case.

The testimony of Mr. *Beriah Wilkins*, the next witness summoned, disclosed the fact that Devlin went to the office of *The Post* on the same day with another typewritten copy of the will. Mr. Wilkins, supposing that he was receiving important and exclusive news, thanked Devlin, but when he learned that it had already been furnished to evening papers he returned the copy to Devlin. Mr. Wilkins thought Devlin appeared somewhat nervous at the time.

*Robert W. Dutton*, of the *Star*, testified that he first saw Devlin in the Register's office, where he was examining the will the same day it was received. The witness' statement as to the hour at which he saw Devlin varied considerably with Devlin's own account of his movements on that day. Mr. Dutton had examined the will carefully, but was unable to give an opinion as to whether the two portions of

the paper were parts of one piece, or whether they had been pasted together. There was nothing at all remarkable about Devlin's appearance.

Perhaps the most important testimony of the day was that given by *Joseph Fought*, who was a messenger in the Judge-Advocate-General's office from 1869 to 1876, having succeeded Luke Devlin when the latter was promoted. Fought is now engaged in the dairy business. He had never observed any evidences of confidential relations between Judge Holt and Devlin. He did remember, however, that once when Judge Holt learned that Devlin had been acting as private secretary to Senator Blair during office hours he summoned Devlin before him, and after a warm interview demanded Devlin's key to the office. Several other incidents were related to show that Judge Holt required the same discipline in the case of Devlin as he did with other employees.

Q. "Do you know anything about Mr. Devlin's proficiency as a penman?"

A. "He used to collect autographs, and would often sit and amuse himself by trying to imitate them, and so successfully that it was difficult to tell them from the real ones."

Q. "Did he ever imitate Judge Holt's signature?"

A. "Well, sometimes when papers had not been signed by Judge Holt, owing to oversight, Mr. Devlin would sign the Judge's name to them, and he did it about as well as the Judge could have done."

The witness was then shown the alleged will, and gave the opinion that it was not written by Judge Holt. There were portions of it, he said, which could not have been written by Judge Holt. It was further developed that although the witness and Devlin had not been on speaking terms for twenty years, Devlin had stopped him last Friday

and asked him if he would testify to the reverse of what was stated by Mr. Saxton last week. Devlin told him his expenses would be paid, but the witness refused to have anything to do with the case. Indeed, he would not have appeared at all if he could have kept out of the way of the subpoena.

The next witness was *Arthur Schatz*, who was a copyist in Judge Holt's office from 1872 to 1876. He had never seen Devlin enter Judge Holt's room or speak to him. He was familiar with Judge Holt's handwriting, and did not think he wrote the alleged will.

Mr. *Judson H. Jennings*, whose wife was on the stand on Wednesday afternoon, gave substantially the same evidence as she had given. Judge Holt was a distant relative of his, and he renewed his acquaintance with him in 1889. He described the interview in which Judge Holt had been so bitter in his denunciation of Maj. Throckmorton. Mr. Schatz was recalled to testify to Devlin's penchant for copying signatures.

Mr. *Wright*, who was Register of Wills at the time of Judge Holt's death, testified regarding the receipt of the will through the mail. Devlin had evinced no surprise when he first saw it. He had spent half a day at the Holt residence after the Judge's death searching for the will. He did so at the request of Washington Holt and Col. Sterett. He found no testamentary papers of any sort. On cross-examination he said he had telephoned to Luke Devlin and asked him to come to his office on a matter of importance. At Devlin's request he gave him a copy of the will.

Q. "What remark did Mr. Devlin make?" A. "He wanted to know whether the Judge had left him anything. I replied that he had left him a valuable trust."

Q. "Do you remember his reading that part of the will leaving everything to Miss Throckmorton and

Miss Hynes, and remarking 'I don't see where I come in.'" A. "I don't remember it."

Q. "Was any reward offered you by the heirs for finding the will at the time you went to the house to look for one?" A. "Yes, by Mr. Washington Holt."

Q. "How much?" A. "Forty thousand dollars." The spectators took a long breath and the witness added: "I didn't expect anything, however; it may have been a careless remark."

Mrs. *Emily V. Miller*, the next witness, has lived in Washington since 1865. She knew Judge Holt, and had received letters from him. She did not think the alleged will was in his handwriting. The letter "g" wherever it occurred was not like Judge Holt's. It was also developed that Mr. Darlington, for the other side, had called on Mrs. Miller regarding the case, but on learning her opinion had not thought it worth while to subpoena her.

*J. Nota McGill*, the present Register of Wills, was called. He testified as to the care which had been exercised in preserving the will.

Mr. *Thompson*, of the Register's office, was also examined. Asked whether the lower corner of the will was separated from the rest of the paper when he first saw it, he stated that it was his distinct recollection that it was intact.

There was a movement of expectation when Col. *William G. Sterett* was placed on the stand. His mother was a sister of Judge Holt's. The Colonel gave a brief sketch of his life, beginning with his birth in Hancock County, Kentucky, in 1847. He told of the high regard he had always felt for Judge Holt. His mother, he said, thought the Judge was the greatest man that ever lived, and the Colonel would have been telling of Judge Holt's good qualities still if the opposition had not objected. Col. Sterett told in detail all about his relations with Judge Holt since he came to Wash-

ington. He remembered particularly one morning when he and Col. Dick Wintersmith had breakfasted at Judge Holt's house.

Q. "Do you remember any particular attention he paid you that morning?"

Col. Sterett's face assumed a rapturous expression as he proceeded: A. "Uncle Joe had no idea of the capacity of a man. He made us a couple of mint juleps about that long," and the Colonel measured off a distance of about a yard and a half with his hands. The description produced the biggest laugh of the trial.

"He didn't ever overestimate your capacity, did he?" asked Mr. Worthington, but Col. Sterett was non-committal on the subject. Asked as to his own relations with Judge Holt, the witness said they were always friendly; sometimes confidential, and never sentimental. He told of Judge Holt's attentions to his wife and children, and stated that besides paying his wife's expenses to the World's Fair and to summer resorts, he gave her money for herself nearly every month. Not that she needed the money, as his own salary of \$60 a week was sufficient to take care of his family.

The witness did not hear of the fall which resulted in Judge Holt's death until the Saturday after it happened. He went to see him that morning, and went every day after that. The evening before he died he went as usual, and met the Judge's physicians there. The Judge seemed to be suffering considerably, but he did not think there was any immediate danger; but the next morning he learned of his death. Pending the arrival of Washington Holt he went to Riggs' Bank to see if he could find any memorandum there containing the Judge's instructions as to the funeral. He had heard from the servants that the Judge had instructed Martha to give his keys, watch, etc., to Washington Holt. The witness



remained at the Holt house on Wednesday night, and was there when Washington Holt arrived. He saw the keys delivered to him.

"As soon as he got the keys," continued the witness, "we went together to the desk to look after instructions about the funeral. We found only some insurance policies and a couple of keys."

"Let me ask you," said Mr. Worthington, "whether you found this paper," holding up the mysterious paper.

Col. Sterett looked amused, as he answered that they had not. "After that," he continued, "we went to the safe deposit building, and asked them to look over the papers, but nothing was found. We were told at Riggs' Bank that Uncle Joe had a little black trunk in which he kept valuable papers. It was not at the safe deposit company's, so we went home again, and finally found it in the closet in the library. The trunk was locked, but Washington Holt opened it in my presence, and found a whole lot of bonds. There was about \$60,000 or \$66,000, I don't remember which."

The witness then described the funeral arrangements and the removal of the body to Kentucky. He accompanied it, together with Washington Holt and his wife. The services were held in the Memorial Church, which Judge Holt had erected at the old family homestead. He also testified regarding the publication of a certain death notice in *The Post*.

Asked concerning the removal of any papers from the house, the witness said that some papers relating to the Surratt case were found, and Washington Holt had expressed a desire for them. Witness replied that he could have them so far as he was concerned, and Washington Holt had taken them, with the understanding that he would furnish copies if any of the relatives cared for them. They had also discovered a number of letters from Judge Holt's

wife, and an autograph letter from Gen. Grant.

Col. Sterett also testified concerning the paper which his little daughter had found. The Colonel was away fishing when the paper was found, but he made a copy of it when he returned, and sent it to Washington Holt. He had made the inscription out to be: "Date of will, January 1, 1886. Roundtree-J. M. Knott." He thought the handwriting was that of Judge Holt.

"I will ask you now, Colonel, whether you had anything to do with sending this paper to the Register of Wills," holding up the alleged will again. The idea was too absurd for the Colonel's equanimity, but he managed to sputter out that he was not the person who had surreptitiously mailed the mutilated document, by which he and all the rest of Judge Holt's relations were disinherited. Neither did he have anything to do with sending Detectives Block and Flinders to the Holt house. In fact he had never heard of them until Charles Strothers had mentioned them to him.

*Friday, June 5.*

Col. William G. Sterett, who was being examined when court adjourned on Thursday, resumed the stand. He first identified copies of local newspapers containing the death and funeral notice, which Mr. Worthington explained was for the purpose of showing that any one having the will in his possession should have been aware of Judge Holt's death, and also to show that Luke Devlin's excuse that he did not attend the funeral because he did not know when it was to be held was not well founded. Mr. Darlington, however, objected to the evidence, and was sustained by the court.

A good deal of Col. Sterett's succeeding testimony was regarding the relations of Judge Holt to the various members of his family. Cross-examining him, Mr. Darlington wanted to know whether, in

1873, the year the alleged will was made, Judge Holt knew whether Col. Sterett was alive or dead. The witness could not say whether he did or not. On one occasion, after the appearance of the alleged will, Col. Sterett said he was with Washington Holt at the Riggs House, when Luke Devlin approached them and suggested that somebody ought to look after the renting of the Holt residence. Col. Sterett told Mr. Holt that an administrator had been appointed, and that it was none of Devlin's business.

Q. "Did you tell a reporter last August that you intended to fight this case through to the last?"  
A. "I did."

Q. "In your sworn statement, accompanying your application to the court for the appointment of an administrator, you said Judge Holt died intestate; what do you think now?"  
A. "My opinion has not been changed."

Mr. *John W. Holt*, also a nephew of Judge Holt, was the next witness called. He met Judge Holt only twice, at his home in this city. The Judge treated him with the utmost kindness and hospitality. The scrap of paper found by Willie Sterett after Judge Holt's death was delivered to Mr. John Holt. It was in his valise which was stolen from a sleeping car while he was on his way from Kentucky to Washington. The valise was subsequently recovered, but the papers had been burned. The witness had nothing to do with sending the alleged will to the Register's office, nor with the sending of the detectives to Judge Holt's residence. Nothing additional was developed by cross-examination.

*Washington D. Holt*, the nephew who, with his family, has figured most prominently in all the testimony given so far, was next called to the stand. He has suffered three mild strokes of paralysis, and was unable to submit to the strain of

testifying for an extended period. The family came into possession in 1811 of the old homestead, known as Holt's Bottom, in Kentucky, where his own father and Judge Holt's father and mother lived and died. He told in detail of his earliest recollections of Judge Holt, and of his later visits there. In fact, all of his testimony was devoted to the relations existing between Judge Holt and his relatives in Kentucky.

Mr. *Levy*, who was formerly connected with the office of the Register of Wills, was next examined. He made a search for a will after Judge Holt's death, and placed under seal all the papers found in the house in August, 1895. Under cross-examination the witness said that Washington Holt remarked to him that if he found a will he would give him \$5000. He said he was naturally anxious to find it. He saw evidences in one of the grates that papers had been burned. He and Mr. John Holt examined the grate, and though they found small scraps of paper, they discovered nothing of importance.

Mrs. *Iglehart* was then recalled for the purpose of stating that she was in Northern Michigan at the time of Judge Holt's death; that Judge Holt took his meals with her when she visited his house, as he was not confined to his bed at that time, and that after his death, when she learned that none of the relatives were here, she telegraphed to Miss Teller, daughter of Senator Teller, to go to Judge Holt's house and represent her there.

The examination of *Washington Holt* was resumed at this point. He related the circumstances of his visits to Judge Holt's house in this city from his first visit in 1876 to the last, in 1893. In answer to a question as to Judge Holt's attitude toward him, he replied: "I don't believe there was a man living who was as close to him. He treated me just as if I was his own son."

Q. "Did he say anything to you at any time regarding his affairs?"

A. "Yes, he said to me often that his affairs, more especially after his death, would be in my hands. He always spoke of his affection for the old homestead, and said he never wanted it to go out of the family if it could be helped. He said he would make provision so that it would remain in the family always. I told my uncle once, jocularly, that I would keep the sheriff off as long as possible, and he replied that he would arrange it so that he would always be kept off.

"Coming down to the will, he told me several times that he had made his will, and had appointed me executor, but added that he was afraid I would have trouble, as the laws were different from those in Kentucky. He was afraid I would have difficulty in furnishing bond. He said he would try and get such a law passed as we had in Kentucky. Afterward, in Florida, in 1890, he told me that such a law had been passed, and that it had relieved him of a great deal of apprehension. On a subsequent occasion here in Washington he told me in his carriage that the law had been passed, and said: 'All you will have to do now will be to come here and take possession.' In that connection, the last day I ever saw him, we were sitting together in his yard, and he said, 'Washington, I want you to know that everything I have is yours.'

"Frequently he would speak about things that might happen after his death, but I would invariably change the subject. I felt as if it was holding up the skull and crossbones before a man who, by reason of his great age, had one foot in the grave. I will say now, though, by way of parenthesis, that I am very sorry I did not discuss it more fully with him. When I left him the last time, in spite of my protests, he insisted on riding down to the depot with me in his carriage, and

at the entrance, as I shook hands with him, the last words I ever heard him utter were, 'Good by, Washington, my son; God bless you.'"

In the course of his succeeding testimony Washington Holt stated that the Judge had told him on one occasion that after his death Washington and his family could go to Europe and stay as long as they wanted to, as they would have ample means. In the whole course of his connection with Judge Holt there was never a criticism or the slightest misunderstanding between any member of his family and the Judge.

The witness told the circumstances connected with his coming to this city after Judge Holt's death, and went at length into the succeeding events. After mentioning the delivery of his uncle's keys and watch to him by Martha, the colored servant, Mr. Wilson asked:

Q. "Did she give you any information regarding what your uncle had said touching arrangements for his funeral?"

A. "Martha told me that she had been instructed by Judge Holt to take care of the keys and deliver them to me, and that he wanted to have a certain flag wrapped around him, all of which he told her was in his will, which might not be opened until after his death. I immediately proceeded to search for further directions. Mr. and Mrs. Sterett were with me when I searched the drawer to my uncle's desk, but found no will or directions."

The witness gave a detailed account of the subsequent search for the will, including visits to the safe deposit building and Riggs' Bank, and the finding of \$66,000 in bonds in an old-fashioned trunk or valise, mentioned on Thursday by Col. Sterett. After he came back from Kentucky after the funeral the witness stated he found a list of Judge Holt's taxable property,

apparently made out in readiness for the assessor. Continuing, he said: "I gave the closet in the library the most thorough search, knowing, or believing, as I still believe, that there must have been a will. I worked until I was completely exhausted, putting in fourteen or fifteen hours a day. If there is any doubt about that house having been ransacked, I want to relieve all doubt about it now; because I ransacked that house."

Q. "Did you find paper of a testamentary character?"

A. "I found a little slip of paper, and on it was written: 'I give and bequeath to the Washington Humane Society, incorporated under the laws of the District of Columbia — dollars.' It contained no date."

Q. "What became of that paper?"

A. "I threw it away, I think. I don't remember whether I even showed it to anybody. It was in my uncle's handwriting. I thought it was a memorandum he used in making a will."

"When did you first hear of the will of 1848?"

"I don't think I heard of it until this forgery came out."

Mr. Holt then testified as to the burning, under his direction, of a lot of pamphlets and printed matter of no importance, and also a number of letters from members of his family to Judge Holt. There were a large number of other letters of a personal nature addressed to Judge Holt, which he wanted to have burned, but Mr. John Holt objected, "and," added the witness, "it was not done, very much to my regret." At this point Mr. Holt was unable to continue, owing to extreme fatigue.

The last witness examined was Mr. John C. Wilson, an officer of the safe deposit company. He testified that he went to Judge Holt's house and took possession of all personal property and papers. Some of the relatives wanted to have

certain letters burned, but he thought he had no discretion in the matter, so took charge of all of them. He broke the seals of the closets in the library and took out the papers. He found the will of 1848 among a lot of old papers, but saw nothing of the alleged will of 1873. The witness was not cross-examined, and with his testimony the case went over until Monday morning.

*Monday, June 8.*

The lawyers who are trying to show in Circuit Court No. 1 that the document alleged to be the will of the late Judge Joseph Holt is a forgery played their strongest card yesterday when they placed upon the stand Mr. David N. Carvalho, a famous expert, not only in handwriting, but in inks and paper. For sixteen years he has been the official expert for the District Attorney's office in New York, and during his career has testified in thousands of cases. The entire day was spent in examining and cross-examining Mr. Carvalho, and court remained in session until a later hour than usual in order to permit him to return to New York last night to testify in the famous Fleming murder case, now on trial. He unhesitatingly pronounced the alleged will of 1873 to be a clumsy forgery, and gave it as his opinion that the name Ellen B. E. Sherman, attached to the document as the name of a witness, was written by the same hand which wrote the body of the document. Furthermore, he applied a chemical test to the ink used in the document and stated as a result that such ink was not in use in 1873, and that it could not have been written at that time. Dr. Frazier, the Philadelphia expert, had fairly bewildered everybody with his technicalities, but after listening to Mr. Carvalho for a day, the impression prevailed that the Philadelphian had only dealt in the rudiments of the science. If Mr. Carvalho had only had time, he would no doubt have told whether

the mysterious document was written in the daytime or at night, in Washington or in San Francisco, and whether the man who wrote it wore a full beard or was smooth shaven.

Mr. *Carvalho* was then called. He is a well-built man, apparently about forty years of age, wears a full dark beard and eyeglasses. He has the appearance of a scientist, and is extremely positive in all his statements. He placed his microscope and a number of papers on a small table in front of the witness stand. He had made a careful study, he said, of the various authenticated writings of Judge Holt of date prior to 1880, in comparison with the writings in the alleged will. His most important observation had been that in the disputed document there is an excessive number of letters, such as "t" and "l," made with a loop at the top. The writing was evidently that of a person accustomed to the forearm movement, although certain words were written in a cramped, studied hand. It also struck him that the names Josephine Holt Throckmorton and Maj. Charles B. Throckmorton seemed to have been inserted after the body of the document had been written.

In order to enable him to give a practical demonstration of his meaning, a large blackboard was provided for the witness and a photograph of the alleged will was handed to each juror. Mr. *Carvalho* attached to the blackboard a large card bearing a copy of Judge Holt's genuine signature enlarged thirty-two times. He then proceeded to point out various never failing characteristics of the signature, which, he said, were lacking in the one attached to the alleged will.

"My conclusion is that if the letters which were presented to me, and which I have examined as the genuine handwriting of Judge Holt, are what they purport to be, Judge Holt did not write the will or

the signature attached to it. It is nothing but a forgery, pure and simple."

Proceeding to the signatures of the witnesses to the alleged will, Mr. *Carvalho* said his examination of them had been confined to the name of Ellen B. E. Sherman, which he was satisfied was written by the hand which wrote the body of the will. After that discovery he had not examined the other signatures.

Regarding the probable age of the paper, the witness explained that while it might be of the purported age it was very easily simulated by holding a paper over the spout of a coffee pot and afterward going over the paper with a hot iron. He was certain that the paper in question had been ironed.

Mr. *Worthington* then directed the witness' attention to the ink in the alleged will, which resulted in a lengthy technical description of the various inks in common use. He had made chemical examinations of the ink used in the genuine letters written by Judge Holt in 1873, and of that used in the will, and found them apparently not the same. The ink used in the will, he stated, was a "loaded" ink, and an ink that was not in ordinary use in 1873. One of Judge Holt's letters which he had examined, he said, was written with an "iron" ink. This letter he had partially burned, and found the effect to be entirely different from the effect of fire on the alleged will.

After recess, Mr. *Worthington* went into the question of the difference in inks more in detail. He brought out the fact that in the case of iron inks, some idea as to its age could be obtained by chemical tests, for the reason that disintegration sets in between four and seven years after its use. In the case of India ink, nothing could be learned, because it was not affected by chemicals. The witness explained also that India ink was not used as

a general thing for ordinary writing purposes, either in the present day or in 1873. "Now, your honor," said Mr. Worthington, "I ask that the witness be allowed to make a chemical test of the ink used in this alleged will, as by the laws of nature we may settle this case right here."

The proposition was agreed to on all sides after considerable discussion.

The word "of," immediately following the name of Luke Devlin, was then chosen. The witness explained that the chemical he was about to apply was muriate of tin. He then took the tattered document, which is causing so much trouble and speculation, and standing before the jury smeared the chosen word over with the liquid. Blair Lee drew his watch and at the end of two and a half minutes the expert declared in positive tones: "It is not India ink."

He then resumed the stand, and continued: "In my judgment, this is a loaded ink; loaded with a material we call 'archil.' It is characteristic of Arnold's chemical writing fluid, which company is using archil to load inks, and has been using it for the past ten years."

Mr. Worthington: "Mr. Carvalho, are you able to state whether archil was used in inks more than ten years ago?" A. "So far as my recollection goes it was not; it was introduced as an adulterant about ten years ago."

Q. "What is your conclusion as to whether that paper could have been written as long ago as 1873?" A. "That paper could not have been written in 1873, and certainly not within a period of ten or twelve years afterward."

Mr. Carvalho's statements created a profound sensation in the court room. Messrs. Wilson and Worthington looked triumphant as they turned the witness over to Gen. Butterworth for cross-examination, while Luke Devlin seemed ill at ease.

In cross-examining the witness Gen. Butterworth first asked: "What is archil?" A. "It is made from seaweed, and is a bluish-green coloring matter. It is obtained by burning the weed. I do not know what its chemical constituents are."

"If you don't know what its constituent elements are, how can you tell what the effects of chemicals will be upon it?" A. "Simply from experiment; from the phenomena which result."

The witness went on to explain that there was a certain something which happened when he applied the chemical which at once told him that the archil was there. He could not explain what this mysterious something was, in spite of Gen. Butterworth's repeated efforts to get him to do so.

Under close questioning the witness said he found Judge Holt's writing full of inconsistencies. That of itself was one of his peculiarities.

"Did I understand you to say that the slope of the letters does not harmonize in the will?"

"Yes."

"But did you find that the slopes in the letters of Judge Holt harmonize?"

"Much more so than in the will. Those in the will are a sort of jumble compared with the others."

The witness then pointed out a number of words in the will which were written with a cramped pen-movement, and compared them with others written more freely. Another thing the witness had observed was an unusually long space after Josephine Throckmorton's name. "The person," said he, "who wrote that name knew he could get it in the space, but he did not know where the 'n' was going to end."

Q. "In your judgment, then, the words Josephine Holt Throckmorton were not written in when the body of the will was written?" A. "It certainly was put in subsequently."

Q. "Is that your impression also as to the words Lizzie Hynes?"

A. "I think that Lizzie Hynes was written with the rest of the document."

Q. "What is your impression regarding the name Maj. Charles B. Throckmorton?" A. "I will answer the same as in regard to the name Josephine Holt Throckmorton. In each case the balance of the line had been written before the names were put in. I arrive at this conclusion by the spaces, and also because the names do not bear the same relation to the base line. There is also a different quality in my mind in the matter of pen pressure. The names are written in a cramped hand."

Speaking of further discrepancies in the alleged will, the witness said that in none of the letters he had examined did he find the letter "t" made with a loop at the top when it was the first letter of a word. Neither did Judge Holt begin the first stroke of his H in his name with a heavy stroke, nor had he found any Js with a heavy stroke at the top.

Replying to Gen. Butterworth's question as to what he found in the name of Ellen B. E. Sherman which led him to suspect that it was not genuine, the witness specified certain characteristics in the "l," "n," and "h" which led him to believe that the name was written by the same hand as that which wrote the body of the will. Regarding the name of W. T. Sherman, he said he had expressed no opinion as to its genuineness, but he had observed that an erasure had been made in the vicinity of the burned hole near the name. The witness also believed that the lower portion of the will had been cut from the upper portion, up to a point near the right-hand side, and that it had been torn the rest of the way.

Mr. Carvalho, at Gen. Butterworth's request, repeated his reasons for believing that the will could not have been written as long ago as 1873, and was then asked:

Q. "Are you able, by looking at that ink, to tell when it was made, within say five years?" A. "Yes."

Q. "Very well, when was the ink made?" A. "Within twelve years."

Q. "Why?" A. "I applied a chemical to it, and obtained a certain result; the result is archil, and prior to ten or twelve years ago ink did not contain it."

Gen. Butterworth then questioned him concerning his experiment with one of Judge Holt's letters, and the witness replied that he was certain there was iron present in the ink with which it was written.

Q. "Do they put iron in all inks?" A. "No, they do not."

Q. "If you will put that chemical on any part of this will, the result will be the same, will it?" A. "Yes, and if you will put it on any other piece of paper containing Judge Holt's writing of February 7, 1873, you will find a different result."

The ink expert went on to describe the effects of the chemical on different varieties of ink. He said there are about forty different kinds of ink manufactured in this country, from which many combinations are made.

*Tuesday, June 9.*

If it had not been for the refreshing appearance of Mr. G. O'Toole McCarthy, in the Holt will case yesterday, the proceedings would have been more than tiresome. Upon the whole it was a good thing McCarthy was there. He burst suddenly upon the scene just when everybody was beginning to yawn and threw so much life into his little comedy rôle that he received a hearty encore, which it required the united efforts of the court officials and Judge Bradley himself to squelch. There was nothing remarkable about his testimony. It was not even allowed in the record, and it would have been of small importance if it had been. It was the way he gave it, or rather tried to give it, that made the hit of the day.

When *Washington Holt* took the stand at the opening Mr. Wilson conducted the examination. The witness related a number of incidents showing Judge Holt's feelings toward his relatives. Once Judge Holt spoke to him of a gift of \$10,000 which he had made to Miss Lizzie Hynes. He said that Miss Hynes was a woman of simple tastes, and that the amount would probably be ample for her needs for the rest of her life. Mr. Wilson asked the date of the conversation, but the witness replied that his memory for dates was very bad, and that if he and Mr. Wilson should take a buggy ride to San Francisco together, discussing all sorts of things on the way, it would be just as easy for him to tell at what particular milestone a certain subject was discussed.

He had never heard Judge Holt mention the Throckmortons and had never heard of Luke Devlin until after his uncle's death. He related again the incident when he and Col. Sterett had been accosted by Devlin at the Riggs House. Mr. Wilson tried to show by the witness that Judge Holt was not on good terms with the Rays, relatives of Miss Hynes, in order to show the improbability of his leaving her a large sum of money which would eventually go to her relatives. Judge Bradley, however, ruled such testimony out.

The witness had first seen the alleged will in the Register's office. "I repeat now," he added, "what I said then, that it is not only a forgery, but a botch. The expert made use of this expression yesterday, but I claim the copyright, as I used it a year ago. There are a great many things about the will which make me believe this. Uncle never used a superfluous word, and the will speaks of Luke Devlin's character as being of the highest standard. The word standard is not necessary, and I am sure he would not have used it. Where it

says that Josephine Throckmorton is to inherit her share at the age of twenty-one, figures are used, and I remember once uncle sent a deed back to me for correction because figures were used, when he said the words should have been spelled out. Mr. Holt was then excused, while two or three other witnesses were examined briefly.

Mr. *Frederick F. Schrader*, of *The Post*, testified that he had an interview with Luke Devlin the day after the alleged will made its appearance, and that Devlin told him that he always had an idea there was a will in existence, and that he had written to the Throckmortons about it. When the witness first examined the alleged will in the Register's office, two or three days after its receipt, the upper and lower portions were entirely separated.

Cross-examined, Mr. Schrader told of his examination in detail, and added that the paper was not folded when he first saw it. He thought its general appearance yesterday was the same as when he saw it first. During his conversation with Devlin the latter had said that while he had always suspected the existence of a will, he had no idea he was named as executor. On redirect examination the witness said Devlin had told him that he had an idea where the will was all the time, but refused further information. Devlin had also stated that he was on intimate terms with the Throckmortons, and that Maj. Throckmorton visited him whenever he was in town.

The next witness was Mr. *John B. Randolph*, for thirty years a clerk in the War Department. He had become familiar with the signatures of Gen. Grant and Gen. Sherman, and was confident that the signatures attached to the alleged will were not genuine. He pointed out a number of peculiarities in the two signatures which inclined him to this belief.



A bald-headed gentleman, with an iron gray beard and spectacles, who said he was *G. O'T. McCarthy*, an "artist in penmanship," next took the stand. He had had occasion to become familiar with the signature of Mrs. Sherman, and when he was shown the alleged will and asked as to the genuineness of the signature attached, he thrust his hand into his inside pocket and produced a bundle of papers, as he said with a decided brogue: "I have to compare these signatures to show radical differences."

Gen. Butterworth at once took advantage of the situation, and asked: "And you cannot show any differences without comparing them?"

"No, but I can show you many differences when I look at them together."

All the lawyers on the other side interposed strenuous objections, but the witness was rattling on at a great rate, utterly oblivious to what was going on around him, and talking as if he had a hot biscuit in his mouth. He seemed to have an idea that he was about to clear up the whole mystery of the will, and could not for a moment understand that there could be any objection. Judge Bradley looked down on him in helpless amazement for a moment, while everybody laughed, and the attendants rapped for order. Then the court said: "Is there any way of stopping you when you get started?"

"Oh, yes, sir; I was only going to —"

"Well, you had better stop when you are asked. Put those signatures in your pocket."

"If you will allow me to make comparisons, I will show you some radical differences," and the witness was off again at a two-minute lick.

"Well, you cannot do that," said the court.

"Very well, then, I have nothing more to say," said the crest-fallen Mr. McCarthy, as he reluctantly

pocketed his documents. Under Mr. Worthington's subsequent questioning, he said he did not think the signature was genuine, but his testimony was ruled out, and after several requests, he was finally induced to leave the stand.

*H. A. Wallon*, who is also a clerk in the War Department, having been there since 1863, was next called. He frequently came across documents bearing Judge Holt's signature, and had two papers with him, dated in March and July, 1873. He thought the signature to the will was not Judge Holt's, but it was developed by Gen. Butterworth that he only spoke after a comparison, and his evidence followed that of Mr. McCarthy.

After recess *Washington Holt* was recalled and cross-examined at length by Gen. Butterworth. The questions put to him for the first hour were all concerning early family history. He was asked concerning the number of acres in the old family estate, and the cost of the improvements which Judge Holt had paid for, but the witness' memory was bad, and he protested repeatedly that he was being asked questions which it would be impossible for any human being to answer. Gen. Butterworth then questioned him closely as to the value of the bonds Judge Holt had given Mrs. Holt, and the amount he had spent in paying the expenses of various trips which Mrs. Holt and her daughter had taken. The witness simply told over again what he and Col. Sterett had both related in detail last week. Counsel for the legatees seemed to be at a loss for a theory, and Gen. Butterworth's interrogations apparently had no significance until he began to dwell particularly upon the large sums of money Judge Holt expended during his lifetime upon Washington Holt's family. Then it began to be suspected that he was attempting to intimate that Judge Holt had done so much for them during his life that it would not

have been surprising if he had left them out of his will. He also questioned him regarding the conversations he had with Judge Holt regarding the disposition of his estate. He brought out the fact that the witness' mental faculties were impaired as the result of paralysis in 1893, and then asked whether it was in that year that all the conversations were held with Judge Holt. A. "Not at all; not at all," was the reply.

Q. "What was the peculiar mental trouble you were suffering from?" A. "My mind seemed to act slowly."

Q. "Was it at that time he told you all he had was yours?" A. "Yes."

Q. "And you inferred from that that he had made provision to leave you something?" A. "Not only from that, but from other conversations."

The search for the will was gone over again, and Mr. Holt repeated his statement that he had never wavered for an instant in his belief that a will existed. A slight sensation followed this statement, as Gen. Butterworth said:

Q. "You joined with Mr. Sterett, I believe, in making application for letters of administration?" A. "Yes, sir."

Q. "Is that your signature?" (showing him the application). A. "Yes, sir."

Q. "Did you swear to this paper?" A. "Yes, sir."

Gen. Butterworth then read that portion of the application which stated that Judge Holt had died intestate, and looked inquiringly at the witness, who replied: A. "I swore to it at the instigation of my counsel, Mr. Wilson, as the only way out of the difficulty, and with no intention of committing perjury. Suppose I had been your client, what would you have advised me?"

Q. "Wait until you become my client, and then I will advise you. You would not swear to anything

which was not true at the instigation of counsel, would you?" A. "It seems that I did; that was the only way out of the difficulty."

Gen. Butterworth attempted to ascertain facts as to dates of occurrences from the witness, but without success, as the witness replied: A. "I have given the facts, but I cannot make my memory do that which it will not do. I know some things as well as I know London is in England, but I cannot swear to that, as I never saw either London or England."

Q. "I understand," said Gen. Butterworth, "that you and other members of the family have built a monument to Judge Holt. When did you do that?" A. "It was built last year, in June; I have a reason for fixing that date."

Q. "Before the discovery of this alleged will?" A. "Yes."

At this point court adjourned for the day.

*Wednesday, June 10.*

When court opened, counsel for the heirs-at-law recalled Mr. *John C. Wilson*, who was an officer of the safe deposit company. He testified simply that in the examination of Judge Holt's safe deposit box no testamentary papers or documents of especial value were found.

*Washington Holt* then took the stand again. Gen. Butterworth created something of a stir by asking him whether he had not said to Representative Hitt that he was convinced that Judge Holt's papers had been gone over, and that he believed Col. Sterett had found a will and destroyed it. A. "I do not remember saying such a thing."

Q. "Did you not say, further, that you thought if Col. Sterett was in his cups he might confess to having done so?" A. "I do not remember. I was very much worried at the time and I do not know what I might have said. I remember a conversation I had with Mr. Hitt, but cannot say what it was about."

Q. "Did you offer Col. Wright,

who was at that time Register of Wills, \$40,000 if he found a will?"

A. "I did."

Q. "Did you offer his assistant \$5000 if he could find a will?" A.

"Yes. I told Col. Wright I was willing to give \$40,000 for the discovery of such a will as I believed was in existence, making me executor. When I offered the assistant \$5000 I remember he said such a sum was not to be picked up every day, and I replied that I did not think it was to be picked up that day, because I was convinced that the will was either lost or destroyed."

Mr. Holt stated further on that he thought the estate was worth about \$180,000, but Mr. Worthington suggested that it was worth close to \$250,000 at one time.

Gen. Butterworth handed the witness the alleged will and said: "Examine this paper, which is called a will."

"You may call it a will, but I don't," replied the witness.

"Well, the paper which we call a will. Now tell us why you say it is not only a forgery, but a botch."

Mr. Holt proceeded to indicate various points in the document which had led to his opinion. In legal documents his uncle always referred to himself as Joseph Holt, of the City of Washington, District of Columbia, while in the alleged will he was called J. Holt, of the City of Washington, D.C.

Mr. Butterworth wanted to know whether the disposition made of the property did not have its effect on the witness' opinion. Mr. Holt said he was unable to answer such a question, and Mr. Worthington objected on behalf of his client, and said that if Gen. Butterworth wanted a lecture on the working of the human mind, he had better wait until after the trial.

Nothing more of importance was developed, and at this point, by an understanding with the other side, Mr. Darlington called Mr. *William Tecumseh Sherman*, of New York,

and asked him as to certain characteristics of his father's signature. Mr. Worthington at once objected, which precipitated there and then the question as to whether counsel for the legatees would be permitted to introduce evidence as to handwriting in the alleged will. After considerable argument the court held that whatever testimony Mr. Sherman might give upon the point could not be held as rebutting the testimony given on Tuesday by Mr. John Randolph regarding the signature of Gen. Sherman. The lawyers made several attempts to introduce the desired testimony by other forms of questions, but they were all ruled out.

Mr. Worthington offered to call Mrs. *W. G. Sterett* as a witness, but Mr. Darlington's objection that she was the wife of one of the interested parties was sustained. His attempt to call Mrs. *Washington Holt* was also thwarted, whereupon the counsel for the heirs-at-law rested their case. After more argument Mr. Darlington craved a recess for an hour, which the court granted.

It will be remembered that several days ago, when Miss Mary Holt was being cross-examined, she was asked as to a certain remark she had heard Judge Holt make regarding Col. William Sterett. Mr. Worthington objected to her answering, and was sustained by the court. Immediately after recess yesterday Miss *Holt* was placed on the stand for the legatees.

"Will you tell us, now," said Mr. Darlington, "what remark you heard Judge Holt make about Col. Sterett?"

Again Mr. Worthington objected, but subsequently withdrew it, and the witness replied:

"I cannot tell you his exact words, but the idea Judge Holt conveyed was that according to the statement of Col. Sterett's wife he was always broke, and according to his own statement, he made plenty of money,

and the Judge wondered what he did with it." The witness was promptly excused.

Mr. Darlington secured permission to read the depositions of Mrs. *Fannie Ricketts*, widow of Gen. Ricketts, now living in California. In 1873 she lived at 1829 G street, in this city, and was intimately acquainted with Judge Holt. In February, 1873, she was a guest at a dinner party given by Judge Holt, and among the other guests were President and Mrs. Grant, Hamilton Fish and Mrs. Fish, and Gen. and Mrs. Sherman. Deponent stated in reply to cross-interrogatories that within three or four years after 1873 she heard Judge Holt express himself with great bitterness against Mrs. Throckmorton, senior. Mr. Darlington explained that the deposition was introduced in order to show that the relations between Judge Holt and Gen. Grant and Gen. Sherman were such that it would have been possible for them to have witnessed the making of the will.

This having been disposed of, *Luke Devlin* was called to the stand, and Mr. Darlington asked him how he came to make application for the office of executor of the McGarrahan estate, to which references had previously been made. Objections were promptly interposed by the other side, and there was another long legal argument, Mr. Worthington holding that if Mr. Devlin were allowed to testify, there was no reason why his side should not be given an opportunity to reopen the question, so that there would be "no end to this thing." The court, however, admitted the question, and Mr. Devlin replied: "I had been McGarrahan's companion from 1871 until April, 1894, and I loaned him sums of money from \$25 to \$100. I hold his note now for \$3100. I became administrator of his estate at the third request of his counsel."

Mr. Worthington then asked the

witness concerning a statement attributed to him by a newspaper reporter regarding his not having been able to see McGarrahan on the night before his death. "I did not say that," replied Mr. Devlin. "On the contrary, I told him I had sickness in my family and could not go to see McGarrahan. I saw him the last time I called and gave him some money."

Questioned concerning his letter to Miss Throckmorton regarding the possibility of Judge Holt having left a will, the witness stated that he had written to Miss Throckmorton in answer to a letter from her. He had destroyed the letter in August, 1895. As nearly as he remembered Miss Throckmorton had asked whether Judge Holt's will had been found. The witness identified his reply to the letter, which was read in court. It began, "My Dear Miss Josephine," and the writer expressed the opinion that Judge Holt had made no will, for had he done so the witnesses to it, three in number, would have come forward. The letter also referred to a theory of a gentleman living near the Holt residence that the will might have been purloined from the house with numerous other articles.

Mr. Darlington then continued: "Some testimony was offered to the effect that you told Mr. Schrader, of *The Post*, that you had an idea where the will was. Did you so tell him?" A. "I believe that was correct. I formed it immediately after my interview with the Register of Wills; after the will was turned into the Register's office."

Q. "Something was also said about your having an autograph album and getting signatures of prominent people?" A. "That is true; I had one up to 1867. I gave it to Mr. O. L. Pruden during the summer of 1867. I next saw it after Mr. Smith's testimony, when I went to the White House and got it."

Q. "In Charles Strothers' testi-

mony regarding an interview with you at his pool room, speaking of the will, he stated that you remarked there would be a pile in it for you?" A. "I did not use such language; I simply said there was a high compliment in it for me."

Mr. Darlington then asked the witness regarding interviews which Mr. John Miller, of the *Star*, had testified to. Mr. Devlin denied positively that he had said there ought to have been a will in favor of the Throckmortons. His conversation in the *Star* office had been addressed to Dr. Howe, who had known the Throckmortons as long as he had. Mr. Miller's statement that he had said he was a fool to let another opportunity go by, and that he should have gone into Judge Holt's room in spite of the servants was also a mistake; it was highly improbable that he would have used such language. In regard to the statement of Mr. Wilkins, of *The Post*, that witness had offered him a typewritten copy of the will, Mr. Devlin stated that he had offered him the official copy of the document to make a copy from. Dr. Howe, of the *Star*, had previously made a copy of it, and the document was in a *Star* envelope.

The statement of Witness Fought to the effect that Devlin had had trouble with Judge Holt over the fact that he (Devlin) was acting as Senator Blair's private secretary was next brought up, and Mr. Devlin denied that Judge Holt had ever spoken to him on the subject. At this point a document was introduced, signed by Judge Holt, testifying regarding Luke Devlin, that "his conduct throughout his long service has been most excellent; thoroughly qualified for his duties, he has performed them at all times with fidelity and zeal." Mr. Devlin also characterized Fought's statement that he had been required to surrender his key to the office as absolutely false. At that very time

Judge Holt had promoted him from a salary of \$1100 per annum to \$1600.

At this point Mr. Devlin was excused, in order to place Judge *John A. Bingham*, of Ohio, on the stand. He testified that he was eighty-one years of age, and was in Congress for eighteen years. He first met Judge Holt in 1864 and had become familiar with his handwriting, having been associated with him at the time of the trial of the assassins of President Lincoln. He met Judge Holt constantly until 1873, when he left the country as Minister to Japan, being gone twelve years. When it became apparent that it was the intention of the attorneys for the legatees to have Judge Bingham testify regarding the genuineness of the alleged will, the lawyers on the other side raised strenuous objections again, and the battle as to what was rebuttal testimony and what was not was on again as fiercely as at first. After a long argument Judge Bradley held that it was clearly not rebuttal, and sustained the objection of counsel for the heirs-at-law. Even then the opposition did not give up, and Messrs. Butterworth, Darlington, and Lee all submitted additional arguments, but without avail.

The court added, however, that he did not want his decision understood as prohibiting testimony as to the attainments and qualifications of Judge Holt as a lawyer, without reference to the genuineness of the document in question, and Gen. Butterworth immediately took the cue and asked:

Q. "Judge Bingham, do you know anything as to the legal attainments of Judge Holt? Are you able to state, from your knowledge of him, whether, in the preparation of legal documents, he was an accurate, technical lawyer?" A. "I regarded Judge Holt," replied the witness, "as a strong, sensible man; a careful, painstaking man; a very faithful man in the discharge of his

official duties. At no time during my intercourse with him did I see any indication that he was a technical lawyer. He was simply a broad-minded, intelligent man. He tried to ascertain his duty and did it. I saw no sign of his being a technical lawyer; he dealt with facts."

The lawyers for the other side refused to cross-examine the witness, and Mr. *Devlin* resumed the stand. Mr. *Darlington* said: Q. "Mr. *Schrader* testified that you told him Maj. *Throckmorton* was on very friendly terms with you, and visited you every time he came to town?" A. "I did not say that; he asked me when Maj. *Throckmorton* would be in town, and where he would stop. I said he would probably stop with me, as I visit at his house."

Q. "It was also stated during the proceedings that you were very fond of signatures of prominent people, and would tear them off papers in the office." A. "It is undoubtedly false; absolutely."

Q. "It was further stated that when Judge *Holt* inadvertently omitted signing his name to official papers you wrote his name to them."

A. "That is absolutely false. I never signed Judge *Holt's* name to a document in my life; not one."

Q. "Mr. *Schrader* stated that you said you believed that Miss *Hynes* would be well provided for in the will." A. "That is correct. From 1862 to 1869 I sent checks quarterly from Judge *Holt* to Miss *Hynes*. I knew she was supported by Judge *Holt*, as she was his ward."

The examination of *Luke Devlin* will be resumed.

*Thursday, June 11.*

Nearly all of the morning session was occupied by *Luke Devlin's* testimony. His own version of the various interviews which he had with newspaper men after the discovery of the alleged will differed materially from that of the scribes and made Mr. *Devlin* appear like

a much-misrepresented man. The balance of the testimony tended to show that Judge *Holt* entertained the highest regard for Miss *Hynes* and to discredit previous statements that Judge *Holt* had not intended to provide for her in his will.

In reference to his having suggested to Washington *Holt* and Col. *Sterett* at the *Riggs House* that the *Holt* residence ought to be rented, the witness stated that Mr. *Holt* had expressed his willingness provided the other heirs were agreeable. He then identified a letter written by Judge *Holt* recommending his appointment as a Second Lieutenant in the army. The letter referred to Mr. *Devlin* in the highest terms.

Mr. *Darlington* asked the witness whether he had anything to do with the writing of the alleged will and the sending of it to the Register of Wills, and Mr. *Devlin* replied: A. "I knew absolutely nothing of it until I saw it at the Register's office."

Cross-examined as to his relations with the *Throckmortons*, the witness stated that they began in 1860, and he had known Miss *Josephine* since her father was stationed at Fort *Myer*. He repeated his statement made yesterday as to receiving a letter from Miss *Throckmorton* regarding the probability of Judge *Holt* having left a will, and also identified a copy of a telegram which he had sent Miss *Throckmorton* after the alleged will made its appearance. It was dated August 26, 1895, and read: "Will found. You and Miss *Hynes* get all; share alike."

Mr. *Devlin* was then asked how he was so well informed as to affairs at the *Holt* residence after the Judge's death, as appeared from his interviews with newspaper reporters. Mr. *Devlin* said he got his information from a Mr. *Olds*, living in the suburbs. Mr. *Worthington* read from the *Star* of August 26, 1895, a number of statements credited to Mr. *Devlin*, which the latter denied most strenuously. He

particularly denied a statement attributed to him that he believed the alleged will had been hidden by some of Judge Holt's colored servants, who afterward became conscience stricken and mailed it to the Register.

The several statements regarding Mr. Devlin's movements after leaving the Register's office on the day the will was found have been very conflicting, and yesterday he reiterated his statement that he went first to a drug store, then to the War Department for Maj. Throckmorton's address, then to the telegraph office, and then to the *Star* office. He was to meet his sister-in-law, Miss Emily Carrico, at the drug store. He insisted that it must have been after 2 o'clock when he reached the *Star* office.

The examination of Mr. Devlin was suspended to allow Mr. C. A. Johnson, who, from 1890 to 1894, was postmaster at Lebanon, Kentucky, the home of Miss Hynes, to testify. After Mr. Worthington's objection was partially overruled, and he had withdrawn it, the witness stated that while he held the office Miss Hynes received money orders about once a month from Judge Holt. They were always for \$50 each.

When Mr. Devlin took the stand again, the fact was brought out that after the finding of the alleged will Maj. Throckmorton's son dined at Devlin's house and left with him a number of letters from Judge Holt. He had turned the letters over to Mr. Blair Lee, one of the attorneys for the legatees.

Q. "Did you tell Mr. Schrader that you were satisfied that the will and the attestations were genuine?"

A. "I may have said so with reference to all the signatures except Mrs. Sherman's."

Q. "Did you tell him that you thought probably the will was written and attested upon some occasion when all the witnesses were at Judge Holt's house?" A. "I did not."

The witness further stated that he is at present employed in the record and pension division of the War Department, and that it is a part of his duty to have tracings of signatures made. He usually got Mr. Harry Fellows, another clerk, to do it. Mr. Devlin named a number of army officers whom he met at Maj. Throckmorton's house. All of them are dead or stationed at posts outside of the city.

This concluded the cross-examination of Mr. Devlin, and after recess, Judge Miller, of the Police Court, was called. He was asked what he knew about the general reputation of Luke Devlin, but Mr. Worthington objected vigorously before he had a chance to reply. "Your honor," said Mr. Lee, "I think this is competent; Mr. Devlin has been accused of a very serious offense." Mr. Worthington, however, argued that evidence as to a man's reputation could not be introduced until that reputation had been attacked. He was promptly sustained by the court, and the police court Judge as promptly vacated the stand.

Mr. H. P. Godwin, city editor of the *Star*, was then called. He testified that he and Mr. John P. Miller were present at the interview which Devlin had with Dr. Howe in the *Star* office on the day the will was found. He had no recollection of Devlin having made a statement to the effect that he had a theory that there was a will in existence before it was discovered, nor did he remember his saying that he had written to the Throckmortons concerning it. Mr. Devlin had with him at the time a typewritten copy of the will. Cross-examined, he thought the interview occurred about 12.30.

Q. "Did Devlin say anything about the life Judge Holt had been living?" A. "I remember him saying that the Judge had lived alone for a great many years and had no one with him except the servants."

The witness identified a portion of

a paragraph in the *Star* of the day the will was found, which he thought he had written, and was then asked: "Have you any recollection as to whether Mr. Devlin made any suggestion to the effect that the will had been held back by some of the servants, and afterward being sent in when conscience pricked them?" A. "I don't recollect that Mr. Devlin said that."

Dr. *Frank T. Howe*, of the *Star*, testified that he did not remember Mr. Devlin saying he thought there was a will before it turned up, and did not hear him say anything about writing to the Throckmortons. Dr. Howe stated that he was employed in the Judge Advocate's office from 1864 to 1869. Devlin was at that time a messenger there. He was always very attentive, and when the Judge's bell rang he was very prompt to answer it. He thought Judge Holt entertained kindly feelings toward him.

Under cross-examination Dr. Howe was asked: "Did Mr. Devlin say to you in substance that he believed the will had been put away either by accident or design by some of Judge Holt's colored servants, who who were his sole companions in his later days?" A. "I do not remember that he said just that. It has never been determined just who wrote the interview with Mr. Devlin. I think, however, that Mr. Devlin conveyed that impression."

The next witness was Mrs. *Frank Evans*. She was employed as a typewriter in the Register's office at the time the alleged will made its appearance. The document was handed to her soon after its receipt for the purpose of making a copy of it. She was asked whether the will was in two pieces at that time, and after Mr. Worthington's objections were overruled she testified that it was in one piece, showing the jury just how it was joined.

Maj. *T. Gaines*, who has already figured as a witness in the case, was

then recalled. He was questioned as to his visits to Judge Holt's house, he having been associated with him since 1862. Mr. Lee explained that this was for the purpose of rebutting the statement of Charles Strothers that he had examined a bushel of visiting cards at Judge Holt's house, and had never found cards bearing the name either of Luke Devlin or Maj. Gaines.

"The last time I called," said the Major, "the servants brought word that the Judge was very ill, and to please call again. I didn't know any of the servants, they were strangers to me. I didn't believe —"

There was a storm of objection, and Mr. Worthington remarked: "Let us permit what he didn't believe to remain a mystery." This was unanimously agreed to, and Maj. Gaines proceeded to testify regarding Luke Devlin's relations with Judge Holt. "Judge Holt," said he, "was very fond of Luke Devlin, as I learned as soon as I entered the office. In conversation with the Judge while riding with him about the city, he spoke frequently about Luke Devlin. I remember one occasion in particular. The chief clerk of the office had become offended at Luke, and there was a good deal of personal feeling between them. The Judge had expressed himself as sorry that Wright had allowed his temper to influence him. He thought that Devlin would not do anything except what was right, and that it would all pass over again."

He did not remember anything Luke Devlin did for the Judge except attend to errands and similar work. The witness was not acquainted with any other of the parties to the suit, although he had seen Maj. Throckmorton. He did not remember who answered the door upon the occasion of his last visit to Judge Holt's house. That visit, he thought, was later than 1880, though he did not remember whether it was subsequent to 1885.



When the name of Mrs. Ray was called a little woman in black, who has sat just behind Miss Hynes and the Throckmortons throughout the trial, took the stand. She comes from Kentucky, and is a niece of Miss Hynes. She first saw Judge Holt in 1862, when he came to Kentucky to take her aunt, Miss Hynes, on a long trip. He did this almost every year. In April, 1884, when Judge Holt was visiting Miss Hynes, he took a lot of bonds from a valise and gave them to Miss Hynes.

Q. "Tell us just what he said upon that occasion." A. "He said: 'Lizzie, here is something I have for you. I have forgotten to send you money lately, and I will give you these bonds, so you will always have a little money.' He said he did not want her to think that was all he was going to give her. He told her to write to him whenever she wanted money, for when he was dead she would be independent of everybody. She could take \$10,000 and spend it just as she wished. He said he had always intended to support her, as he had promised his wife to do so."

The witness then spoke of the visits she had made to Judge Holt's house in this city in company with her aunt. In 1882 Judge Holt had spoken to her in this city, in regard to Miss Hynes. He said he had promised his wife, whom he referred to as "Cousin Mary," on her deathbed to take care of "Poor Lizzie," as she called Miss Hynes.

Mrs. Ray remembered on another occasion when Judge Holt was not feeling well he told Miss Hynes that he might never see her again, and that he did not want her to think that \$10,000 was all he intended to give her.

At this point Mr. Worthington objected if the testimony was intended to prove that Judge Holt had spoken of providing for Miss Hynes in a will. He claimed that such evidence should all have been intro-

duced by the other side in the first place; that even if they should now offer to produce a man who saw Judge Holt write and sign the alleged will, it would not be competent. Mr. Darlington named three grounds upon which he thought they had a right to introduce Mrs. Ray's testimony, the most important being that it was rebuttal to Washington Holt's statement that Judge Holt had said that the \$10,000 he had given Miss Hynes would be enough for her needs for the rest of her life. The court thereupon overruled the objection, and the witness continued as follows:

"Judge Holt said he wanted Miss Hynes to know that he would fix his business affairs in such a way that she could have all she wished while he lived, and after he was gone she would be amply provided for. Miss Hynes then asked him what his relations would say, and he replied that his relations had nothing to do with his affairs, that they had never given him a dollar, and that he had made all his money himself. They would have nothing to say about it."

The witness was then questioned as to her own family, for the purpose of introducing further facts regarding Judge Holt's attitude toward Miss Hynes, but the court sustained Mr. Worthington's objection. A number of letters from Judge Holt to Mrs. Ray were then introduced as evidence, most of them, as Mr. Darlington explained, containing references to Miss Hynes. They were also objected to, but the court ruled in favor of their admission.

While Judge Wilson was examining them, preparatory to their being read this morning, Mr. Worthington began his cross-examination of the witness. She stated that she last saw Judge Holt in 1885 or 1886.

Q. "Why was it that you and he ceased to correspond?" A. "My husband owed him a note; that was

all it was; I never had any trouble with him myself."

This answer explained the bitter attack Judge Holt made on Mr. Ray in one of his letters to Washington Holt.

Q. "When Judge Holt spoke of his relations in that conversation with Miss Hynes, was his tone that of unkindness?" A. "No; not at all."

An adjournment was then taken.

*Friday, June 12.*

The testimony was confined to attempts to prove the friendly relations existing between Judge Holt and Miss Hynes and between Judge Holt and the family of Maj. Throckmorton, and also that the will was in one piece when it was received at the Register's office. The latter has all along looked like a plain proposition, but it did not appear to have been satisfactorily proved until yesterday.

Mrs. Ray, Miss Hynes' niece, resumed the stand as soon as court opened, and in regard to the letters written to her by Judge Holt, it was decided to read only those containing references to Miss Hynes. Under cross-examination, additional facts were brought out regarding the difficulty between the witness' husband and Judge Holt. The latter held her husband's note for \$4000 which was not paid when due. It was afterward turned over to Washington Holt, and the witness admitted that she became much embittered, when he sent an officer to levy on the furniture in their house. She stated that after the note was paid, with the exception of \$315, and her husband had asked for thirty days in which to pay the balance, Washington Holt had refused.

Judge Holt's letters to Mrs. Ray were read. They all expressed deep affection for Miss Hynes, and Mr. Darlington passed them around among the members of the jury, with the suggestion that they compare the handwriting with that in the alleged will. He called their

particular attention to the absence of the jab on the J, which had been set forth as a characteristic of Judge Holt's signature, and in one letter he directed their attention to a number of t's made with a loop, which Mr. Carvalho, the expert, had testified he had not found in Judge Holt's writings.

Under further cross-examination, Mrs. Ray said she was not sure whether the amount was not \$715 instead of \$315, remaining unpaid on the note, nor was she certain that Mr. Holt had not granted her husband several extensions of time. At any rate, she was very indignant at Mr. Holt's action.

Miss Sarah A. Terry, who was a clerk in the Register's office when the alleged will was received, was called to the stand. She stated that when she first saw the document it was in one piece.

In the same connection Prof. W. M. Gray, microscopist of the Army Medical Museum, was summoned. He identified an immense photograph which he made of the alleged will, and which Mr. Blair Lee handed to the jury with the statement that it showed that the break between the two portions was not complete. The witness also identified several photographs of letters which cross the line of alleged separation in the document, including one of the final "t's" in the signature of J. Holt, and another of the final "y" in February in the line above. In reply to questions by Mr. Lee, Prof. Gray stated that the magnified photos showed such an interlacing of the fibers on the two edges as to convince him that it was originally one complete piece of paper. Efforts to get the witness to testify to details were objected to, and in spite of numerous methods of questioning in order to bring about the desired result, the court sustained the other side in their contention that Prof. Gray was not an expert concerning the subject of wear and

tear of paper. Mr. Worthington declined to cross-examine the witness.

Maj. *Throckmorton* was called, and his examination occupied the rest of the day. He gave a fairly complete history of his life since his first acquaintance with Judge Holt in 1858. Judge Holt was then Commissioner of Patents, and in 1859 he took Maj. Throckmorton to the office of the Postmaster-General and had him appointed to a clerkship. Subsequently he was offered a position in Louisville, Kentucky, which Judge Holt advised him to accept. Some time afterward he wrote to Judge Holt, saying he would like a position in the army, and in March, 1861, the Judge wrote him that he would get him an appointment as Second Lieutenant. He came at once to Washington, and Judge Holt told him that President Lincoln had made the appointment. Maj. Throckmorton's father and cousin were anxious to have him decline the appointment and go South, but Judge Holt told him it was the duty of every young man to serve his country at that time. He served through the war, and in 1865 he was brought to Washington with his battery, and encamped near H street and Maryland avenue, where Judge Holt came to see him repeatedly. He was sent to Detroit with his battery in October, 1865. In 1868 he returned to Washington, and was stationed at Fort Foote and Fort Washington, remaining until October, 1872. Judge Holt visited him repeatedly, and the most friendly relations existed between them. In 1872 he went to California and engaged in the Modoc campaign.

The Major referred to his marriage in Kentucky in 1863, and to the birth of his daughter, Josephine Holt Throckmorton, in Detroit. Judge Holt was informed of the event, and also of the intention to name her after him, and to make him her godfather. He replied, thanking

him for the honor, and sending his godchild a silver mug, and also a bottle of water from the River Jordan, which he wished to be used at the baptism. He had procured the water while on a visit to the Holy Land.

In 1876 Maj. Throckmorton was quartered in Washington by direction of President Grant. He brought his family with him, and saw Judge Holt repeatedly while he was here. While he was stationed in Maine he left his wife and family in Washington, and in 1881 he came to Washington as a member of the court-martial which tried Sergt. Mason for his attempt to kill Guiteau, the assassin of President Garfield. He was located at the Washington Barracks from Christmas, 1883, until May, 1884, and frequently met Judge Holt, their friendly relations being continued.

After that he was in New Orleans until the yellow fever scare of 1888, when he was ordered to New York by sea, remaining there until June, 1890. "I saw very little of Judge Holt," continued the witness, "after my return from New Orleans, for the reason that I was very rarely in Washington. On two occasions after 1888 I called at Judge Holt's house. Once I rang the bell, and the servant woman, who has been here — Martha — came to the door. I handed her my card, but mentioned no name, as I am not in the habit of giving my card and name at the same time. She said Judge Holt was not in, and I said I only wanted to pay my respects and left. Within a year I called again, and the same servant came to the door. I asked if Judge Holt was in, and she replied that he was not. I again left my card, saying I had called to pay my respects.

"The next morning I met Judge Holt on the corner of New Jersey avenue and B street. He stopped and spoke very kindly, saying that he did not know I was in town. I replied that I was sorry, as I had

left my card at his house the day before."

Q. "What difficulty ever took place between you and Judge Holt?" asked Mr. Darlington. A. "No difficulty between Judge Holt and myself," replied the witness. "There was a misunderstanding between him and my mother, an old lady eighty-eight years of age."

Mr. Darlington then handed Maj. Throckmorton a number of letters, which he identified as letters he or members of his family had received from Judge Holt, and also two written by Judge Holt to a third party. The latter referred to Maj. Throckmorton as the "soul of honor," and also referred to his brave conduct at Bull Run. Mr. Worthington wanted to know what such evidence was in rebuttal of, as it simply referred to the friendly relations between the two men twenty years before they had claimed any breach occurred. Mr. Darlington replied that his purpose was to show relations which would make the writing of such a will as was in question a probability, and he was finally given permission to read them.

The correspondence brought out the fact that Maj. Throckmorton's father was an officer in the Confederate army. Several of the letters referred to Judge Holt's efforts to have Maj. Throckmorton sent into the field with Gen. Sherman instead of doing mustering duty. One dated in 1863 regretted that the Major had "been disturbed by an idle rumor."

Q. "To what did that refer?" A. "My impression is that some one said I had been drinking. I wrote back that it was a lie."

Another of Judge Holt's letters stated that he was glad Maj. Throckmorton had met Miss Hynes, who was "in every way a noble-spirited woman, especially in her love of country." Other letters read were dated in 1873, one being dated in February of that year, the same

month in which the alleged will was written. At that time Maj. Throckmorton was located at the lava beds of California, it being the height of the Modoc campaign. One of the letters read was addressed to Mrs. Throckmorton, beginning, "My dear cousin." It was evidently in reply to one from her in which she had expressed the greatest anxiety for her husband's safety. The Judge's was a very tender letter, expressing confidence that the life "so precious to us all" would be preserved, and sending his love to the "dear little children." Both Mrs. Throckmorton and Miss Throckmorton shed tears while it was being read.

Maj. Throckmorton identified a letter, dated February 5, 1873, as one which he had written to Judge Holt from the lava beds. In it the Major expressed sympathy for the Indians he was warring against. He said they had been driven to desperation by bad treatment and broken promises, and had been compelled to eat their ponies to keep them from starving. He added: "I hoped to be home with my wife and babies by about March 15. If I should be so unfortunate as not to get back, I know you will not let my wife and little ones want."

Q. "Did you receive any reply to this letter?" Maj. Throckmorton was asked. A. "I have not got it. At the time I received it I was in the lava beds and could hardly keep one shirt."

Q. "In that letter what response did Judge Holt make to this paragraph in your letter?" A. "He told me to do my duty, they should not suffer."

A letter was read from Judge Holt to President Grant, dated December 9, 1876, asking for the appointment of Maj. Throckmorton to a position in the newly established signal corps. It referred particularly to his bravery at the battle of Bull Run, where he was confronted by that part of the Confed-

erate army in which his father was an officer.

Q. "Something has been said regarding a difference which sprung up between Judge Holt and your family. What do you know of that?" A. "In 1880, in reply to one of my letters, Judge Holt wrote me that my mother had told him that my wife had informed her that Miss Lizzie Hynes had shown to my wife letters written by Judge Holt to Miss Hynes. I wrote to him at once, but I could not quite understand his letter, so I turned it over to my wife to answer in full. He made a reply to that letter to my wife."

Q. "Tell us how far that matter affected your relations." A. "It did not affect either myself, my wife, or my daughter. He seemed to be very bitter against my mother. The subject was never mentioned between us. I always believed that it was brought about by misrepresentation, but I was placed in such a delicate position that I was powerless to act. I seemed to drift away from him after 1885. As he would not discuss it, I could not discuss it, and being absent from the city, I saw very little of him. When we did meet I saw no change in his manner toward me. He received me as he always did. He was a very dignified man, who rarely unbent to anybody. I last saw him in July, 1891."

Mr. Worthington conducted the cross-examination, which resulted in some lively tilts between him and the Major. Mr. Worthington handed him a letter dated January 2, 1892, and asked whether he had written it. The Major replied that he had. The letter read: "After many years of separation, I again approach you for assistance." The writer asked for a letter which he could lay before the general court-martial, before which he had been summoned, adding: "You have been in the past the best friend I have had, and I have always loved

and respected you as a benefactor, though a terrible misunderstanding and separation has come between us." Later on the witness said he got only a verbal reply to the letter through his daughter.

Mr. Worthington questioned him closely, for the purpose, he stated, of trying to find some reason why Judge Holt should have made a will leaving Miss Throckmorton \$80,000 or \$90,000, and nothing to the Major's son or any of the other members of the family. Nothing important was developed on this point. Maj. Throckmorton explained, however, that when he wrote to Judge Holt stating that he knew that the Judge would not let his family want, he had just learned of the collapse of a life insurance company in which he carried a policy.

Some questions came up as to the number of the elder Mrs. Throckmorton's house on Capitol Hill, and Maj. Throckmorton said to Mr. Worthington, with a tinge of sarcasm, "You might know yourself; your man was up there in the kitchen several times."

Q. "I didn't ask you about that; when it has been asserted that my man was there it will be time enough for you to tell what you know. I might ask you whether you had anything to do with sending the detectives up to Judge Holt's house."

A. "I did not, sir; I never heard of them until it was brought out here."

Mr. Worthington brought out the fact that Maj. Throckmorton's mother acted as proxy for Judge Holt at the baptism of Miss Josephine in which the water from the River Jordan figured. The witness said his mother was a strong Union woman, so far as he ever heard her express herself.

On redirect examination, Maj. Throckmorton stated that Judge Holt was a very peculiar man, and it made him furious to hear of any of

his correspondence being shown to a third party.

At the conclusion of the examination of Maj. Throckmorton, Mr. Darlington proceeded to read the deposition of *Robert S. Holt*, portions of which had been read already by Mr. Worthington. The latter, however, objected, and rather than argue the point at that time, Mr. Darlington laid the deposition aside, and was about to read letters from Judge Holt to Robert S. Holt when Court was adjourned until Monday morning.

*Monday, June 15.*

The first witness called by counsel for the legatees was Mr. S. A. *Manuel*, proprietor of the Hotel Varnum, which adjoins the Holt residence on Capitol Hill. He stated that in the spring of 1894 Luke Devlin entered the hotel office and asked for a blank card. Shortly afterward he saw Devlin going up the steps of Judge Holt's house. He did not see him enter or leave.

Mr. *Charles Baum*, bookseller, identified an old leather-colored Bible, which he stated he had purchased at the auction sale of Judge Holt's library. The Bible was then offered in evidence. It was originally the property of Judge Holt's first wife. It contained a record of their marriage and of the wife's death in the handwriting of Judge Holt.

Maj. *Throckmorton* was then recalled and gave a running account of various incidents to which previous witnesses had testified. When Mrs. Olivia Briggs was on the stand she stated that Judge Holt on one occasion took her to one of President Arthur's receptions, and that while at the White House Maj. Throckmorton had approached Judge Holt to speak to him, and that the latter had turned his back. Maj. Throckmorton stated that he had never attended one of President Arthur's receptions, and that Mrs. Briggs' statement was without foundation.

Regarding his acquaintance with

Luke Devlin, the Major said he had known him thirty-one years, having seen him frequently in Judge Holt's office. He had only seen Mr. Devlin three or four times from 1885 until the alleged will was found. Maj. Throckmorton was cross-examined regarding an interview he had with the New York correspondent of *The Post*. He affirmed a portion of the interview as published, but denied some of the statements made. He stated that he did not say that Judge and Mrs. Holt had introduced his daughter Josephine to Washington society. Mrs. Holt died when Miss Josephine was a little girl.

Asked on redirect examination as to what he really did say in the interview, Maj. Throckmorton replied: "Reporters have been the bane of my existence for the past four or five years." Mr. Worthington promptly objected on the ground that the reporters were not represented by counsel, and the court held that the newspaper men were not on trial. The remark was ordered stricken out of the record. Maj. Throckmorton continued, saying that *The Post* correspondent told him a great deal more about the finding of the will than he knew. He did tell the correspondent that he had always thought Judge Holt had made a will, if for no other reason than to provide for Miss Hynes, who had always been his ward.

The next witness was *Julius A. Truesdell*, a *Star* reporter. He gave an account of an interview he had with George Johnson, who is now employed by Secretary Carlisle, but who was formerly employed in the Holt household. The reporter stated that Detective Lacey was present at the interview, in which Johnson told him that he had heard Judge Holt say that not a dollar of his money should go to his relatives, who had abused him for his loyalty, and also that he intended to provide for Miss Lizzie Hynes.

Maj. *Throckmorton* was recalled for the purpose of identifying a letter, dated January 12, 1880, which Judge Holt had written to Maj. *Throckmorton's* wife, in reply to her letter regarding the trouble between Judge Holt and the elder Mrs. *Throckmorton*. A piece of the letter, about an inch wide, was missing from the bottom of the first page. Mr. *Darlington* read portions of it, omitting certain references to a third party, which he said ought not to be produced in court. The letter began, "Dear Mrs. Major *Throckmorton*." It dealt with the statement attributed to the elder Mrs. *Throckmorton*, and referred to on Friday, that Miss *Lizzie Hynes* had shown some of the letters Judge Holt had written her, and called him "an old fool" on account of certain terms of endearment which they contained. Judge Holt took up the matter in detail in his letter to Maj. *Throckmorton's* wife, and stated that from investigations he had made he was satisfied that Miss *Hynes* had not read any of his letters to others. He referred to his relations with Miss *Hynes* as those of friend and protector. The letter requested Mrs. *Throckmorton* to express Judge Holt's warmest thanks to Maj. *Throckmorton* for his course in the matter, and continued: "He has been my constant, true friend through many long years."

The elder Mrs. *Throckmorton* was referred to indirectly in a condemnatory tone.

Expert *Harrison Blake Hodges*, who is tall and angular, with a partially bald head and an English accent, then took the stand. He is a chemist in the office of the Southern Railway. He studied abroad, and was for four years professor of chemistry at Harvard, a position which he resigned to accept one as chemist for the Carter Ink Company.

There is very little reliable literature on the subject of inks, he said, for the reason that the manufacturers endeavored to keep their

recipes secret. Mr. *Carvalho* had testified that he had obtained a great deal of information on the subject through correspondence with ink manufacturers. Mr. *Carvalho* had also stated that archil was procured by burning seaweed, and that it was not used in the manufacture of ink prior to ten or twelve years ago. Mr. *Hodges*, on the contrary, testified that it is made from lichens, that he never heard of it being used to adulterate inks. Archil, he said, was supposed to have been known to the ancient Greeks, but of late years anilines have almost completely taken its place. Mr. *Carvalho* had applied muriate of tin to the alleged will, and in a few seconds had declared that the ink contained archil. Mr. *Hodges* declared that it was almost an impossibility to detect its presence with that chemical.

Q. "What would be your conclusion," he was asked, "if in your experiments with the ink you should discover archil?" A. "It would be my opinion that the ink was made prior to the time when the cheaper and more effective aniline dyes came into general use."

The witness was shown the bottle containing the liquid with which Mr. *Carvalho* made his experiment, but said he could not tell positively what it was. He was then handed the alleged will, and the word on which Mr. *Carvalho* made his experiment was pointed out. He was asked:

Q. "Assuming that the word has been treated with pure muriate of tin, do you believe that the result shows the presence of archil in the ink?" A. "Muriate of tin bleaches archil, while this word shows a brownish tint that could not have been brought about by the action of muriate of tin on archil. I can say positively and beyond question that the experiment has not demonstrated the presence of archil in the ink."

While this statement appeared like

a flat contradiction of Mr. Carvalho's statement, it was really not so pronounced as some of the witness' previous statements. Mr. Carvalho had held out that some peculiar phenomena occurred when he applied his liquid, which he could not explain, but which he insisted demonstrated to him the presence of archil.

Gen. Butterworth secured permission from the court for Mr. Hodges to make an experiment. After explaining the character of his chemical, which he said was chloride of tin, the witness applied it to a word in the will and quickly announced that he found iron in the ink. Upon examination he stated that there was nothing which led him to suspect the presence of archil. He gave it as his opinion that if the alleged will had been written within the last twenty years, he would have discovered aniline blue, which had been used in the manufacture of ink for even a longer period. In his opinion a man could not be a chemist in inks without being well versed in general chemistry, which reflected on Mr. Carvalho's statement concerning his own attainments.

Mr. Hodges told about the different works on chemistry of which he was the author, and made more experiments. Replying to questions by Gen. Butterworth, he stated that he did not know whether archil had been used in Arnold's inks within the last ten or twelve years, and he could not tell by chemical analysis of writing whether the ink contained archil. He stated also that it was next to impossible to get any information from manufacturers as to what their inks contained, as it was a secret very rigidly maintained. Mr. Worthington promptly objected to the statement, taking the position that while it might have been impossible for him to get such information, it was quite probable that Mr. Carvalho had been able to obtain it.

Mr. Hodges experimented on a

letter written by Judge Holt a short time prior to the date of the alleged will, and announced: "This ink is different from that in the other paper."

"That's exactly what we expected," put in Mr. Worthington, his own countenance and that of Jere Wilson being wreathed in smiles. The witness hastened to correct himself by saying that he would not be positive about it until the paper had dried. Mr. Hodges then applied the test to a letter written by Judge Holt on February 7, 1873, the date of the alleged will, and announced that all three tests produced the same result.

Q. "Can you tell, as a chemist in inks, whether there is archil in one and not in the other, or in any of them?" A. "I cannot tell, because the effect of the chloride of tin would be to bleach out the archil so that it would be entirely invisible beside the reddish brown of the iron."

Cross-examining the expert, Mr. Worthington asked:

Q. "Is not the effect on the two letters precisely the same, and is it not entirely distinct from the effect on the alleged will?" A. "There is not a pronounced difference in the color."

"There is not, eh? Well, I will ask permission of the court to show them to the jury," and having been granted the privilege, Mr. Worthington placed the two letters side by side with the alleged will, and held them up for the inspection of each member of the jury.

"Now, Mr. Hodges," he resumed, "whatever may be in that bottle, if you apply it to the same ink, under the same conditions, it will have the same effect?" A. "Yes."

Q. "And if you apply it to two inks and do not get the same effect, that indicates that the inks are different; is not that so?"

The witness began to explain that it depended a good deal upon how much of the liquid was used, and how long it was allowed to remain.



The witness was questioned regarding the manufacture of archil. He repeated his statement that it was made from lichens, which grow on the sides of hills. It was not the product of a maritime plant, he told Mr. Worthington.

Q. "Let me ask you," said the latter, "whether you recognize the *Encyclopædia Britannica* as an authority on this subject." A. "Yes, I do."

Mr. Worthington promptly produced the work in question and read the article concerning the manufacture of archil from lichens, which are found on various seashores. The *Century Dictionary* said about the same thing.

When Mr. Hodges had finished still another problem confronted the jury. If Mr. Hodges knew anything at all about ink, it was perfectly plain that Mr. Carvalho, the other expert who testified, knew nothing at all about it, and if Mr. Carvalho did know anything, then Mr. Hodges was simply talking nonsense. Impartially summed up, these two learned gentlemen made a draw of it, and the effect is about the same as if no expert evidence concerning ink had ever been introduced. Mr. Carvalho was positive that there was no iron in the ink with which the alleged will was written, but that it did contain archil. Mr. Hodges was just as certain that there was iron in the ink and he could not detect the presence of archil. Mr. Carvalho said archil is made from seaweed, and Mr. Hodges maintained that it was made from lichens, which grow on hillsides. The dictionaries and encyclopedias state that it grows near the seashore.

*Tuesday, June 16.*

The first witness called was Col. Charles James, who testified that he saw ex-Postmaster-General Horatio King in this city soon after the publication of a facsimile of the alleged will. Mr. King had told him that he was satisfied that the

handwriting was genuine, but that he could not imagine where it had been since Judge Holt's death. The court ruled out a question as to whether or not during that conversation anything was said regarding Judge Holt having been a Spiritualist. The witness was not cross-examined.

Ann Tully, a domestic in the Throckmorton family, testified that in 1891 she went twice with Miss Josephine Throckmorton to Judge Holt's house. She remained about an hour the first time, Judge Holt bidding her good-by most affectionately, and telling her to come again. The second visit was even longer, and as Miss Throckmorton started to leave the Judge said he had forgotten something, and handed her something wrapped in tissue paper. Cross-examination made the witness' testimony all the stronger, as she stated that the colored servant, Martha, answered the door, and told Miss Throckmorton that Judge Holt was expecting her.

Miss Lizzie Hynes, one of the legatees, then took the stand again, and gave a detailed account of her relations with Judge Holt. She said she was a cousin of Mary Harrison, Judge Holt's first wife, who took care of her at the death of her parents, when she was a child. She first met Judge Holt when she was five or six years old, and he seemed very fond of her from the first. She was then shown Judge Holt's family Bible, containing a record of his marriage to Miss Harrison, on April 22, 1839. Miss Hynes remembered the wedding distinctly, Judge Holt having told his wife that he would always take care of "Little Lizzie," and treat her as his own daughter.

Miss Hynes testified that Judge Holt paid her school bills, bought her clothing, and insisted on her spending all her vacations at his home in Louisville. At the death of Mrs. Holt, Miss Hynes said she

went to live with her married sister, and Judge Holt wanted to continue paying her board, but her brother-in-law would not permit it. He did pay her other expenses, however, and kept her in pocket money. The witness related many incidents connected with a number of trips which she made with Judge Holt to Niagara Falls and the large cities. She stood beside him on the steps of the Tremont House, in Boston, when he made a famous speech there. The last trip she took with him was in 1885 or 1886. During her visits to Judge Holt's house, in this city, she always heard him speak in the kindest terms of the Throckmortons. He was especially fond of Miss Josephine, and had taught her to call him "Bon Père."

Miss Hynes also gave her version of the misunderstanding between Judge Holt and Mrs. Throckmorton, the elder. The Judge had been informed that Mrs. Throckmorton had said that Miss Hynes had read some of his letters to her to a third party, and had called him an old fool. Judge Holt had given her the \$10,000 in bonds, Miss Hynes stated, in 1884, because he sometimes forgot to send her monthly remittances and he wanted her to have a fund to draw upon. He told her that he did not wish her to understand that he would not continue to provide for her. She was never dependent upon the interest on the bonds.

"I asked him once," said Miss Hynes, "what his relatives would think of his generosity, and he replied that it was none of their business. The last time I saw Judge Holt was in this city in 1891, and when we separated he said: 'Lizzie, may God be with you till we meet again.' That was the last I ever saw of the truest friend I had on earth—a friend from my earliest childhood."

Miss Hynes identified a letter from Judge Holt, which Mr. Darlington proceeded to read to the jury. It began: "My Precious Cousin," and

went on to say that he rejoiced in her independence as much as she did, adding that he would be very unhappy to think that she was at the mercy of the world. The letter added that she was perfectly safe then, but would be safer in due time.

Mr. Worthington conducted the cross-examination. Miss Hynes said she thought it very strange that no will was found after Judge Holt's death, and denied ever speaking to any one about making terms in case a will was found. She did not remember that Judge Holt kept a written account of all his expenditures. Mr. Worthington asked whether it was not a fact that after the present of bonds in 1884 Judge Holt only sent her money once. The witness replied that the Judge continued to send her money as before, but could not remember in what form it was transmitted.

She identified the writing in Judge Holt's expense book, which Mr. Worthington handed her, after which he asked her: Q. "Miss Hynes, can you now say positively that after June, 1884, when he gave you the bonds, Judge Holt ever sent you a cent until April, 1885, when he sent you \$30?" A. "Yes, I think so; I think he sent me money."

Mr. Worthington continued to question her closely on this point, but the witness could only remember positively that he gave her money when she visited him in this city.

At this point counsel for the caveators were permitted to call as a witness Mr. *Lee M. Lipscomb*, of the money order division of the post office in this city. He had with him a number of large volumes containing the records of the money order division, which showed that from 1890 to 1894 only thirteen orders were drawn on the office at Lebanon, Kentucky, in favor of Miss Hynes, amounting in all to \$465.

Miss Hynes took the stand again after recess, and in response to Mr. Worthington's question stated

that she had visited Florida since Judge Holt's death, accompanied by a Mrs. Hardin.

Q. "Do you remember telling Mrs. Hardin, in speaking of the \$10,000 in bonds, that Judge Holt had drawn a will for you disposing of it." A. "Yes, the will was drawn in 1886. I was very sick at the time and wrote to Judge Holt regarding the disposition of what he had given me. He sent me a draft of a will, which I copied."

Miss Hynes stated that she still had the will, and when Mr. Worthington asked whether she had any objection to letting him see it, said she did not think it was necessary, that a will was a private paper, and she did not care about the public knowing its contents. Mr. Worthington developed the fact that Judge Holt had written Miss Hynes that Mrs. Ray had a husband and was provided for, so that Mrs. Ray was left out of Miss Hynes' will. The witness did not remember telling Mrs. Hardin that she expected to get something more out of Judge Holt's will. She did nothing herself toward finding a will, but thought her nephew, Mr. John McCord, had written to parties in Washington concerning it.

On redirect examination Miss Hynes stated that the date of her will was January 1, 1886, and that J. M. Knott, cashier of a bank in Kentucky, and another person named Roundtree were in some manner connected with it.

"There is one mystery explained," said Mr. Worthington.

"I am glad," rejoined Mr. Butterworth, "to have our witnesses confirmed upon a point on which they were cross-examined, as if they were not believed. I never attached any importance to the theory of a will by Judge Holt of that date."

Then the inimitable Mr. Ed. Hay appeared on the stand as an expert in handwriting, which was certainly putting his popularity in the community to a severe test, for when he

appeared in court with an armful of the familiar letters of Judge Holt to members of his nephew's family, a sign of anguish involuntarily escaped the spectators. He made a large number of practical comparisons, however, which evidently made quite an impression on the jury. He stated that he had devoted many years to the study and comparison of handwriting, and had testified in courts in the District of Columbia, Maryland, Pennsylvania, Dakota, Minnesota, and Ohio. He had also devoted considerable time to a comparison of the alleged will with other papers in the case. He did not attach any great importance to the use of a microscope. He had first seen the alleged will in the Orphans' Court. It was in a much smoother condition at that time, and it was undoubtedly in one piece. He had never made any especial study of papers to determine their age, although he had examined papers to see whether they were "doctored" to simulate age. The effect was produced by saturating them in tea and holding them over the mouth of a coffee pot.

Q. "Have you examined this paper with a view of determining whether it has been ironed?"

A. "There is no evidence to my mind that it has been touched with an iron."

Mr. Darlington then handed his witness a large number of letters from Judge Holt to the members of the family of Washington Holt, which Mr. Hay identified as those he had examined.

Q. "How does the handwriting in these letters compare with the handwriting in the will?" A. "It compares most favorably. I never use the word natural; but they all appear like the writings of the same individual; they contain the same regularities and irregularities of slant."

Mr. Hay showed the jury two or three different positions in which Judge Holt might have held his

pen in order to produce the form of handwriting in the will.

Q. "You say, then, that this will gives no evidence of being written in a feigned hand?" A. "Oh, no; it could not be."

The witness went on to explain that feigned handwriting showed evidences of nervousness, caution, and careful formation of letters which were lacking in the will. He also explained the methods of tracing, but there was no evidence of this in the document in question. He had found in the letters nearly all the characteristics which appear in the will. There was no evidence of a cramped movement which Expert Carvalho had pointed out, and Mr. Hay gave the audience another lesson on the blackboard, showing the three principal forms of writing, the whole arm movement, the forearm movement, and the finger movement. Judge Holt wrote with the finger movement.

Mr. Hay took up various points in the alleged will which previous expert witnesses have stated were unnatural and proceeded to find corresponding peculiarities in a number of Judge Holt's authenticated epistles. He paid particular attention to the letter k, which in the Throckmorton in the alleged will has been said to be too large, and found half a dozen letters in which the letter was formed in the same way. These were passed around among members of the jury.

The unusually long space between the Throckmorton and the following word in the alleged will was then referred to, and Mr. Hay, after admitting that this was unusual in Judge Holt's writings, nevertheless found a number of instances in which it occurred.

Q. "It has been said," Mr. Darlington remarked, "that Throckmorton was interpolated after the balance of the document was written in each instance where the name occurs." A. "That is mere conjecture on the part of anybody who said that."

The witness said there was nothing except the space to substantiate the supposition.

About the time for adjournment Mr. Darlington and his witness had reached the point where they were conversing knowingly about "similar dissimilarities" which occurred in the letters just as they occurred in the will, and it is possible that Judge Bradley was doing them a kindness when he ordered the court adjourned.

*Wednesday, June 17.*

Mr. Hagan took the stand as soon as court convened. He is a man apparently close on to sixty years of age, short of stature, with white hair and side whiskers, and wearing spectacles. Besides being an examiner of disputed handwritings he is well versed in the manufacture of inks, and has testified in many famous will contests. He said he made a thorough examination of the alleged will of Judge Holt last January, and had examined it again last Tuesday. When he first saw the will he was satisfied that it was not in two separate pieces. When he was shown the elaborate table of measurements, which Expert Carvalho had introduced in his testimony, Mr. Hagan said he placed very little reliance on such comparisons, and had long ago discarded them. Mr. Hagan's testimony was entirely contradictory of that of Experts Frazier and Carvalho, as to various alleged discrepancies in the will as compared with Judge Holt's letters, and in answer to Mr. Darlington's question he said that he was almost certain that the will and letters had been written by the same hand. He denounced the statement that the name Throckmorton had been interpolated after the balance of the document was written, as simply guesswork. Judge Holt, he thought, wrote with a combination of the finger and forearm movement. There was no evidence of imitation in the will, and it contained many characteristics which would hardly have

been found in simulated writing. An examination with the microscope, he said, showed that it had not been traced.

As for the signatures of Mrs. Sherman, which Mr. Carvalho had testified was written by the same hand as that which wrote the balance of the will, Mr. Hagan said he found nothing to indicate that. While there were slopes in the will corresponding with the slopes in the name of Mrs. Sherman, the latter were more constant, resembling the copy-book style more than the other writing. The witness also stated that he had examined the handwriting of Luke Devlin, comparing it with that in the will. This comparison had thoroughly convinced him that they were written by two different individuals, there being nothing whatever to indicate that the same hand had written both.

Mr. Darlington then reverted to the theory he advanced some time ago that Charles Strothers, the colored man who was Judge Holt's coachman, and who has had charge of the Holt residence since the Judge's death, was the person who mailed the alleged will to the Register's office. At that time a number of photographs were exhibited showing a sign which Strothers had painted on the stable wall, stating that he had coal, wood, and ice for sale. These photographs were produced again yesterday and handed to members of the jury while Mr. Hagan testified that he had examined a number of the printed letters in the sign in connection with the inscription on the envelope in which the will was mailed and a number of letters which Strothers wrote for Judge Holt. In reply to Mr. Darlington Mr. Hagan stated that it was his opinion all were the work of the same individual. The construction of the punctuation marks, he said, was similar throughout.

Mr. Hagan had also examined the will with a view of determining whether artificial methods had been

used to give it the appearance of age, and found nothing to indicate this, although it had a smoky appearance in places, due to partial burning. He undertook to give his views as to just how the will was burned, but Mr. Worthington objected and the court sustained him.

The witness next took up the subject of archil, which Mr. Carvalho had testified was not used in ink until ten or twelve years ago, and which since that date had been a characteristic of Arnold's writing fluid. Mr. Hagan stated that it was not used in inks to any extent, although he had found it in an English ink which he had analyzed in 1848. He said, however, that its presence could not be detected by the use of muriate of tin, which chemical Mr. Carvalho claimed to have used when he made his alleged discovery that there was archil in the ink with which the will was written.

The witness was then turned over to Mr. Worthington for cross-examination, who produced a book on inks, written by the witness, in which archil was referred to. Expert Carvalho's bottle of chemical was also produced, but the witness could not tell from looking at it what it was. Mr. Worthington read extracts from the work on inks, and asked the author whether his understanding of the question was still the same. Mr. Darlington protested that this was not treating the witness fairly, and Mr. Worthington retorted warmly that if it was not treating him fairly, he did not know how to do it. In one chapter of the work it was stated that when competently executed a chemical test would disclose whether all the writing in a document was done with the same ink. The witness still held the same opinion.

Mr. Hagan was questioned regarding the various points in the alleged will which have been pointed out as at variance with Judge Holt's style, but they did not seem to

strike Mr. Hagan so forcibly as they did Mr. Carvalho.

Mr. Worthington handed the witness Judge Holt's letter of the same date as the alleged will, of which counsel for the caveators have had facsimile copies made. Mr. Hagan was asked:

Q. "How many times does the word 'to' occur in that letter?"

A. "I find it eight times."

Q. "And how many times is the letter 't' made with a loop?"

A. "I don't find any of them."

Q. "And how many do you find made with a loop in the will?"

Lawyer and witness counted them together and agreed that there were six. Mr. Worthington continued:

Q. "That would not indicate anything to your mind, I suppose?"

A. "Not if I found it to be the habit of the writer to use both."

Q. "Yes, but on the same day. It didn't appear to be his 'loopy' day when he wrote the letter."

The other "t's" in the letter of February 7, 1873, were pointed out to the witness by Mr. Worthington, who interjected "no loop" as he came to every "t." Summing up the result, he announced that in the alleged will the "t" was only made with a loop when it occurred in the word "to," and that there were no "to's" with loops in the letter.

After this question was disposed of a board about twelve feet long was brought in and placed before the jury at a height of about five feet from the ground. An enlarged photograph of the alleged signature of Judge Holt attached to the will was tacked on the blackboard. Mr. Worthington explained that the letters spread across the board contained the genuine signatures of Judge Holt from 1861 to 1894, and asked Mr. Hagan to indicate which pile of letters gave evidence that Judge Holt was beginning to make a cross instead of a curve across the two staffs of the "H" in his signature.

The enlarged photograph was abandoned, however, and the jury

were handed the photographs of the entire will. The examination then turned on the curve to the J in the signature and the dot at the beginning of the signature. Among the various piles of letters the witness tried to find signatures without dots, while Mr. Worthington strained his eyesight in an effort to get dots on the witness.

This portion of the cross-examination of Mr. Hagan produced the driest of all the tedious expert testimony. It dealt largely with minute measurements and comparisons, among the lawyers and the witness, which were not likely to be comprehended except by a jury of mathematicians. The character of the testimony is well illustrated by the fact that Mr. Worthington read an extract from Mr. Hagan's book in which the statement was made that only once out of 2,866,000,000,000 times would two signatures of the same individual agree exactly as to size and formation when examined transparently. At one point the court seemed impressed with the idea that only the witness, besides Mr. Worthington, of course, had the remotest idea of what was going on. He suggested that it might be a good plan to make a record of dates and other statistics, to which Mr. Worthington made the unconsciously humorous response that he thought everybody was listening, including the stenographer.

For purposes of exact comparison, Mr. Worthington produced some photographs, on a transparent substance, of the words "these" and "Washington" in Judge Holt's letter of the same date as the will. The transparent photographs were placed over the same words occurring in the alleged will, and the witness invited to examine them. Mr. Hagan did not think the words corresponded exactly, but Mr. Worthington, somewhat in a tone of triumph, invited each member of the jury to step up and view the result for himself.

Mr. Worthington produced a transparent photograph of a portion of the will and placing it over the letter of February 7, 1873, asked the witness to compare the words "the city of." Mr. Hagan had previously testified that where words were found to compare exactly under such treatment it was a good indication of forgery by the tracing method. The witness indicated several points in which the words compared did not exactly agree, but Mr. Worthington again called on members of the jury to decide for themselves.

Mr. Worthington continued his efforts to convey the impression that the alleged will was forged by tracing from Judge Holt's letter of the same date, placing the name "Holt" where it occurred in "Josephine Holt Throckmorton" in the transparency, over the signature "J. Holt" in the will itself.

Mr. Worthington then summed up all these striking similarities and asked:

"Now, what do you think the chances are that the writings of a man on the same day would exhibit all these similarities?" A. "It would be improbable even with a man writing under the same nervous condition on the same day; but it might occur. It is not impossible, although it looks as if the chances were against it."

"So it does begin to look a little improbable, even to your mind," was Mr. Worthington's rejoinder.

The court adjourned at this point, and Mr. Worthington will bestow further attentions on Mr. Hagan to-morrow. Originally Mr. Hagan was the caveatee's witness, but people who dropped into the court room in the afternoon were under the impression that he was the exclusive property of Mr. Worthington, as that gentleman had taken him completely in charge and had him penned in behind a big board loaded down with letters written by Judge Holt and arranged so the dates were

not visible. Mr. Worthington worked up his tracing theory very artistically, and earlier in the trial the climax might have been sensational, but yesterday it only created a ripple of surprise. It was simply the development of a theory that the will might possibly have been forged by tracing most of the words from Judge Holt's letter of February 7, 1873. When opposing counsel are afforded their next opportunity, however, they will produce other letters in which the similarity is equally marked. As it is at present, however, whenever they produce rebuttal testimony Mr. Worthington manages to make his cross-examination last about twice as long as the examination-in-chief.

*Thursday, June 18.*

The cross-examination of Expert *Hagan*, of Troy, was resumed at the opening, and Mr. Worthington again subjected him to the most searching examination. The witness stated that he had observed in Judge Holt's writing a tendency to write the same words almost identically alike, which he thought accounted for the fact that many of the words in the letter and in the will bore an almost exact resemblance.

Mr. Darlington devoted a good deal of his redirect examination of Mr. Hagan to an effort to overthrow Mr. Worthington's theory of tracing. The witness selected a letter written by Judge Holt on February 11, 1888, fifteen years subsequent to the date of the will, and pointed out that the word Washington corresponded almost exactly with that in the gelatine print of the will. He added: "There is just as much similarity between the Washington in this letter and the Washington in the will as there is when I compare the word in the will with that in the letter of February 7, 1873."

These investigations were continued until recess, after which Mr. Worthington resumed his cross-examination. He wanted to know

whether the witness had found any letters containing words almost a fac simile of the words in the will, which he had not referred to. Mr. Hagan said he had produced all that were of any importance. Judge Holt's letter of September, 1873, was then taken up by Mr. Worthington, who, in his effort to substantiate the tracing theory, called attention to the words "standard work of the highest character," and asked the witness to compare them with the words "character" and "highest standard" in the will. Mr. Hagan said that, while there were similar characteristics of spacing, the loops were different, and many of the letters were differently formed. Mr. Worthington, however, asked each member of the jury to observe the similarity. He wanted to know whether the witness was aware of the fact that, outside of letters which had been in possession of Maj. Throckmorton and his family, he had only been able to find one word of more than a single syllable that corresponded to any marked degree with the same word in the will. Mr. Hagan said he did not know where the letters came from.

There was considerable sparring between Mr. Worthington and the witness.

Q. "Now, Mr. Hagan, let me ask you to compare the capital D in Devlin with the D in Washington, D.C., in the will. I believe you said yesterday that when letters examined transparently were found to correspond exactly it was a good indication of forgery. I suppose the resemblance in this case does not suggest anything wrong to your mind?" A. "That would depend entirely upon the connection in which I found it."

Q. "Well, but when you find it in connection with twenty or thirty other similarities, how then?"

Lawyer *Ed. Hay*, as an expert, was recalled. He had been making comparisons himself, and the dreary

grind of measurements and comparisons began again as soon as he took the stand. He testified that of 150 of Judge Holt's signatures examined he had not found two alike. Mr. Hay compared the handwriting of Luke Devlin with the will, and found the only general resemblance to be in the "inclination to be vertical." There was really no comparison between the handwriting of Mr. Devlin and Judge Holt. The will exhibited none of Mr. Devlin's peculiarities.

After pointing out, in the authenticated writings of Judge Holt, these various peculiarities, the witness was asked:

Q. "Will you tell us, from your comparison of the will with the letters in evidence, what conclusion you have reached?" A. "My opinion is that the same hand that wrote the letters in exhibit here wrote the will. If Judge Holt wrote the letters, he wrote the will."

Q. "With what degrees of positiveness can you state this?" A. "As positive as one can be from a comparison of handwriting. It is not so difficult to imitate a signature, but it would be impossible to get up a whole page of script to present all the similarities found in this document as compared with the other writings."

*Friday, June 19.*

Lawyer-expert *Ed. Hay* resumed the stand at the opening and continued to point out characteristics in the will and writings of Judge Holt, on which his belief as to the genuineness of the document was founded. There was not a letter in the will, he said, of which he had not been able to find the counterpart in Judge Holt's letters. Under cross-examination, he was asked particularly regarding the word "of," which he stated on Thursday was one of the strongest characteristics in the document. He admitted that the word was written, wherever it occurred in the will, with greater regularity than any other word.



Mr. Hay explained the method of tracing writings by placing them on a barrel over a strong light.

Q. "Tracing in that way does away with the necessity of using a pencil first, the marks of which must afterward be erased, does it not?"

A. "I presume so."

Q. "How nearly can an expert penman, like yourself, imitate the handwriting of another person?"

A. "I can come very close to it."

Q. "Close enough to deceive the ordinary observer, myself, for instance?"

A. "Well, I think I could deceive you, Mr. Worthington," replied Mr. Hay, smiling blandly, while the audience laughed, and even Judge Bradley joined in.

The witness said it was much easier to imitate an odd or unusual signature than a simple one. A very eccentric signature could be readily imitated for that very reason. Mr. Hay was next questioned as to space between certain words in the will, and also the punctuation.

In reply to a question, he said he had not been able to find in any of Judge Holt's letters any line in which he left such a space between two words as occurs after the name of Josephine Holt Throckmorton in the will, but that he had found considerable space between the end of one sentence and the beginning of another on the same line. This answer was objected to, Mr. Worthington complaining that Mr. Hay was taking advantage of opportunities to state what he had not been asked. The court held that the witness must confine himself to the questions put to him. Mr. Hay said he had found no letter of Judge Holt's in which the lack of punctuation marks was so marked as in the will.

During recess Mr. Hay reproduced on the blackboard a number of Judge Holt's signatures, taken from letters of various dates, while he also made a good imitation of the signature attached to the will. The

witness pointed out several points of difference between the signatures, the one attached to the letter of September 29, 1873, he thought, being decidedly different from any other signatures he had found. After efforts had been made by the opposition to discredit some of Mr. Hay's comparisons, the long board which has figured in the trial for the last three days was removed.

Miss Hynes was recalled by Mr. Worthington to identify the will which Judge Holt had drawn up for her. The will was placed in evidence. It simply disposed of the \$10,000 in District of Columbia bonds, bequeathing them to Miss Hynes' two nieces, the Misses McCord. Replying to questions, the witness stated that Judge Holt never had the will in his custody after it was executed, and that she did not remember any correspondence regarding it. R. H. Roundtree was the original executor, but after his death Miss Hynes, in another paper, appointed W. M. Knott executor.

Mrs. Ray took the stand, also at Mr. Worthington's request, and identified a letter which Judge Holt had written her in reply to a request for a loan of \$4000. Mr. Darlington objected to the introduction of the letter as evidence, but was overruled, and he noted an exception. The letter was dated October 11, 1884, and in it Judge Holt said he had sold four bonds, from the proceeds of which he sent her a draft for \$4000, as a loan to her husband. Mrs. Ray held in her hand another letter from Judge Holt to her husband, dated January 11, 1886. When she referred to it Mr. Worthington said he would like very much to have it. The witness promptly handed him the epistle. The letter was turned over to Mr. Darlington, who lodged an objection to its admission upon the ground that it contained matter of a nature that had already been excluded. The court, however, decided to admit the letter, and an exception was again

noted. Before the letter was read Mr. Worthington read a number of Judge Holt's indorsements on the back of Mr. Ray's note for \$4000, regarding non-payment of interest. The letter itself was full of scathing denunciations of the borrower. The Judge said he regarded his promises to pay as "little less than mockery." The failure to take up the note, he declared, was a deliberate breach of faith, for which there was no decent excuse. Judge Holt also referred to an offer he had previously made to Mr. Ray to take up the \$4000 note for \$2000.

Mr. Worthington then introduced some memoranda found among Judge Holt's papers at the safe deposit, in which were a number of bequests to such institutions as the Emergency Hospital, the Washington Humane Society, and the municipal lodging house.

The feature of the case yesterday was the reappearance on the witness stand of Miss *Josephine Holt Throckmorton*, the most important part of her testimony being in rebuttal to that of the colored servants at Judge Holt's house regarding her visits there. The witness' first recollection of Judge Holt was of his visiting her father when he was stationed at Fort Washington, and trying to teach her to call him "Bon Père." Her father was ordered to California in 1872, and when she was seven years old, Judge Holt sent her a ring set with seven pearls. Her subsequent relations with Judge Holt were gone into, and Gen. Butterworth asked:

Q. "Was there ever, from your earliest recollection, down to the last time you saw Judge Holt, any change whatever in his bearing toward you?"

A. "Never; not the slightest."

She corresponded with Judge Holt constantly while she was absent, and called at his home at least twice a week while she was here. He made her presents of jewelry and books, and treated her most affectionately on all occasions. Once Judge Holt expressed

a desire to see her in evening dress, and in 1885, when she was on her way to one of President Cleveland's receptions with her father, she stopped at Judge Holt's house. The dress she wore on that occasion was her mother's wedding dress.

Q. "How did Judge Holt address you?" A. "He called me Josephine; I have never been called Jo. He always said 'Josephine,' or 'my child.'"

On her birthday in August, 1887, Judge Holt gave her a diamond ring. Referring to one occasion when she called at Judge Holt's house, Miss Throckmorton said:

"The servant who came to the door, the girl sitting over there [indicating Martha Thomas], said Judge Holt had just gone out, but just then I saw my godfather walk across the porch, so I called to him, and told him the girl had said he was out. He asked her how it was, and she replied: 'The young lady misunderstood me; I said you had just come in.'"

Martha, the servant, had been listening intently to this testimony, and at this point shook her head vigorously. Miss Throckmorton referred to Judge Holt as either "Bon Père" or "my godfather" throughout her testimony. He invariably kissed her when they met, she said.

Q. "When did you first begin to have difficulty in seeing Judge Holt?"

A. "The first time was in 1887, of which I have just told you. Again in 1888 I went to his house. Ellen, the cook, came to the door and told me my godfather had gone to Kentucky, and would not be back for six months. The next morning I went to the market and met my godfather there. I told him I thought it was queer, and he said: 'When you are coming to see me, just write and let me know.' I noticed after that when I wrote to Bon Père and let him know I never had any trouble in getting into the house."

Q. "Do you remember his send-

ing word to you and your brother to leave his premises?" A. "It is absolutely false. I never received such a message. I was here on that visit only during the months of December, January, February, March, and April, and could not possibly have been eating peaches in his yard; at least, if there were any peaches there, I didn't see them."

Miss Throckmorton told of other presents Judge Holt had given her, and also of his offer to send her abroad to study art. She denied ever having spoken to Charles Strothers, or ever having visited Judge Holt's house heavily veiled. When she began to relate the incidents connected with her visit to Judge Holt in behalf of her father when he was in trouble, Miss Throckmorton wept copiously, and her testimony came slowly. She testified that Judge Holt was deeply affected and advised her to write to a Mr. Huntington and get a letter of introduction to Vice President Morton. She referred frequently to her father's army record and to the great injustice which was done him. The witness said she did not know why the servants had declined to admit her to Judge Holt's house.

When Gen. Butterworth brought up the subject of Judge Holt's letters to the Throckmorton family, he asked the witness where these letters had been kept prior to the discovery of the will. She replied that they were kept in a wooden box.

Q. "How was that box fastened?"

A. "Nailed," said Miss Throckmorton, with so much vehemence that it caused a general titter.

It was nearly 4 o'clock when the cross-examination of Miss Throckmorton was begun. She was asked regarding her letter to Mr. Devlin prior to the discovery of the will, but without additional developments. She was also questioned closely as to the names of the servants at Judge Holt's during different periods, but her recollection was not very

clear regarding them. The cross-examination was interrupted by Judge Bradley's adjourning the court.

*Monday, June 22.*

Detective Lacey was called by the caveatees to testify regarding the interview between Reporter Truesdell and George O. Johnson, Secretary Carlisle's butler, who was formerly in Judge Holt's employ. Lacey was present at the interview, and testified that Johnson said he had been sent for by Mrs. Washington Holt, and that she expressed surprise and disappointment because no will had been found. Johnson had also stated that Judge Holt said once in his hearing that none of his property should ever go to any of his relatives who had criticized him for his loyalty to the Union.

Cross-examined, Mr. Lacey also testified to Johnson's statement regarding the quarrel between Judge Holt and the elder Throckmorton. Johnson said he regretted it at the time because the innocent children who had nothing to do with the trouble would be the sufferers. For his own part, however, he had been the gainer by the misunderstanding, as prior to that Judge Holt's carriage had been at the disposal of Mrs. Throckmorton, and she had used it nearly every day, which made him extra work.

Miss Throckmorton was recalled to the stand, and her cross-examination resumed. She was questioned closely as to her visits to Judge Holt's house, and the fact was developed that she never saw Mr. and Mrs. Holt, Miss Holt, Mrs. Ray, or Col. Sterett until the trial began. Mr. Worthington wanted to know whether it was possible for Judge Holt to have gone to Niagara in 1885 without her knowing it, and the witness replied that she remembered his going, as he sent her presents from Niagara on that occasion.

"Miss Throckmorton," asked Mr. Worthington, "do you remember that your father wrote your mother that he had received a letter from

Judge Holt agreeing to take care of his wife and children in case he was killed?"

The question was objected to, and the examination turned upon the letters which had been placed in evidence. Miss Throckmorton repeated her statement that they had been kept in a box securely fastened until the alleged will made its appearance, when the box was opened and her brother brought the letters to Washington last summer. One of the letters found in the box, Miss Throckmorton stated, was from Gen. Sherman to Judge Holt, in relation to the Modoc war, but the statement was objected to, and the objection sustained by the court.

The witness also stated that she had kept a scrapbook of papers connected with the will case, beginning with the telegram from Luke Devlin, regarding the discovery of the alleged will, and including various newspaper articles on the subject. She offered to produce the book if necessary. Mr. Darlington stated that he intended to rest his case with Miss Throckmorton's testimony, but had concluded to place her brother, Wickliffe Throckmorton, on the stand, adding that he would be here on Tuesday. Otherwise his evidence was all in.

*George Johnson* was recalled by Mr. Worthington at this point, for the purpose of testifying to the fact that Judge Holt kept a set of account books in which he recorded even his smallest expenditures. He identified the books handed to him by Mr. Worthington. Martha Thomas was also recalled and testified to the same fact. She was also questioned regarding the statement of Ann Tully, the Throckmortons' servant, that she had accompanied Miss Throckmorton on two occasions to Judge Holt's house. The witness testified that the first time she had ever seen Ann Tully was when she appeared in court. Ann Tully had stated that she sat in the hall for an hour and waited for Miss Throckmorton, but

Martha said the hall was narrow and dark and nobody ever sat there as it was too narrow to keep a single chair there.

Mr. *Frederick F. Schrader* was also recalled to elaborate the story of his interview with Luke Devlin, several points of which the latter had failed to confirm when he was on the stand. Mr. Schrader stated that when Mr. Devlin had expressed the belief that the signatures to the alleged will were genuine he had not excepted that of Mrs. Sherman's. Devlin had told him, to illustrate the intimacy between Gen. Grant and Judge Holt, that Gen. Grant had once offered to make Judge Holt Secretary of War. Mr. Devlin had also stated that he supposed the will was signed and attested some evening when all the parties were at Judge Holt's house.

*Charles Strothers*, another of Judge Holt's servants, took the stand again and corroborated the testimony of Johnson and Martha Thomas as to the account books and also as to the size of the hall at the Holt residence. He had never seen a chair in the hall.

Mr. Worthington recalled Miss *Mary Holt*, Washington Holt's daughter, who identified Judge Holt's account books, and stated that, at Mr. Worthington's request, she had examined the books carefully from 1872 to 1888, and made a list of all items of expenditure, with which the initials of Miss Elizabeth Hynes were connected. The books showed all the trips Judge Holt had made away from Washington, and the last record of a trip to Niagara with Miss Hynes, the witness found to be October 6, 1879. Mr. Worthington placed in evidence that portion of the entries covering the expenses of this trip down to expenditures of 5 cents. After recess Miss Holt identified a list, which she made from Judge Holt's expense books, indicating amounts paid to "E. H." (Elizabeth Hynes), beginning in 1872. The amounts specified payments aggregating between \$600 and \$700

per annum up to 1884, when the present of \$10,000 in bonds was made. After that the payments fell off to \$30 in 1885, \$25 in 1886, and \$50 in 1887.

Q. "Now, Miss Holt," asked Mr. Worthington, "in examining these books, did you find any entry indicating presents to any member of the Throckmorton family?"

A. "I have never found the name Throckmorton in any of the books I have examined."

The questioning and cross-questioning of the witness as to the method she had pursued in making extracts from the elaborate expense accounts occupied considerable time, Mr. Worthington explaining that one object was to show that Miss Hines was mistaken in testifying that she went to Niagara Falls with Judge Holt in 1885.

Mr. Worthington called *Edward F. Frazier*, a photographer, who testified that he made the gelatine print of the alleged will, the photolithographs of Judge Holt's letters of February 7 and September 9, 1873, and other photographs of portions of various documents, which have been introduced as evidence.

*Robert E. Carmody*, a draftsman, identified a diagram of the interior of the Holt residence, which he made yesterday morning.

Mrs. *Meigs*, wife of a deputy clerk of the court, who has lived on New Jersey avenue near the Holt residence for thirty-one years, was called. She knew the Throckmortons and had seen the children call at Judge Holt's house when they wore short dresses. She did not remember their calling after that.

Q. "Do you know anything of Miss Throckmorton's calling there at the time her father was in trouble?" A. "I heard of her being there, but did not see her."

Under cross-examination, the witness admitted that people might have entered the Holt house without her seeing them. Mr. Worthington produced a letter written

by Maj. Throckmorton's wife to Judge Holt in which she had written asking for \$2000. The second letter stated that she had secured \$1000, and continued: "Won't you, dear Mr. Holt, let me have \$1000? Charlie is to be tried by court-martial, and we are very much distressed."

At Gen. Butterworth's request Miss *Throckmorton* took the stand, and testified regarding the letter written by her mother. She said that almost immediately after the letter was written, the necessary amount had been secured. She came on to Washington, and went to Judge Holt's house. He told her he would gladly let her have the money, and said if she would return in the afternoon, he would make the necessary arrangements. She thanked him, but told him that they did not need it then.

Q. "Did you ever take any other verbal answer from Judge Holt to letters from your parents?" Mr. Worthington inquired. A. "No, I can't say that I remember doing so."

Mr. Worthington thereupon produced a letter from Maj. Throckmorton, to which he testified he had received a reply through his daughter. The letter requested Judge Holt to send the Major a letter which he could place before the general court-martial.

A. "Yes, I recall now," said Miss Throckmorton. "My godfather said he would be glad to give father a letter, but he would have to dictate it, as he was in such a condition then that he could not write himself."

Q. "Did he dictate that letter?"

A. "No; because he was informed that it was not needed."

At 2.45, on the first day of the sixth week of the trial, Mr. Darlington announced: "We rest here, your honor, so far as we are concerned."

Mr. Darlington thought they should make an effort to dispose of the prayers to instruct, so the jury was excused for the day, and the lawyers

began their consultations. It developed that only Mr. Darlington had his prayers prepared, but the court suggested that as he was the plaintiff he should submit them. This was done at once. There were eleven of them altogether, the most important being those referring to instructions regarding the evidences of revocation. Mr. Darlington asked that the jury be instructed that they must not find revocation merely upon the evidence of the paper appearing in a burned and mutilated condition. They must find that the mutilation was the work of Judge Holt himself, or that it was done by his direction, and that it was done for the purpose of revocation. In order to substantiate the theory of revocation by a subsequent will, Mr. Darlington contended, the caveators must have satisfied the jury that a later will was in existence at the death of Judge Holt, or that it was accidentally or fraudulently destroyed during his lifetime.

Mr. Worthington then made a general review of the prayers of his opponents, objecting to all of them from the fourth to the thirteenth inclusive. He said it was practically asking that the jury be instructed that the caveators must explain the mystery of the will, and that unless they can do it the paper must be admitted to probate. Mr. Worthington thought that the proper way in which the jury should be instructed was that there was no burden of proof about it. He thought his side would be justified in asking the court to instruct the jury that from the appearance of the paper, and the fact that it came from nowhere, the presumption must be that it had been revoked if Judge Holt ever executed it. He would also ask that the jury be instructed that if there was any doubt in their minds as to whether Judge Holt executed the will, then their deliberations must be confined to that point.

*Tuesday, June 23.*

At the opening yesterday Capt. James E. Bell, superintendent of the city delivery of the general post office, was called to the stand for the purpose of having all his information concerning the mailing of the will appear in the record. It did not take him long to tell all he knew about it. It was only possible for him to say that the envelope was collected in the north-west section of the city on the 4 P.M. collection.

Maj. Throckmorton's son, *Charles Wickliffe Throckmorton*, was called by Mr. Darlington. He stated that he was in Washington in the months of June and September, 1895. He came the second time for the purpose of seeing Luke Devlin, and that was the first time he ever saw him. He first saw the alleged will on Labor Day, 1895. He brought with him the letters from Judge Holt to the Throckmortons, which have been introduced in evidence. He had never seen the letters prior to that time.

Following this testimony, Mr. Worthington read a list of entries taken from Judge Holt's expense books for the years 1889, 1890, and 1891, for the purpose of rebutting Miss Hynes' testimony that Judge Holt still continued to send her monthly allowances after having presented her with \$10,000 in bonds in 1884. Mr. Worthington's list showed that in no one of the three years mentioned did Judge Holt send Miss Hynes more than \$150, while prior to the gift of bonds the allowances had averaged \$50 per month.

Mr. Worthington also undertook to prove by these same expense books that the dinner at Judge Holt's house, referred to several times during the trial, at which President and Mrs. Grant and Gen. and Mrs. Sherman were present, was given on February 21. An entry under date of February 22, 1873, showed that Judge Holt had paid a caterer \$110 for a dinner the

day before. This was for the purpose of correcting a possible impression that the dinner was given on the date the alleged will was executed. Several letters were also read, indicating that the breach which had previously existed between Judge Holt and Mr. Ray, husband of Miss Hynes' niece, had been healed.

At 11.45 both Mr. Worthington and Mr. Darlington announced that they had no more evidence to present, and Judge Bradley promptly excused the jury until 1 o'clock, so as to give the lawyers free scope for the battle over the prayers. This occupied nearly an hour, in the course of which there were several little tilts between opposing counsel. Everything was finally arranged, however, and immediately after recess Mr. Blair Lee began the opening argument in behalf of the caveatees.

Mr. Lee began by calling attention to the privilege of his opponents to set up two lines of defense — forgery and revocation — adding, however, that common sense compelled them to adopt one, as the one was absolutely inconsistent with the other. "It will become necessary," he continued, "for the gentlemen on the other side, when they come before you with their argument, to decide whether they will hold that this paper is or is not a forgery, or whether there was revocation of the document."

Mr. Lee went on to say that it had become necessary for his adversaries to "shift their ground." Mr. Worthington, at the outset, had contended that Judge Holt could not by any possibility have created Maj. Charles B. Throckmorton a trustee, but it had been clearly proven that Maj. Throckmorton was not guilty of the charges laid at his door. Besides, these charges were made long after Miss Josephine Throckmorton became of age, and the trust had expired. Mr. Lee referred to the

great stress his opponents laid upon the finding of a memorandum in Judge Holt's closet. "Nearly every witness placed on the stand referred to it, until, taking a hint from the cross-examination, Brother Worthington tried to hedge a little. And then the whole matter fell upon the simple statement of Miss Hynes that the will referred to in the memorandum was her will, and the executors her executors." Mr. Worthington's picture of the tender relations between Judge Holt and the Steretts was next touched upon. "It was stated that during the last few years of his life Judge Holt leaned upon them like a cripple upon his crutches; and yet their own witnesses testify that Judge Holt could not understand the two Col. Steretts, the one always making money and the other always hard up. And this Col. Sterett, who made his entry to the house by the back way, was unable to get possession of the keys and watch from this dead man's body. That 10-cent key to a 10-cent lock may have been small protection, but they were intrusted to a servant of Judge Holt's rather than to this faithful, intimate, and tender nephew."

Mr. Lee referred at length to the emphasis laid upon the alleged separation of the contested document, and to the testimony of various witnesses to the contrary, and also to the statements of Fred Grant and William T. Sherman, Jr., as to the genuineness of the signatures of the witnesses. Regarding the burning of the documents at the Holt house, Mr. Lee said he had always regarded it as strange that Washington Holt should have ordered certain letters, which he was particularly interested in having destroyed, burned on a portion of the premises where he could not see them.

Another significant fact, Mr. Lee thought, was the appearance of the will at the very time that Charles Strothers was about to be ejected

from the Holt residence, where he had been living, tax free and rent free, ever since the Judge's death. After the will appeared, however, Strothers continued to live there, and was likely to remain indefinitely.

Mr. Lee took up what he called the "trick transparency of this campaign." He said he had carefully compared the word "Washington" in the letter of February 7, 1873, upon which so much stress was laid, with the word in the transparency, and that to his eye "unaided, or rather undimmed by this gelatine partition, there was a slight difference in nearly every stroke." Mr. Lee also drew a comparison between the statements of numerous witnesses, both expert and non-expert, that the alleged will was a forgery, by reason of various existing or lacking characteristics, and Mr. Worthington's claim that many words in the will were simply traced from letters written by Judge Holt. A memorandum found at the safe deposit and dated a month subsequent to the alleged will, which Mr. Lee claimed presented the strongest resemblance to the writing in the will of any document yet produced, was then handed to the jury for their inspection.

Judge Holt's relations with his family prior to the date of the will were referred to by Mr. Lee, dwelling upon the fact that Judge Holt was not on very intimate terms with his relatives until long after the date of the alleged will. After a time, however, Judge Holt did take an interest in his old home in Kentucky, and finally grew to love it, but Mr. Lee held that this love did not extend to his relatives. And the influence which Washington Holt thus acquired over his uncle was not used to bring about affectionate relations between Judge Holt and the balance of his family, for there were no family reunions at Holt's Bottom. So far as Judge Holt's relations with the Throckmorton family were concerned, Mr.

Lee thought they made the writing of such a will as the one in question extremely probable.

Mr. Lee attacked the testimony of witnesses regarding troubles between Judge Holt and Luke Devlin, claiming that if Witness Fought had known of such actions as he accused Devlin of on the witness stand, he would not have gone to his superiors with trifling tales when he had it in his power to crush Devlin by telling of the more serious irregularities. He reviewed at length the testimony of the witnesses in Devlin's behalf.

Mr. Lee was bitter in his attack on the testimony of the caveators. Mrs. Washington Holt's veracity, he said, was attacked by her cousin, and Mr. Holt's lack of veracity was admitted by himself. "They come here desperate," he continued, and charge a great crime to a man (Luke Devlin) who has a very small interest in this case. They are like the character in the Scripture who, having been forgiven a great debt, went out and took the man who owed him a penny by the throat."

Mr. Lee made the most of the picture of Maj. Throckmorton in the lava beds of California, about the time the alleged will was executed, writing to Judge Holt and saying that he hoped to return to his darling wife and little ones by a certain date, but that if he should be so unfortunate as not to get back, he knew Judge Holt would not let his family want.

At this point Mr. Lee announced that his time had expired.

Mr. *Darlington* began his address to the jury. He said at the outset that there were only two points for them to consider: first, whether Judge Holt executed the will, which he thought was simply a question of whether it was in his handwriting or not, and, second, if Judge Holt did write it, did he revoke it?

Mr. *Darlington* proceeded at once to discuss the inconsistency of



Washington Holt's conduct, after accusing Charles Strothers of stealing or destroying a will, to subsequently place him in charge of the Holt residence. The rejection by Washington Holt of Mr. Devlin's suggestion that the house be rented was also commented on, and Mr. Darlington proceeded to review the testimony tending to show that Charles Strothers addressed the envelope in which the will was received at the Register's office. He said there were five times as much evidence to show that Strothers did it as there was to indicate that Devlin was the man.

Mr. Darlington confined his attention largely to the technical features of the case, going over the evidence as to the handwriting and the composition of the alleged will, from the standpoint of both the lay and the expert witnesses. He took Mr. Carvalho's minute measurements of characters in the will and the letters written by Judge Holt, and claimed that they were all in favor of the will. Mr. Carvalho's composite photograph of Judge Holt's signature, Mr. Darlington said, also compared very favorably with that in the will. Mr. Darlington also added: "I don't like to discuss Mr. Carvalho, as I will say very frankly that he did not impress me favorably, and I believe he had the same effect on you. He attempted to impose on the jury as science things that are the veriest nonsense in the world."

The testimony of Mr. Carvalho, that the ink with which the will was written was not in existence at that date was vigorously attacked by Mr. Darlington, who said: "If that record does not satisfy any man that he is unreliable, untrustworthy, and unentitled to belief, then I am doing him a great injustice." He read Mr. Carvalho's evidence concerning archil, and continued: "He is evidently a man ignorant of what he pretends to

know, who attempts to impose on people whom he assumes to be as ignorant as himself."

Mr. Darlington combated the theory that Judge Holt was a strict technical lawyer, and poked fun at the testimony of some of the witnesses to this fact, one of whom did not know the difference between caveatees and caveators. He also assailed Washington Holt's statement that he did not believe Judge Holt would have used the expression "highest standard," or that he would have used the word "inherit" as applying to personal property.

Mr. Darlington endeavored to point out that the selection of Luke Devlin as executor was a perfectly natural proceeding, in view of whom the beneficiaries were and the character of the property to be divided. He asked the jury to compare the letters written by Judge Holt about the date of the will to members of his family with those he wrote to the Throckmortons, and those in which Miss Hynes was mentioned, and judge for themselves who he would have been most likely to make his beneficiaries.

Mr. Darlington had not quite finished his address to the jury when the hour of adjournment arrived. The court has restricted the time for argument to three hours for each side.

*Wednesday, June 24.*

Mr. Darlington, for the caveatees, faced the jury again as soon as court opened yesterday morning, and began in his suave and easy manner to unfold his theories. He thought it passing strange that his opponents should first devote several weeks to showing that the will was written in a hand thoroughly unlike that of Judge Holt, and then another week to arguing that the resemblance was so close that it could only have been accomplished by tracing. It was also curious, if tracing was the method resorted to, that, while unimportant words had been traced, no signa-

ture of Judge Holt's could be found which was an exact facsimile of the one in the will.

In reviewing the evidence on his side of the case, Mr. Darlington said fourteen witnesses had sworn that the handwriting was genuine, and, besides, the very appearance of the paper itself was inconsistent with the theory that the will was not genuine. It was absurd to suppose that any one attempting to perpetrate a forgery would have burned and mutilated his work in such a manner. As for the sending of the will to the Register's office, Mr. Darlington admitted that he could tell nothing about it. He had his own theory, and he presumed the jury had theirs. "As for the burning," he continued, "I can only say that if the paper had been folded twice and thrust into a fire in a coal scuttle or a grate, it would present about the same appearance as it does now." There could be no doubt as to the genuineness of the signatures of the witnesses; that had been proven beyond question. It had also been shown conclusively that the paper was in one piece when it reached the Register's office.

The character of the persons involved, he said, was additional proof that no such crime as forgery had been committed. A review of Luke Devlin's career was satisfactory proof that he would never have stooped to forgery. In looking for a forger the jury would have to go beyond Luke Devlin. It would be equally preposterous to suppose that a man with a long and honorable record in the army, like Maj. Throckmorton, was guilty of the crime, and he thought no member of the jury would smirch the fair name of Mrs. Throckmorton or that of her beautiful daughter by even a suspicion that they would take part in a crime for which people are sent to the penitentiary.

Referring to the theory of revocation, Mr. Darlington said there was

absolutely no evidence to show that Judge Holt had ever changed his mind as to the disposition of his property, and there was nothing to prove that Judge Holt had ever done anything that constituted a legal revocation. If he had made a later will, the fact that it was not found was legal presumption that he destroyed it himself.

Mr. Darlington concluded his argument shortly after 11 o'clock, and was followed by

Mr. *Worthington* for the caveators. There were four questions to be decided, said Mr. *Worthington*. Did Judge Holt write the will? Did he revoke it? Was there fraud? Was there undue influence? The argument of his opponent, that if the jury found Judge Holt did not write the will, it would mean that Luke Devlin did, was unsound. It would mean only that Judge Holt did not write it, and nothing more. An effort to find the forger would fall upon another court. Neither Mr. Devlin nor any member of the Throckmorton family would be implicated by such a decision.

The theory that Charles Strothers had mailed the will to the Register's office, Mr. *Worthington* held was unworthy of consideration. If Strothers had found the will and carried it in his pocket for a year, no good reason why he should have sent it in at the end of that time had been shown. The only result would be an opportunity for him to come into court and perjure himself. If he had found it, the natural thing for him to have done would have been to take it to Washington Holt or to Col. Sterett and make what he could out of it; or he might have taken it to the Throckmortons and Miss Hynes and tried to dicker with them over it. It would be just as reasonable to suppose that Washington Holt or Col. Sterett had sent the will in, and then engaged lawyers to try to prove that they did not.

The will was a suspicious docu-

ment from first to last, and not worthy of the slightest trust. It was sent in by some person who was ashamed of what he was doing and unwilling to have any one know it. The burning of the paper could not have been done by dropping it into the fire, as was shown by an examination of the burns. It was remarkable that not a single word in the whole document had been obliterated. It required no expert testimony to show that the ink with which the will was written was different from that with which Judge Holt wrote his letters, and if Judge Holt wrote the will, he must have sent out and got a special bottle of ink, which he never used again. Mr. Worthington called attention to various other suspicious appearances, and continued that the will was the work of an ignoramus. It convicted the writer in the first line, which began, "I. J. Holt." Any lawyer knew that the name of the deviser should be written out in full. Again, one of the beneficiaries was referred to as Lizzie Hynes, so that if she should ever have occasion to transfer any of the property, she would have to secure affidavits that J. Holt was Joseph Holt and that Lizzie Hynes was Elizabeth Hynes. Mr. Worthington declared that if he should ever draw up such a will for anybody and charge \$5 for it, he would be liable to arrest for obtaining money under false pretenses. He compared the alleged will with other legal papers drawn up by Judge Holt, including the will of 1848 and Miss Hynes' will, which he said were models of clearness and fullness.

Mr. Worthington's argument was interrupted at the usual hour for luncheon. He resumed his address after recess, calling attention to the character of the witnesses for the caveators, who gave evidence concerning the handwriting and signatures in the alleged will, and pointing to the fact that they had every facility for being competent to

judge. He thought it was a most striking fact that every one of these witnesses had stated positively that neither the handwriting nor the signature was that of Judge Holt. Fourteen witnesses, he said, none of them at all interested in the case, had testified to this effect. He characterized as an immense fallacy the argument of his opponents that the evidence of the witnesses was valueless because they could not point out specific differences in the writing.

Referring to Mr. Darlington's denunciation of Expert Carvalho, Mr. Worthington said he would offer to the jury a theory, by which they could determine whether Mr. Carvalho came to the court to give his honest opinion or to lie for so much per day. He then proceeded to point out that Mr. Carvalho, in regard to several circumstances where his own opinion differed with that of the lawyers, by whom he had been summoned, unhesitatingly asserted his own views without any regard for the effect it would have on the case. He had testified that the kind of paper on which the will was written was manufactured as long ago as 1873; he had expressed the opinion that Luke Devlin had not written the will, and that the document had not been entirely severed at the time it was received. All these theories were at variance with the belief of the lawyers, but it had made no difference to Mr. Carvalho's testimony. "Now, I would like you to contrast this testimony with that of an individual who came from Troy," he continued. "Don't you remember Mr. Hagan, standing there and saying to me: 'If I said anything that will help you, I didn't intend it?' Standing at the bar of justice, where he had sworn to tell the whole truth, he unblushingly declared that if the truth would help us, he would not tell it."

Turning to the forgery theory, Mr. Worthington grew vehement.

He had his transparency prepared days before he had seen the famous letter of February 7, 1873, and knew that when he came to place the word "Washington" in the will over that in the letter he would find them identical. He knew it because the same words in the will agreed identically, and it was natural to suppose there was an original somewhere. "We knew," he added, "that the person who forged that will was the person who had in his possession that letter." Mr. Worthington here held up for the inspection of each member of the jury the will and two letters, one of February 7, 1873, and the other of September 11, 1888. The "Washington" in the former letter, he said, was the one from which they claimed the word in the will was traced, while the "Washington" in the letter of September 11, the other side claimed, bore just as much resemblance to the word in the will. He asked the jury to compare the two words, indicating a large number of alleged differences. He went into the subject of handwriting at great length, making numerous comparisons between the testimony of the two experts — Carvalho and Hagan. He cut the word "that" out of his famous transparency and placed it over "that" in the letter of September 9, 1873, from which he claimed the word was traced, and then made the same comparison of the word in other letters, which Mr. Hagan said also resembled the word in the will. He invited the jury to step up and use their own eyesight. These comparisons occupied some time, and at the conclusion Mr. Worthington summed up the list of striking similarities.

"Now," said he, "we come to the crowning point of all. When you think about it, the ringing in of such an expression as 'whose character I believe to be of the highest standard,' after the name of an executor is a very extraordinary

thing. But, lo, and behold! what happens? The gentlemen on the other side bring in a letter dated September 29, 1873, which we had been looking for, and on the fourth page we find the following reference to Blackstone: 'Which is a standard work of the highest character.' Now you see why that expression was put in there. They wanted something to copy."

The question of punctuation was then taken up. Mr. Worthington read a number of properly punctuated epistles of Judge Holt's, then dashed off the alleged will, pausing three times to take breath.

"There are other things," he continued, "which I do not like to refer to, which indicate that this will is a forgery. Why was this will dated February 7, 1873? We supposed we knew all about it when the letter of February 7, 1873, appeared. The witnesses were President U. S. Grant and Mr. and Mrs. Sherman — all dead before Judge Holt, all dead before this paper saw the light of day, so there was no chance of their contradicting it. Now, if it be a fact, as I think I have demonstrated to you, that this will was prepared by somebody who had the letters of February 7 and September 29, 1873, in their possession, you would expect they would use any knowledge in their possession regarding the witnesses. Very well; some time in February, 1873, Judge Holt gave a dinner, at which these witnesses were present. And you find that the people who had these letters had in their possession another letter, which they held back until the last minute — a letter which shows that this dinner was to have been given on February 7, 1873, but was postponed.

"You also find Miss Josephine Throckmorton leaving New York a few days before this will appeared and going to Culpeper, Virginia, where she had relatives living. It had never occurred to her to visit them

before. She comes back here and waits at the Baltimore and Potomac depot for one hour for her train. "And during that very hour this thing was mailed, and mailed in the very section of the city in which she was waiting. This coincidence of the mailing of that letter; the coincidence of the date of the will; this terrible coincidence of the words in the will and the words in the letters in the possession of the Throckmorton family, all point to something which you will have to decide upon."

Mr. Worthington proceeded to attack the assumption that it was natural for Judge Holt to have made Luke Devlin his executor, and next argued against the possibility that Judge Holt would have made a will cutting off all his blood relations. His opponents, he said, had failed in their attempts to show that Judge Holt was a man without a family. He read numerous letters from Judge Holt to members of his family in Kentucky, the tone of which, Mr. Worthington held, proved of itself that he never could have written such a will. "It is enough to make him rise from his grave and come here to curse those who proclaim that he did so," the attorney declared.

After completing his argument, that it was impossible for Judge Holt to have written such a will, Mr. Worthington took up the theory of revocation, and referred at length to the evidence regarding the changes in Judge Holt's relations with the parties interested. Especially did Mr. Worthington dwell upon his relations with the family of Washington Holt, adding that if Judge Holt had died and left such a will as the one under discussion for the world to see, then he was "the grandest hypocrite the world has ever seen." If Washington Holt told the truth, Mr. Worthington said, his evidence absolutely disposed of the question of revocation. He spoke of his tireless search for the will and his questioning of the

servants and then asked: "Do you suppose Washington Holt would have acted in this way if none of these things he has testified to is true? No; he had these conversations regarding a will with Judge Holt, and that was why he acted in that way."

Mr. Worthington exhibited a memorandum of a bequest to the Washington Humane Society, which Washington Holt testified to finding in a closet at the Holt residence, showing, Mr. Worthington said, that Judge Holt was engaged in the act of making a will after 1886. "There it is," he said, holding up the paper. "Judge Holt's own handwriting. He is speaking from the grave."

The gift of \$10,000 to Miss Hynes next received attention from Mr. Worthington, who argued that the interest accruing from the bonds was equivalent to the allowance of \$600 per annum which he had previously made her. He would say nothing reflecting upon Miss Hynes, except that her interest in the case had so affected her memory, unconsciously, that it was absolutely unreliable. Mr. Worthington also endeavored to correct the impression that certain of Judge Holt's letters, containing kindly references to Mr. Ray, were not written subsequently to the breach between the two men. He argued also that the will which Judge Holt drew for Miss Hynes, disposing of the \$10,000 in bonds which he had given her, was a strong piece of evidence against the existence of such a will as that in question. Judge Holt was careful to so arrange matters that none of the \$10,000 could ever get into the hands of his enemy, Mr. Ray, and if there had been a will in existence leaving Miss Hynes half of his estate, or if he had intended to leave her anything more, he would not have drawn such a will for Miss Hynes, in which the only property referred to was the money he had given her in 1834.

*Thursday, June 25.*

Mr. *Worthington* resumed his address for the caveators at the opening with further references to the testimony of the Throckmortons. If they had told the exact truth on the witness stand, he said, then eight or ten eminently respectable and disinterested witnesses had not told it. The Throckmortons had stated that the difference Judge Holt had with the elder Mrs. Throckmorton had not extended to the other members of the family, while numerous other witnesses said that Judge Holt had expressed the greatest animosity toward the whole family. Mr. *Worthington* devoted considerable attention to the relations between Judge Holt and the Throckmortons, calling attention to the unavailing appeals for money made to Judge Holt when Maj. Throckmorton was in trouble. He thought Miss Throckmorton's statement that she came to Washington from New York for the express purpose of telling Judge Holt that her father had made arrangements for the money, and did not need it, a most remarkable one.

Turning to Judge Holt's relations with the family of his nephew, Washington Holt, Mr. *Worthington* asked why it was that Judge Holt directed his servants to turn over his watch and keys to Washington Holt instead of Luke Devlin, if such a will as the one in question was in existence. Mr. *Worthington* had no doubt that Judge Holt did write a will, as he told his nephew, in which he made him executor, but that on his deathbed his thoughts turned back to his old home in Kentucky and to all of his relatives, and he decided to let his property go to all of them alike. "I am as sure, gentlemen, as I am of anything," he added, "that Judge Holt's own hand destroyed that will, leaving his property to be divided among all his relatives as the law provides."

Mr. *Worthington* was followed by his colleague,

*Jere Wilson*, who began with a vigorous attack upon the validity of the alleged will. He reviewed the evidence thoroughly on both sides as to the genuineness of the document, and asked the jury to make a comparison of the testimony. The burden of proof as to the validity of the will rested on the other side, and he did not think they had proved it. There was argument in every sentence of Mr. *Wilson's* address. It was perfectly natural, he said, that the will should bear a striking resemblance to the handwriting of Judge Holt. A man would be an arrant fool to attempt to get up a fictitious will and not to imitate the handwriting of the person whose will it purported to be. He thought the preponderance of evidence was that it was not Judge Holt's writing. The legal form and composition of the alleged will he argued was convincing proof that it was not written by a man of Judge Holt's character and attainments.

Mr. *Wilson* referred pointedly to the testimony of Miss Throckmorton, where it conflicted with the testimony given by the servants at the Holt residence. There was as much reason for believing them, he said, as for believing her. There was no \$80,000 or \$90,000 at stake so far as they were concerned, and besides there were six of them and their statements all agreed, while hers was exactly the opposite.

Gen. *Butterworth* began the closing argument for the caveatees immediately after recess. He began with an attempt to refute the assertions of his opponents that the will was not such a document as an able lawyer would have drawn up. On the contrary he doubted whether there was a lawyer in Washington who could have drawn up a will that would dispose of property more satisfactorily. The only thing that could be said against the will was that it had turned up in a mysterious manner, and to his mind it was surprising that it ever turned up. His

opponents, he said, were trying to make it appear that it was a forgery and that the forger in order to certify to its worthlessness had burned and mutilated it in an effort to defeat his own aims. "That this will was burned," he continued, "is certain, and that it was burned by the only persons interested in its destruction is equally certain."

Paying his respects to Expert Frazier, Gen. Butterworth said that ships could not be navigated about the shores unless more accurate measurements could be made than Mr. Frazier was able to make with the instrument he called a "producer." Mr. Worthington corrected him, and said it should be "projector," at which one of the spectators laughed so loudly that Judge Bradley reprimanded him severely, and said if it occurred again, he would have the offender ejected from court. Reverting again to the handwriting, Gen. Butterworth said a bank teller knows in a moment whether a bank note is good or not, but he cannot tell why. In the matter of handwriting it was the same, the general appearance enabled any one to decide as to its genuineness. People do not always write the same; it depends on conditions.

Discussing the probabilities of Judge Holt writing such a will, Gen. Butterworth spoke eloquently of Judge Holt's promise to his dying wife to care for Lizzie Hynes. He referred to the war, and made the most of Judge Holt's loyalty to the Union and the fact that his relatives were Southern sympathizers. He drew a harrowing picture of the bitter civil strife, when rewards were offered for the heads of abolitionists. It had been said that Judge Holt referred to the family of Washington Holt as an oasis in the desert of his life, and surely, said Gen. Butterworth, "an oasis which cost \$75,000 was not a cheap one."

Concerning the probability of Judge Holt writing such a will, Gen. Butterworth asked: "Isn't it

a little strange that until Washington Holt and his family established an oasis in the life of Judge Holt nobody who had any claim on him was ever turned away from his door? Wasn't it a little strange that after they came into his life the key turned hard and there were letters which never reached Joseph Holt? Wasn't it strange that when he went to his old Kentucky home there were no family reunions there? When he went to the oasis he had nothing but the oasis. The trouble between Judge Holt and the elder Mrs. Throckmorton originated in Kentucky, and, strangely enough, after that the mails did not reach Joseph Holt regularly." He drew a touching picture of Miss Throckmorton's interview with Judge Holt when her father was in trouble and of her unswerving devotion to the latter, and added: "Is it possible that she has disgraced him by an attempt to perpetrate a forged will for the purpose of securing an estate? Is it possible that that can be true? If so, human nature is a lie." Gen. Butterworth again waxed eloquent when referring to the relations between Judge Holt and the Throckmortons, and quoted Scripture in connection with the bottle of water from the River Jordan which Judge Holt sent for use at the baptism of Miss Josephine. The General pronounced Jordan in the same way that many people pronounce a product of Kentucky which does not flow in streams. Taking up Mr. Worthington's insinuation that Miss Throckmorton had mailed the will, Gen. Butterworth grew vehement. "They would have you believe," he shouted, "that this young lady, whose life has been as spotless as a star, is the criminal."

He dashed at the tracing theory like a bull at a red rag, and referring to the characters in the will which it had been claimed were identical with those in Judge Holt's letters, said: "If they are the same, I will

abandon this case. I not only deny that they are the same, but I deny that any man, honestly comparing them, has a right to tear the heartstrings and render infamous a helpless girl with such an insinuation. My friend (Mr. Worthington) has said here, without hesitation, they are the same. I deny it. And yet upon this he bases his claim of forgery." "By what warrant do you assert that I set my theory upon that similarity?" interrupted Mr. Worthington. "Well, upon that and other things," responded the General fiercely. "You have warped the heartstrings of innocent women upon the theory that this is a reproduction." Considerable time was spent by Gen. Butterworth in submitting for the examination of the jury the words in the alleged will compared with the words in the letter from which it was claimed they were traced. "Now, if anybody had been using that letter for the purpose of tracing," resumed the speaker, "they would have been apt to trace the genuine name. Is it possible, viewed from any standpoint of reason, that this can be a forgery?" Gen. Butterworth claimed that it had never been denied that the signatures to the will were genuine, and asked whether it was possible that President Grant or Gen. Sherman signed a forged paper. He denounced Witness Carvalho in unmeasured terms. "He knows no more about chemistry," said the General, "than I do about Sanscrit." Gen. Butterworth, in referring to the gelatine print of the will, pointed out to the jury that in examining the writing by the aid of this transparency the refraction of the light would make a substantial difference, and it would also make a difference as to the point from which it was viewed. He stated also that he had found no less than fifty-seven instances in other letters of Judge Holt, where the characters agreed with those in the will just as closely as those in

the letter from which it was claimed they were traced.

The testimony regarding Luke Devlin's character was taken up. "Of the whole pack turned loose to hunt Luke Devlin down," said the speaker, "only one could be found to say aught against him, and that was Fought. He made him a criminal from choice, one who forged for the love of it, without hope of reward or fear of punishment. After holding up Luke Devlin as a forger they turned from him and attempted to humiliate, degrade, and disgrace the goddaughter of Joseph Holt."

The closing portion of the argument was devoted to the revocation theory. "Forty-five thousand dollars offered for a will," said the speaker. "Where are the witnesses to this subsequent will? Is it possible that such a reward would not call some of them into existence? Is it probable, if he made a will, that no one would know anything about it? All the evidence they have on this point is that he loved these relatives. Col. Bill Sterett says there never was a will, and there is a kind of rugged candor about Col. Sterett that I admire. Are we to make a will for Joseph Holt? Are we to destroy his will, or is it to stand? My friend says that if you find this a forgery, it will cast no reflection on anybody, but he has labored here week after week to wreck a home and a heart to set aside the will of Joseph Holt."

The closing hours of what has been perhaps the most remarkable trial in the history of the Circuit Court of the District were of the dramatic order, the feature of the proceedings being the eloquent appeal of Gen. Benjamin Butterworth in behalf of the caveatees. The crowd in the court room throughout the day was dense; but when the time came for Judge Bradley to deliver his charge to the jury there was a breathless stillness in the room, and many members of the bar present strained their ears in an effort to hear every word.



Judge Bradley prefaced his charge to the jury with a very pleasant little address, in which he referred to the fact that the jury had been kept beyond the ordinary time which the law imposes upon citizens for such service. "I feel sure," he continued, "that each member of the jury has felt it a privilege to sit in a case so remarkable in all its features. The case has been distinguished by the remarkable ability of counsel on both sides, and it has been a pleasure to listen to a case so admirably tried."

Proceeding directly to his charge, Judge Bradley said: "There are four issues which have been submitted by the Orphans' Court, and to each of these issues you must return an answer, and that answer will be 'yes' or 'no,' save with respect to the fourth issue. The answer to that issue may be, if the evidence justifies it, more than the simple affirmative or negative. The first issue is, Was the paper executed by the said Joseph Holt as his last will and testament? The second is, Was the execution procured by fraud practiced upon Joseph Holt? The third is, Was it secured by undue influence? The fourth is, If it was executed, has it been revoked by the testator? Your deliberations will be confined absolutely to the first and fourth issues, for these are the only issues which have been on trial. The second and third relate to the question of fraud and undue influence upon the testator by any person or persons, and to the second and third you will answer 'no,' for there is no evidence which would justify any other conclusion, and the court directs that you return that answer to these two issues.

"As to the first question, inasmuch as the testimony has indicated, and the instrument itself indicates, that this entire will, as well as the signature, purports to be in the handwriting of Judge W. Holt, the question necessarily is, Was this will, as well as the signature to it, written by

him? As a necessary sequence, if it were not written by him, either as to signature or body, it is not his will. If it were written by him and signed by him as his last will and testament, then it matters not what its contents are, who is benefited by it, or who is deprived of benefit by it. The fact being established that this will is in his handwriting and signed by him, your answer to this first issue would necessarily be 'Yes.'

"If this will had been found (and when I say will, I don't mean to indicate that it is a will) among the papers of Judge Holt, that circumstance would lend to it the presumption of genuineness. If we had been enlightened by the testimony of any one of these subscribing witnesses, probably this question would not have been put to you for determination. If any one of these subscribing witnesses, Gen. Grant, who was at the time of this alleged execution, President of the United States, or Gen. Sherman, who I believe was General of the army at that time, or his wife, had testified, I hardly think that any one of you would have any question as to the genuineness of the signature of Judge Holt. If a reputable witness had testified that he had seen Judge Holt sign the paper, or had heard him acknowledge the signature, the question would have been almost absolutely foreclosed.

"If we were enlightened as to the source from which this paper emanated just before it made its appearance in the office of the Register of Wills, doubtless it would throw a great deal of light upon this question. The difficulty is that this paper was deposited in the mail by some person who, for some fraudulent reason of his own, deems it necessary to be quiet, for he does not come forward and indicate that it was so deposited. Who that person is there is no direct evidence in this case. Who that person may be, it is claimed by counsel for both parties, is indicated by circum-

stances in this case. Who that person is you may be able to determine, measuring these circumstances by your experience as men and understanding the motives which ordinarily influence them. And if you do reach the conclusion as to who in all probability sent this paper to the office of the Register of Wills, you will probably have in your hands the key to the situation."

The court then referred to the numerous prayers which he had granted to both sides, most of them referring to the revocation issue, and in this connection the court instructed them: "Your inquiry as to this question must be addressed to the circumstances in evidence. If these circumstances show you that this paper was mutilated, torn, or burned by Judge Holt with the intention to revoke it, then your answer to this inquiry should be 'yes.' If he executed it as a sealed instrument and he subsequently tore off that seal, that act would be sufficient to accomplish the fact of revocation. If you reach the conclusion that it has been revoked by later will containing inconsistent provisions which do not cover the entire estate, then you should indicate by your answer to what extent this inconsistency goes."

At this point Mr. Worthington handed in two supplementary prayers. The prayers were granted by the court, who said: "You are to be influenced by no other motive than to reach the exact truth. Let justice be done, no matter who is injured by your verdict. You are not responsible for the outcome of this case, no matter whether or not it will indicate perjury on the part of any witnesses of high or low social standing."

It was 4.20 o'clock when the court completed the charge, and both Mr. Darlington and Mr. Worthington called attention to minor points to which they took exception. They were all straightened out without difficulty, however, and at 4.35 o'clock the jury filed out of the court room. At the end of an hour an

attendant announced to the waiting crowd that there was no prospect of a verdict and the court room was cleared. It was at first stated that the jury were instructed to render a sealed verdict, and under this impression both Mr. Darlington and Mr. Lee left for their homes in the suburbs. Judge Bradley, however, left orders to be notified at any time before 10 o'clock if a verdict was reached, and he was back at the court very soon after 8 o'clock upon notice that the jury had agreed. A single gas lamp threw a dim light upon the final scene in the great drama. The figure of Judge Bradley was only a dark outline upon the bench, and a few indistinct shadows scattered about the room represented the lawyers and spectators.

The verdict was rendered without a single one of the lawyers for the caveatees being present. Messrs. Worthington and Wilson were there representing the caveators, who were none of them present, while on the other side were Maj. and Mrs. Throckmorton, Luke Devlin, and Mrs. Ray. Messrs. Darlington and Lee had both left for their country homes under the impression that a sealed verdict was to be rendered, and Gen. Butterworth could not be found. After waiting until 8.20 o'clock for some of the lawyers for the caveatees to put in an appearance, Judge Bradley announced that he did not feel justified in keeping the jury waiting any longer, and ordered that they be summoned to the court room. They filed in and stood in line on the right of the bench. The foreman handed the clerk the paper on which the questions they had decided upon were typewritten, and after each man had answered to his name, the clerk read the four questions.

The whole verdict hinged upon the first question: "Was the paper, bearing date February 7, 1873, and filed in this court August 23, 1895, written and executed by the said Joseph Holt as his last will and testament?" "Your answer to this

question is — ?” And here the clerk paused and Foreman Bentley answered “No.” The answers to the other three questions were necessarily the same, but they were all read and the proper replies made. The second inquiry was whether fraud had been exercised in connection with the execution of the will; the third was whether undue influence had been brought to bear, and the final question was whether the paper had been revoked. By arrangement between the lawyers and the court the formal answer to the last inquiry was recorded: “No, because it was not executed.” This was done to avoid any possible conflict in the event of another trial.

As soon as he heard the verdict, Maj. Throckmorton arose and hurriedly left the court room to join his wife in the corridor, where she had gone as soon as Judge Bradley summoned the jury. She accepted the result without the slightest demonstration.

Judge Bradley addressed a few words to the jury, saying: “I think you should receive the thanks of the court for your faithful services. I am glad that you were able to so promptly reach a conclusion in such a difficult case.” The court room was quickly cleared, Mr. Wilson going at once to the Riggs House to inform Washington Holt of the verdict.

There was really little division among the jury. Two or three of them were inclined to hold to the theory that the will was genuine, but was subsequently revoked, but one of the others had taken with him the will of 1848, and it was not long before those who believed in the revocation theory were won over. While it was generally thought that the verdict would be against the will, there was a strong feeling that it would be repudiated on the ground of revocation.

A highly important, and, in view of the verdict, a somewhat startling fact was developed yesterday. The

fact that Mrs. U. S. Grant, though still alive, had had no connection whatever with the case has been commented upon frequently, and it was ascertained yesterday that the lawyers for the caveatees have in their possession an affidavit by Mrs. Grant, stating that one evening in February, 1873, she was present at a dinner at Judge Holt's house, together with her husband, President Grant, and General and Mrs. Sherman, whose names appear as witnesses to the will. The affidavit further states that during the evening Judge Holt, President Grant, and Gen. Sherman retired together from the room in which the party was assembled, and that a few minutes later Gen. Sherman returned, and asked his wife to step into the next room, as her presence there was desired for a minute.

This affidavit was only secured last Sunday, and no attempt was made to introduce it as rebuttal testimony, although there were vague hints concerning it during the argument for counsel yesterday. In his address Mr. Worthington mentioned the fact that Mrs. Grant was alive, but nothing had been heard from her, and in closing, Gen. Butterworth took the matter up and asked Mr. Worthington whether he would be willing to admit a deposition at that point. Mr. Worthington answered that he would have been perfectly willing at the proper time.

The caveatees will undoubtedly appeal the case, and the affidavit will doubtless be produced in the higher court.

[On the points of law, principally rulings on evidence, the verdict was sustained in the Supreme Court of the District (1898, *Throckmorton v. Holt*, 12 D. C. App. 552). But in the Supreme Court of the United States the verdict was set aside, three judges dissenting (1901, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. 474). No second trial took place, the parties having settled the case by compromise.]

391. **LAURENCE BRADDON'S TRIAL.** (1684. *HOWELL'S State Trials*. IX, 1127.)

[After the accession of James II in 1680, the antagonism of the Protestant and Catholic parties became even more intense. Two prominent leaders of the Protestants were the Earl of Essex and Lord Russell. Treason being in the air, Russell and Essex, with Colonel Algernon Sidney and others, were charged with a Protestant conspiracy to depose the Catholic James (the Rye-House Plot). All were arrested. Lord Russell's trial began on Friday, July 13, 1683. The Earl of Essex had been confined in the Tower. On that morning, his body was found in his cell with the throat cut and a razor by his side. This suicide of one of the leaders made a deep impression when the news came to the court room. Russell, Sidney, and others were convicted and executed. Shortly afterwards, a rumor spread that Essex had been assassinated by connivance of government sympathizers, the killing being timed so as to produce an impression on the pending trials. The Protestants were in consternation; and a zealous gentleman named Braddon set himself to disprove the suicide and vindicate the memory of the Earl. Later, in 1688, much evidence pro and con was elicited at an investigation made by a Committee of the House of Lords on Mr. Braddon's demand. But at the time of his original inquiry the chief and almost only basis of Braddon's belief was the story told by two children, living near the Tower of London, who on the morning of the Earl's death said that they had seen a bloody razor thrown out of the Earl's window in the Tower. Braddon procured their written statements, and began to stir up inquiry. For this he was prosecuted, on charges of seditious libel and of subornation. The trial took place on February 7, 1684. Whether the Earl's death was a murder or a

suicide has been discussed by every historian of English politics, and the verdicts have differed. These children's stories, however, were the starting point in this interesting problem.]

*Hilary, February 7, 1684.*

The defendants, who had pleaded not guilty to an information filed last term, were now brought to trial.

*Cl. of Cr.* — Crier, call the defendants, Laurence Braddon and Hugh Speke.

*Crier.* — Laurence Braddon and Hugh Speke, come forth, or else this inquest shall be taken by your default.

*Mr. Wallop.* — They appear.

*Cl. of Cr.* — Gardez votrez Challenges. . . .

*Cl. of Cr.* — Gentlemen, you of the jury hearken to the record. . . .

Then Proclamation was made for evidence.

*Mr. Dolben.* — May it please your lordship, and you gentlemen that are sworn; This is an information preferred by Mr. Attorney-General, against the defendants Laurence Braddon and Hugh Speke, and the information does set forth, that whereas Arthur late earl of Essex, the 12th of July last, was committed to the Tower of London for certain treasons supposed to have been by him done: And the said earl being so committed prisoner to the Tower for treason, not having the fear of God before his eyes, feloniously and as a felon did kill and murder himself, as by an inquisition taken before the coroner of the Tower liberty may more fully appear; yet the defendants Laurence Braddon and Hugh Speke not being ignorant of the premises, but designing to bring the government into hatred and contempt, the 15th day of August last, in the parish of St. Clement Danes in this county, with force and arms, falsely, unlawfully, maliciously, and seditiously did conspire together to

make the king's subjects believe, that the inquisition aforesaid was unduly taken, and that the said earl of Essex did not murder himself, but was by certain persons unknown, in whose custody he was, murdered. And it further sets forth, that these defendants, Laurence Braddon and Hugh Speke, designed to disturb and disquiet the minds of the king's subjects, and to spread false reports, did conspire to procure certain false witnesses to prove that the said earl of Essex was not a felon of himself, but was by some persons unknown killed and murdered: And to persuade other subjects of our sovereign lord the king to believe the said report, they did falsely, maliciously, unlawfully, and seditiously cause to be declared in writing, that the said Laurence Braddon was the person that did prosecute the said earl's murder. And this was to the great scandal of the government, to the evil example of all persons in like case offending, and against the peace of the king, his crown and dignity. To this the defendants have pleaded not guilty; if we prove it upon them, we make no question you will find it. . . .

*Att.-Gen.* — My lord, we will then read the inquisition, that the earl, being thus in the Tower, killed himself.

*Solicitor-General.* (Mr. Finch.) — Show the inquisition. Where is Mr. Farnham?

*Mr. Farnham.* — Here I am. The inquisition is returned here, and is upon record.

*Cl. of Cr.* — Here it is, Number 11. [He reads.] . . .

*Att.-Gen.* — Call Mr. Evans and Mr. Edwards. After this, my lord, we shall show you, that Mr. Braddon went about the town, and declared the earl was murdered, and he was the prosecutor. There is Mr. Evans, swear him. [Which was done.] Pray will you give an account to my lord and the jury, what you know of Mr. Braddon's going about and declaring he was the

prosecutor of my lord of Essex's murder?

*Mr. Evans.* — My lord, all that I know of this matter, is this. About the 17th of July last —

*L. C. J.* (Sir GEORGE JEFFERIES.) — When is the inquisition?

*Cl. of Cr.* — It is the 14th of July.

*L. C. J.* — Well, go on.

*Evans.* — The 17th of July last I was at the customhouse key, shipping off some lead, and the person that brought me the warrant, I told him I could not execute it without one of the commissioners' officers; and I bid him go to Mr. Edwards, who was the next officer adjoining to the key, and he went to his house, and told him I was at the water side, and had a warrant, which I desired him to be present while I executed it; Mr. Braddon it seems was then present in the place with Mr. Edwards when this was told him, and hearing my name, Mr. Braddon came down with Mr. Edwards, and found me then at Smith's coffeehouse. . . .

. . . There they began to discourse about this matter.

*Just. Withins.* — Who began to discourse?

*Evans.* — Mr. Edwards.

*L. C. J.* — Well, what was it he said to thee?

*Evans.* — Mr. Edwards began thus: Says he, Mr. Evans, this gentleman has been at my house to examine my son concerning a report that is spread abroad concerning a razor that was thrown out of the window of the earl of Essex's lodgings that morning he cut his throat. I hearing of that, said I, Gentlemen, I have read the Coroner's inquest that is in print, and it is otherwise declared there: And therefore let there be no discourse of any such matter, for I believe no such thing. And, said I to that gentleman, Mr. Braddon, pray forbear meddling in any such thing, for Mr. Edwards is a poor man, and has divers children, he may be ruined, and you likewise

may be ruined yourself, if you proceed any farther in it. . . .

Mr. *Braddon*. — [Lifting up his hands in an unusual manner.] Mr. *Evans*. Pray, will you answer one thing? . . .

*L. C. J.* — What is it you would ask him?

*Braddon*. — My lord, I desire he may be asked, whether I, with a brother of his, did not come to his country house, on the Monday immediately after my lord of *Essex's* death, and whether at his table there was not a report then of a razor being seen to be thrown out of my lord of *Essex's* window? . . .

*Evans*. — My brother, Mr. *Hatsell*, came down along with Mr. *Braddon* to my house at *Wansted* in *Essex*, on the Monday, after my lord of *Essex's* death (July 16), and coming down, my brother, Mr. *Hatsell*, pulled out the Coroner's inquest upon oath that was printed, and showing of it to me, I read it; and as soon as ever I had read it, said I, Mr. *Edwards*, that was at the Customhouse, that very morning when the earl of *Essex's* throat was cut, did declare to me upon the Customhouse key, That his son did declare that the razor was thrown out of the window, which seems to contradict this paper, that says, it was found lying by him.

Mr. *Freke*. — Was this before Mr. *Braddon* was with Mr. *Edwards*?

*Evans*. — I can't tell that.

Mr. *Freke*. — Was it before Mr. *Braddon*, and Mr. *Edwards* came to you to the coffeehouse?

*Evans*. — Yes, I believe it was. . . .

*Att.-Gen.* — Yes, my lord, this discourse at *Wansted* was before that at the customhouse. . . .

*Att.-Gen.* — Take the times, my lord, and you will see he does speak very notably. The 13th of July my lord of *Essex* murdered himself, the 14th of July the inquisition was taken before the coroner. . . .

*L. C. J.* — But pray let me ask you one question, if your matter about the inquisition in the country

was before the matter of your cautious discourse at the Customhouse, how came you to tell them, I heard this report of a razor thrown out of the window that morning the earl of *Essex* cut his own throat?

*Evans*. — Mr. *Edwards* reported this same thing that very same morning to me and several others at the Customhouse key.

*L. C. J.* — Why did you not tell us this before? . . .

*L. C. J.* — Now after all this discourse of the matter, for aught I can understand, the matter is but this: he says, *Edwards* before the meetings either at his house in *Essex*, or at the coffeehouse by the Customhouse, reported to him, as though the earl of *Essex* had not murdered himself, but somebody else had done it for him. And this was reported at the Customhouse that morning the earl of *Essex* cut his own throat. . . .

*Sol.-Gen.* — Look you, Sir, you say that very morning my lord of *Essex* killed himself, Mr. *Edwards* discoursed, and made this report to you at the Customhouse; pray tell what the discourse was; what he said to you; and then tell us what time of day it was?

*Evans*. — To the best of my remembrance it was about 11 o'clock: there were several persons standing together, among the rest captain *Goodland*, and some of the searchers, and Mr. *Edwards* was there; and said he, I am informed from home, that my boy has been at home, and given an account to my wife, that being in the Tower, he saw a hand throw a razor out of a window, and he named my lord of *Essex's* window; and this Mr. *Edwards* did not only tell me, but to a whole coffeehouse of people, this matter of fact.

*Just. Holloway*. — Did not Mr. *Edwards* tell you, that somebody had been examining his boy about that report?

*Evans*. — That was the second time, when Mr. *Braddon* and Mr. *Edwards* came together. . . .

*Att.-Gen.* — Come, Mr. Edwards. Crier swear him. [Which was done.]

*L. C. J.* — What do you ask him, Mr. Attorney? . . .

*Sol.-Gen.* — Pray tell what you know of Mr. Braddon's coming to your son, and what discourse he or you had about the murder of the earl of Essex?

*Mr. Edwards.* — The report that Mr. Braddon came to inquire after, was with us some three days before; it was in our family three days before, and upon the 17th of July —

*L. C. J.* — What was the report, Mr. Edwards, before Mr. Braddon came to you? . . .

*Edwards.* — The report of the boy the 13th of July, about ten o'clock, as I was informed by my family, and by the boy afterwards by word of mouth, was this: he comes in about ten o'clock, says he, I have been at the Tower (to one of his sisters), and I have seen his majesty and the duke of York, and the earl of Essex has cut his throat, and I see an hand throw a razor out of the window, and one came out of the house, a maid, or a woman in a white hood and a stuff coat, and took it up, and went in again, and then I heard a noise as of murder cried out. This was the boy's report, and more than as his report I cannot speak to it.

*L. C. J.* — This was your son, was it not?

*Edwards.* — Yes, the younger of them. The two boys were that morning going to Merchant-Taylors' school together as they used to do, and by the way hearing the king was in the Tower, this younger boy that was well acquainted with the Tower, gave his elder brother the slip and went into the Tower, and rambled about from place to place.

*Att.-Gen.* — Did not you examine him?

*Edwards.* — Ay, I did examine him.

*Att.-Gen.* — Did not you find that he denied it again?

*Edwards.* — No, I did examine him, and I found no denial of any-

thing at all that he had reported, till Mr. Braddon came to make inquiry. As soon as he came to make the inquiry, and I understood what Mr. Braddon's business was, I begged of him that he would not insist upon it by no means, I begged of him as if I had begged for my life, but he was so zealous in the business, that nothing would satisfy him. And after I had told Mr. Braddon that which I could not deny, which was the boy's report, I left him and went down to the Customhouse, and some of my family discoursed the boy at that rate, that he began to deny it, and in less than half an hour's time recollected himself, and began to own it again; and so the boy was off and on till the time he was before the Council; and to this day he seems to stand in the denial; whether he will do it now or no I cannot tell.

*Att.-Gen.* — Did you acquaint Mr. Braddon that you had found this boy to be a lying boy, and detected him in lies several times?

*Edwards.* — May it please you, Sir, I acquainted him with thus much: said I, Mr. Braddon, as I have dealt ingenuously with you, to let you know what the boy's report was, so I must likewise tell you, that I cannot, nor will undertake to assert the truth of it; and presently upon that my daughter told me, the boy had many times excused his playing truant by false stories.

*Att.-Gen.* — Did you acquaint Mr. Braddon, that your boy was a lying boy at that time?

*Edwards.* — I think I did not at that instant of time.

*L. C. J.* — How old is this boy you talk of?

*Edwards.* — About 13 years of age, my lord.

*Att.-Gen.* — What do you know of Mr. Braddon's forcing your boy to sign anything that he had prepared after this? . . .

*Sol.-Gen.* — How did Mr. Braddon behave himself?

*Edwards.* — Like a civil gentleman.

I saw nothing else by him, but that he was very zealous in the business, that is the truth of it, nothing could persuade him to desist. . . .

*Mr. Jones.* — Did not Mr. Braddon carry your son before several justices of peace?

*Edwards.* — Before none as I know of; not one truly to my knowledge.

*Att.-Gen.* — Did you understand he had taken your boy from your house in a coach.

*Edwards.* — Never till he carried him into his majesty's presence before the Council, and I knew not that till the boy came home.

*Mr. Thompson.* — Mr. Attorney, Have you done with him? may I ask him a question?

*Att.-Gen.* — Ay, ask him what you will.

*Mr. Thompson.* — If I understand you right, Sir, this report of the boy's was that morning that the earl of Essex was murdered.

*L. C. J.* — Was murdered? murdered himself, man.

*Mr. Thompson.* — My lord, I mean the day of his death. Now I would ask you, Sir, when that was?

*Edwards.* — The boy's report was this, Sir, —

*Mr. Thompson.* — I ask you not what his report was, but when? What day it was?

*Edwards.* — The 13th of July. That day the earl of Essex cut his throat.

*Mr. Thompson.* — How many days after that was it when Mr. Braddon came to you?

*Edwards.* — It was not till the 17th of July.

*Mr. Thompson.* — Had you discoursed of the report of your boy at the Customhouse, or anywhere else, that same day he came to you?

*Edwards.* — I cannot say that.

*Mr. Thompson.* — Had you discoursed it before Mr. Braddon spake to you, upon your oath?

*Mr. Edwards.* — Yes, I believe I had.

*Sol.-Gen.* — Had you discoursed it before your boy told you?

*Edwards.* — I should then indeed have been the contriver of the story.

*Att.-Gen.* — So it is like enough you were.

*Sol.-Gen.* — Had you discoursed it to anybody before you went home to your own house, upon your oath, Sir?

*Edwards.* — Upon my oath then I discoursed nothing of that nature, not a tittle of it, nor knew nothing of it, till I had it from my own family.

*Sol.-Gen.* — Did you not discourse of it before you went home?

*Edwards.* — No, when I came home they told me of it.

*L. C. J.* — I ask you again, Sir, Did not you tell it before you came home?

*Edwards.* — About ten o'clock, I having heard the news of the earl of Essex's cutting his throat, at the Customhouse, I stepped home, being very near to my own house, and as soon as I came in at the door, the family began to give me an account what news the boy brought in.

*L. C. J.* — That was the first time you heard of it?

*Edwards.* — Yes, that was the first time I heard of it.

*L. C. J.* — And did you not discourse of it till after that?

*Edwards.* — No.

*L. C. J.* — Call Mr. Evans, let him come in again.

*Att.-Gen.* — Let Mr. Evans come in again.

*L. C. J.* — Mr. Evans, I would ask you this question. . . .

*L. C. J.* — When you first had a discourse with Edwards about this matter, what was it that Edwards did say to you?

*Evans.* — Being upon Customhouse key, and captain Goodland and several others standing upon the key, that very morning my lord of Essex's throat was cut, about eleven o'clock Mr. Edwards came to us, being standing upon the key, and told us, That he was informed his boy had been at the Tower, and came home and told his mother, he saw a hand throw a razor out of



a window, and that he went to take it up, and a maid or a woman came and took it up, and went in again.

*L. C. J.* — Evans, did he tell you this as if he had been at home?

*Evans.* — No, I think it was that he had it from home by some hand or other.

*Edwards.* — I was at home.

*Evans.* — My lord, at two o'clock in the afternoon, when he came again to the Customhouse, he did tell us he had been at home, and his boy did tell him the same story.

*L. C. J.* — But when he had told you before he had dined, did he say, he had been at home?

*Edwards.* — My family can testify I was at home between ten and eleven o'clock.

*Evans.* — To the best of my remembrance he told me he heard so from home.

*L. C. J.* — Before he went home, you say, he told you of this, and that was ten o'clock in the morning, and about two o'clock, in the afternoon, he said, he had been at home, and it was true.

*Mr. Evans.* — Yes, my lord.

*Edwards.* — My lord, I was at home.

*L. C. J.* — Mr. Edwards, did you tell him so, or did you not?

*Edwards.* — It is like I might say so about ten o'clock, but not before I had received the report at home.

*Mr. Evans.* — I understood it so, my lord, that he had heard from home.

*L. C. J.* — I ask you this upon your oath, mind the question, and answer me plainly, Did you speak to him, that you had such a report from home, or did you not?

*Edwards.* — When I told it him, I had it from home, for I brought it from home.

*L. C. J.* — Nay, did you tell him you had such a report from home at ten o'clock, or no?

*Edwards.* — I told him that I had met with such a report.

*L. C. J.* — From whom?

*Edwards.* — From my family at

home, for the boy came not to me to tell it.

*L. C. J.* — Then did you see Mr. Evans about two o'clock that afternoon?

*Edwards.* — 'Tis probable I did.

*L. C. J.* — Did you, or did you not?

*Edwards.* — Yes, I believe I might. . . .

*L. C. J.* — Answer me my question, did you, or did you not tell him so?

*Edwards.* — I did not acquaint him with it before I had been at home, and received it from my own family.

*L. C. J.* — Look you, Sir, don't you go about to evade the question, to trifle with the court, you must answer me my question directly, and upon your oath, did you tell him you had notice from home of such a report, or no?

*Edwards.* — I did not receive notice from home, but I brought it from home.

*L. C. J.* — Did you tell him you had it from home?

*Edwards.* — I told him I had it from my family, who told me the boy had made such a report.

*L. C. J.* — Did you tell him you had it from your boy, or received notice from home about it?

*Edwards.* — I did not tell him anything before I had been at home.

*L. C. J.* — Well, then, answer me this question. Did you tell him in the afternoon at two o'clock: Now I have been at home and examined my boy, and find it so as I told you?

*Edwards.* — I examined my boy at dinner, and I found the boy agreed with the report of my daughter, and confirmed it.

*L. C. J.* — I ask you what you told Mr. Evans, not what your boy or your daughter told you?

*Edwards.* — It is probable I might tell Mr. Evans the same story after dinner at two o'clock, that I did before.

*L. C. J.* — Now tell us the passage again, Mr. Evans, as you heard it.

*Evans.* — To the best of my remembrance, at two o'clock in the afternoon, Mr. Edwards came and told us, he had examined the boy, and says he, the boy has confirmed all that I told you.

*L. C. J.* — But before that in the morning what did he say?

*Evans.* — I cannot say exactly the time, but I think it was about ten o'clock. There were four or five more besides myself standing at the Customhouse key, and Mr. Edwards came to us, and told us, says he, I am informed from home, as I understood it, not that he had been at home, but that he heard it from home, that his boy had been at the Tower, had seen an hand throw a razor out of the window.

*L. C. J.* — What said he at two o'clock?

*Evans.* — He said he had examined his boy, and he said the same thing, that he told us he had heard in the morning. . . .

*Sol.-Gen.* — Mr. Edwards, pray let me ask you a question, Did Mr. Braddon tender any paper to your son to sign?

*Edwards.* — I was informed he did do it afterwards, but I saw him not do any such thing.

*Sol.-Gen.* — Did you never say that Mr. Braddon had tendered a paper to your son to sign?

*Edwards.* — I do not believe I ever did say so, I do not remember any such thing.

*Sol.-Gen.* — Pray recollect your memory, and tell us whether you did, or did not?

*Edwards.* — I thank God, Sir, that he has given me my memory and my understanding, I bless him for it.

*Att.-Gen.* — But it were well if thou hadst any honesty too.

*Edwards.* — And honesty too, Sir: I have not lived these thirty-nine years at the Customhouse without honesty. I never had my honesty questioned to this day. I am sure nobody can tax me with dishonesty.

*Sol.-Gen.* — Pray, Mr. Edwards, let your anger alone for a while, and

answer the question that I shall ask you: Did your son refuse to sign that paper?

*Edwards.* — He did sign it at last.

*Sol.-Gen.* — Did he refuse to sign it?

*Edwards.* — I do not know whether he refused it or no.

*Just. Withens.* — Did you hear that your son refused it?

*Edwards.* — I did hear that he had signed it.

*Just. Withens.* — But did you hear that he refused to sign it?

*Edwards.* — The boy did not tell me he had refused to sign it. I did not hear him refuse it.

*L. C. J.* — Thou dost prevaricate very strangely, I must tell thee that, notwithstanding thy reputation of thirty-nine years of honesty: Prithee, answer plainly, Did you hear at any time, that your son had refused to sign it?

*Edwards.* — No, my lord, I did not, to the best of my remembrance.

*L. C. J.* — That is a plain answer, man; but thou dost so shuffle up and down, one cannot tell what to make of what thou sayest.

*Mr. Thompson.* — Sir, I desire to ask you one question, Whether ever Mr. Braddon and you had any former acquaintance?

*Sol.-Gen.* — Pray, stay, Sir, and if you please, spare your question a little, for we have not yet done with Mr. Edwards. Mr. Edwards, pray answer me, Did Mr. Braddon ever tell you, that he had other informations to confirm this report of your son from others?

*Edwards.* — Truly, I do not remember he said any such thing.

*Sol.-Gen.* — Did you ever say he told you so? Consider of it, and remember your former examination.

*Edwards.* — 'Tis like since he may have said so, but not at his first coming.

*Sol.-Gen.* — At his first coming did your son sign his paper then?

*Edwards.* — No, he did not, as I am informed, I saw it not.

*Sol.-Gen.* — But afterwards you

say, Mr. Braddon did tell you he had other evidence to confirm it.

*Edwards.* — It may be he might, I cannot say it positively.

*Att.-Gen.* — You say he did not sign the paper at his first coming?

*Edwards.* — No, I am informed he did not.

*Sol.-Gen.* — How do you know he did sign it at last?

*Edwards.* — My wife and daughter's information.

*L. C. J.* — But how then can you say, that you never heard he did refuse it.

*Edwards.* — My lord, he did not tender a paper to sign, till he had been two or three times there, as I have heard; it was not tendered the first time he came.

*L. C. J.* — I wonder how thou hast escaped thirty-nine years with such a reputation.

*Edwards.* — My lord, I never was thought otherwise, nor I hope never gave any occasion for such a thought.

*L. C. J.* — I assure thee I do not, nor can take thee for one.

*Edwards.* — I hope I have done nothing to make your lordship think the contrary.

*L. C. J.* — Yes, thou hast. Thou didst nothing but shuffle up and down, thou art to consider thou art upon thy oath, and must answer questions plainly.

*Edwards.* — My lord, I do answer as truly as I can. . . .

*Att.-Gen.* — Then where is Edwards, the boy? [Who was brought forth with into the court.]

*Edwards.* — I charge you in the presence of Almighty God, speak truth, child.

*Sol.-Gen.* — And so should you too.

*Edwards.* — Be sure to say nothing but the truth.

*L. C. J.* — And child, turn about, and say, Father, be sure you say nothing but the truth.

*Att.-Gen.* — My lord, this is the boy, he is very little and very young, will your lordship have him sworn? What age are you of?

*W. Edwards.* — I am thirteen, my lord.

*Att.-Gen.* — Do you know what an oath is?

*W. Edwards.* — No.

*L. C. J.* — Suppose you should tell a lie, do you know who is the father of liars?

*W. Edwards.* — Yes.

*L. C. J.* — Who is it?

*W. Edwards.* — The devil.

*L. C. J.* — And if you should tell a lie, do you know what will become of you?

*W. Edwards.* — Yes.

*L. C. J.* — What if you should swear to a lie? If you should call God to witness to a lie, what would become of you then?

*W. Edwards.* — I should go to hell-fire.

*L. C. J.* — That is a terrible thing. And therefore, child, if you take an oath, be sure you say nothing but what is truth, for no party, nor side, nor anything in the world; for that God, that you say will call you to an account, and cast you into hell-fire, if you tell a lie, and witness to a falsehood, knows and sees all you do, therefore have a care, the truth you must say, and nothing but the truth.

*Crier.* — Pull off your glove, and hearken to your oath. [Then he was sworn.]

*Sol.-Gen.* — And now remember you call God to witness to the truth of what you say.

*Att.-Gen.* — Young man, look upon that paper, is that your hand?

*W. Edwards.* — Yes.

*Att.-Gen.* — Did you sign that?

*W. Edwards.* — Yes.

*Att.-Gen.* — Prithee tell the court, how thou camest to sign it?

*L. C. J.* — Ay, child, be not afraid. Tell the truth, for if thou tellest the truth, thou needest not be afraid, but if thou tellest a lie, thou hast need to be afraid; let nobody, whatever has been said to thee, affright thee from telling the truth.

*Sol.-Gen.* — Don't be afraid of thy

father, or anybody, but tell plainly what thou knowest, and speak only the truth.

*Att.-Gen.* — How came you to sign that paper?

*W. Edwards.* — Mr. Braddon bid me sign it when he had writ it.

*L. C. J.* — Hark thee, child, Did he take it from thee what he writ, or did he write it from himself? Come hither, child, be not afraid, nobody here will do thee any hurt.

Then the Boy was lifted up upon the table before the Judges.

*L. C. J.* — Look upon that paper, didst thou put thy name to that paper, child?

*W. Edwards.* — Yes.

*L. C. J.* — Whose handwriting is that paper, besides thy name?

*W. Edwards.* — Mr. Braddon's.

*L. C. J.* — Did he bring it ready written?

*W. Edwards.* — He writ it in our parlor.

*L. C. J.* — How came he to write it?

*W. Edwards.* — He said it was for the earl of Essex, to give to his wife.

*L. C. J.* — And what did he ask thee before he writ that?

*W. Edwards.* — He asked me, whether I saw anything at the Tower, and so I told him, yes.

*L. C. J.* — Ay, tell us what you told him, and be not afraid, child, but tell the truth.

*W. Edwards.* — I told him I was in the Tower, and saw a razor thrown out of a window.

*L. C. J.* — You told him so, and then what said he to you?

*W. Edwards.* — He bid me speak the truth.

*L. C. J.* — Was that all the words you had?

*W. Edwards.* — I afterwards went with my brother into the Tower, and I showed my brother the place, and then afterwards Mr. Braddon writ this, and he said it was to give to the countess of Essex.

*Just. Holloway.* — Did he read it to you after he had writ it?

*W. Edwards.* — Yes.

*Just. Holloway.* — And did he ask thee, whether it were true? *W. Edwards.* — Yes.

*L. C. J.* — And didst thou tell him it was true?

*W. Edwards.* — Yes.

*L. C. J.* — And didst thou tell him all that was in that paper was true? *W. Edwards.* — Yes.

*L. C. J.* — Did you tell him all that was writ in that paper before he writ it down?

*W. Edwards.* — Yes.

*L. C. J.* — Prithee mind the question, and speak truth, Didst thou tell him all that was in that paper before he writ it down?

*W. Edwards.* — Yes, I told him, and so he writ it down.

*Just. Holloway.* — You heard it all read to you, you say? *W. Edwards.* — Yes.

*L. C. J.* — Then I ask you again. Did you tell him all that was in that paper was read to you, before he writ it down? *W. Edwards.* — Yes.

*L. C. J.* — And after you had told him, he writ it down?

*W. Edwards.* — I told him as he writ it down.

*L. C. J.* — And after such time as he had writ it down, did he read it to you?

*W. Edwards.* — Yes.

*L. C. J.* — And then you put your name to it?

*W. Edwards.* — Yes.

*Att.-Gen.* — I pray, my lord, he may be asked this question, Whether or no, when he first brought it in, the boy did not deny to sign it?

*L. C. J.* — Did he bring the paper thither before thou signedst it?

*W. Edwards.* — It was upon the table.

*L. C. J.* — Didst not thou refuse to put thy name to it? *W. Edwards.* — Yes.

*L. C. J.* — Why? *W. Edwards.* I was afraid.

*L. C. J.* — Why?

*W. Edwards.* — For fear of coming into danger.

*L. C. J.* — Why, what danger

could there be? There was no danger if it was truth.

*W. Edwards.* — That was not the truth.

*L. C. J.* — Which was not the truth? Was not the paper that he had written truth?

*W. Edwards.* — No.

*L. C. J.* — How so, child? Was not that thou toldest him the truth?

*W. Edwards.* — No.

*L. C. J.* — Tell the truth now then.

*W. Edwards.* — So I do.

*Sol.-Gen.* — Then he offered it first to you, and bid you sign it, and you denied to put your hand to it, because it was not true?

*W. Edwards.* — Yes.

*L. C. J.* — And how long after did he offer it to you again?

*W. Edwards.* — A little while after.

*L. C. J.* — But did you tell Mr. Braddon it was not true, when you refused to sign it?

*W. Edwards.* — No, I did not.

*L. C. J.* — Why didst thou refuse to sign it then?

*W. Edwards.* — I was afraid, because it was not true.

*L. C. J.* — Didst not thou tell Mr. Braddon it was not true?

*W. Edwards.* — I did not tell Mr. Braddon it was not true.

*L. C. J.* — Why then wast thou afraid to sign it because it was not true at one time, and yet did sign it, though it was not true, at another time?

*Sol.-Gen.* — Child, didst thou give Mr. Braddon any reason, why thou didst not sign it at that time? *W. Edwards.* — No, Sir. . . .

*L. C. J.* — Thou sayest, thou didst first refuse it, because it was not true?

*W. Edwards.* — Yes.

*L. C. J.* — And then afterwards thou didst sign it? *W. Edwards.* — Yes.

*L. C. J.* — Then I ask thee, who persuaded thee to sign it after that time that thou still refusedst it?

*W. Edwards.* — My mother was afraid to have me sign it.

*L. C. J.* — Who persuaded you to sign it?

*W. Edwards.* — Mr. Braddon said there was no harm in it, so I did it.

*L. C. J.* — Did Mr. Braddon then persuade you to sign it?

*W. Edwards.* — He said there was no harm in it, that was all.

*L. C. J.* — Did you do it at his desire?

*W. Edwards.* — Yes.

*L. C. J.* — And you refused it at first when he desired it? *W. Edwards.* — Yes.

*L. C. J.* — What, because it was false?

*W. Edwards.* — Yes.

*L. C. J.* — Why then wouldst thou sign it afterwards, if somebody did not persuade thee to it?

*W. Edwards.* — He told me there was nothing of harm in it.

*Att.-Gen.* — Hadst thou any money offered thee by Mr. Braddon? —

*W. Edwards.* — No.

*Att.-Gen.* — Hadst thou any money promised thee? *W. Edwards.* — No.

*Att.-Gen.* — Hadst thou anything else offered or promised thee?

*W. Edwards.* — No, nothing at all.

*L. C. J.* — You have heard what he has said, gentlemen?

*Jury.* — No, my lord, we have not heard a word.

*L. C. J.* — Then I will tell you what he has said exactly. He says, that Mr. Braddon writ it from him; that he writ it in the room while he was there; that after such time as he had writ it, Mr. Braddon read it to him: He says, that he had carried his brother to show him the place where he assigned that the razor was found in the Tower: He says, that after such time as the writing was finished, Mr. Braddon offered it him to sign, and he refused to sign it, and I asked him the reason why, and he says, because it was false; he says some short time afterwards Mr. Braddon came to him again.

*W. Edwards.* — No, Sir, it was the same time.

*L. C. J.* — Well, the same time

Braddon was at him again, and told him there was no harm in it, and therefore desired him to sign it, and because he would not, he would have his aunt to have signed it; and he says, that Braddon telling him there was no harm in it, he did sign it.

*Sol.-Gen.* — But withal he says, that it is false.

*L. C. J.* — Ay, he swears now it is all false.

*Mr. Freke.* — Did you tell Mr. Braddon it was false?

*L. C. J.* — No, he says he did not.

*Mr. Freke.* — Did your sister at all discourse with you after you had dictated to Mr. Braddon? Pray what discourse had you with her after Mr. Braddon writ that paper, before you refused to sign it?

*L. C. J.* — Do not ask any leading question, Sir, but propose a fair plain question.

*Mr. Freke.* — Did you discourse with your sister at all, after Mr. Braddon had been at your house?

*W. Edwards.* — Yes, I had been at school, and when I came home, they said that a gentleman that came from the earl of Essex's brother, had been to inquire of the truth of the report I had raised.

*Mr. Freke.* — What did your sister say to you?

*W. Edwards.* — That was all.

*Sol.-Gen.* — Did she name the gentleman, and did you see him afterwards?

*W. Edwards.* — Yes.

*Sol.-Gen.* — Who was it?

*W. Edwards.* — That gentleman, Mr. Braddon.

*Jury.* — My lord, we don't hear a word he says.

*L. C. J.* — He says he had been at school, and when he came home, they told him a gentleman came from the earl's brother, to inquire of the truth of what he had reported. It was asked him who the gentleman was, and he says, it was that gentleman, Mr. Braddon.

*Mr. Thompson.* — Before such time as Mr. Braddon came to you,

what did you tell your father about this razor, and when?

*W. Edwards.* — Sir, I told him the king and duke of York were at the Tower, and while I was there, I said, I saw a hand cast out a bloody razor, and a maid come out and take it up, and go in again.

*Mr. Thompson.* — Did you see any such thing as a bloody razor cast out?

*W. Edwards.* — No.

*L. C. J.* — What a dust has such a trivial report made in the world! Admit the boy had said any such thing, what an age do we live in, that the report of every child shall blow us up after this rate? It would make a body tremble to think what sort of people we live among: To what an heat does zeal transport some people, beyond all reason and sobriety? If such a little boy had said so, it is not an half-penny matter, but presently all the government is to be libeled for a boy, which, whether he speaks true or false, is of no great weight, and he swears it is all false.

*Sol.-Gen.* — My lord, we shall next call Dr. Hawkins's son of the Tower. Where is Thomas Hawkins? [Who was sworn.]

*Att.-Gen.* — My lord, agreeable to what the boy has now said, to show you that what Mr. Braddon got him to sign was all false, here is the young man that truanted with him the same morning, that was with him all the time, the whole morning, that says, there was no such thing, and he saw no such thing; and how could it enter into the boy's head such a malicious lie, if it had not been dictated? Pray, Mr. Hawkins, will you acquaint my lord, and the jury, whether you played truant that morning with this other boy, and where you were?

*L. C. J.* — Ay, tell the truth in God's name, young man, be it one way or the other, let the truth come out.

*Hawkins.* — In the morning, Sir, I met with him at the Tower, going round with the king, and we walked

round the Tower as long as the king walked, and then the king going into the Constable's house, we and some more boys were playing —

*L. C. J.* — Prithee speak out, as though thou wert at play at chuck-farthing.

*Hawkins.* — After we had been at play, I went home, and after I had been there a little while, news was brought to my father that the earl of Essex had killed himself. My father went down, and I followed him, and after I had been there a little while, William Edwards came home, and there we stood looking up at the window an hour or two at least, and after we had tarried there a great while, I went out of the Tower gate a little after eleven.

*Att.-Gen.* — Was there no razor thrown out of the window?

*Hawkins.* — No, there was no razor thrown out.

*L. C. J.* — Didst not thou see a razor thrown out of the window and a maid come and take it up?

*Hawkins.* — No, there was no such thing.

*L. C. J.* — Were you there before Edwards came? *Hawkins.* — Yes.

*L. C. J.* — And you went out with him?

*Hawkins.* — Yes.

*L. C. J.* — Did you and Edwards go away together? *Hawkins.* — Yes.

*Mr. Thompson.* — Did he tell you of any such thing? *Hawkins.* — No.

*Sol.-Gen.* — What time of the day was it that you went out of the Tower?

*Hawkins.* — Almost eleven o'clock.

*Mr. Wallop.* — The boy does say, he did tell his father and mother, and all the family of it. And it is plain by the father, that it was known in the family by ten of the clock.

*Sol.-Gen.* — Was this young man with you, all the time that you was there, Edwards?

*W. Edwards.* — Yes.

*Att.-Gen.* — Did you not tell your father of this story when you came from the Tower?

*W. Edwards.* — Yes.

*Att.-Gen.* — And that was the same time you came out of the Tower with Hawkins?

*W. Edwards.* — Yes.

*Att.-Gen.* — And you, Hawkins, was this young man with you all the time you were at my lord Essex's window?

*Hawkins.* — He came thither while I stood there.

*Att.-Gen.* — My lord, this is but the beginning of our evidence, your lordship sees what a fine case it is, and how all this noise and bustle has come to be made in the world. The rumor did first arise in a fanatic family, and was propagated by that party.

*Mr. Jones.* — Ay, it is easily known whence it came.

*L. C. J.* — Gentlemen, pray will you go on with your evidence, and make no descants.

*Mr. Freke.* — You, Hawkins, when you came from your father's house, did you find that boy in Tower?

*Hawkins.* — Yes, Sir, a-going round with the king.

*L. C. J.* — That was before this thing happened.

*Mr. Freke.* — Were you with him all the while he was in the Tower?

*Hawkins.* — Just before my lord Essex cut his throat I went home.

*Mr. Freke.* — Were you with him all the time or no? And how long were you with him?

*Hawkins.* — I went with him round the Tower with the king. And after we were at play, and then I went home, and then when I had been at home a little time, the rumor and noise came, that the earl of Essex had killed himself; so I went with my father, and stood before the window, and I tarried there awhile before he came home, and I stayed with him looking at the window a great while, and we went out of the Tower together. . . .

*Att.-Gen.* — My lord, we had not laid so much weight upon Mr. Brad-don for this matter, but that he

could not be quiet, but must inform the king of it, and this matter was all examined before the king, the boy was sent for, and before his face the boy declared it was a lie. And after he knew this, and after the boy had twice in the presence of the king denied it, yet notwithstanding all this, then was the project between him and Speke. We shall first prove the examination of this matter before the Council, and how he was acquainted with it. Pray call Mr. Blathwaite and Mr. Monstevens.

*Mr. Blathwaite* was sworn.

*Att.-Gen.* — Pray, Mr. Blathwaite, will you give an account whether you were present at the Council, when Mr. Braddon brought this information, and how the matter was examined there, and what was done.

*Mr. Blathwaite.* — My lord, it was on the 20th of July, that Mr. Braddon came to Whitehall, he may remember I was there, for he could not but see me attending on the king. This little boy was brought before his majesty, and was asked what information he had given Mr. Braddon? And whether the matter of the information was true? The boy said it was a lie, and that upon his faith it was not true. Mr. Braddon knew all this, for he was called in and informed of it; and I believe Mr. Braddon will remember, that he heard the boy deny it. The whole examination could not but show that it was an invention of his, as he said it was, to excuse himself for having played truant that day, and that because he was afraid to go home he invented that lie. After this Mr. Braddon, as it appears, did nevertheless pursue this business.

*L. C. J.* — Pray only tell what you know of your own knowledge, both before and after.

*Mr. Blathwaite.* — I know, my lord, that Mr. Braddon (having been in the country) came afterwards before the king, and was again examined upon this matter, by which it appeared, that he did continue in his pursuit, though he was

always informed of the denial the boy made, and that it was understood to be a lie by the whole family of the Edwardses, as well as from the denial of the little boy; for they did confess, that the boy used to tell lies, and one of the sisters said he had denied it at first, but afterwards was brought to say it. And if I remember right, the words of one of the sisters were, "Braddon compelled the boy to sign it." Those are the words in the minutes that I took at the examination. . . .

*Att.-Gen.* — My lord, I pray that a word of the Information may be read, we will first prove the information taken by him. . . .

*Cl. of Cr.* — This is subscribed, "William Edwards."

*L. C. J.* — Call the boy in again. . . .

*L. C. J.* — Hark you, young man, do you know my lord Gerard? *W. Edwards.* — Yes.

*L. C. J.* — Which lord Gerard do you know?

*W. Edwards.* — My lord Brandon Gerard.

*L. C. J.* — How came you to know him?

*W. Edwards.* — By sight I know him.

*L. C. J.* — Do you know where he lodged in the Tower? *W. Edwards.* — Yes.

*L. C. J.* — Where?

*W. Edwards.* — At one Mr. Sam's.

*L. C. J.* — Was you ever in his lodging?

*W. Edwards.* — No.

*L. C. J.* — Never at all? *W. Edwards.* — No.

*L. C. J.* — Did you ever tell anybody you were in my lord Brandon Gerard's lodgings?

*W. Edwards.* — Never in my life.

*L. C. J.* — Did you never tell Braddon, that you went to see his lodgings?

*W. Edwards.* — Into the house I never went.

*L. C. J.* — Did you never tell Braddon, That you went to see my lord Brandon Gerard's lodgings? Never in your life?



*W. Edwards.* — No, Sir.

*L. C. J.* — Now read it.

*Cl. of Cr.* [Reads.] — "The Information of William Edwards, second son to Thomas Edwards, of the parish of All-hallows Barkin, London, taken the 18th day of July, in the 35th year of the reign of our sovereign lord king Charles 2, anno 1683, says: That this informant on Friday the 13th of this instant July, as he was going to school, with his brother Edward, he heard that his majesty and his royal highness the duke of York, were going to the Tower. Whereupon this informant left his brother, and went to the Tower to see his majesty, and his royal highness. And when this informant had seen his majesty and his royal highness, this informant about nine of the clock in the morning of the same day, went to see my lord Brandon Gerard's lodgings; and as this informant was standing almost over against my lord Gerard's lodgings, between the lord Gerard's and the late lord of Essex's lodgings, this informant saw a hand cast out a bloody razor out of the said earl of Essex's lodgings. And this informant was going to take up the said razor, which he saw on the ground to be bloody; but before this informant came to the razor, there came a maid running out of captain Hawley's house, where the said lord of Essex lodged, and took up the said razor, which she carried into the said captain Hawley's house. And this informant believes that it was the said maid, who he first heard cry out murder. And this informant further said, That he heard the said maid say to some which were about the door, after the murder was cried, That she did hear the said lord of Essex to groan three times that morning. The father, three sisters, and brother will swear, That the said William Edwards did declare the substance of this Information to them on Friday the 13th instant, and never in the least denied it till

Tuesday after, when being chid and threatened by the eldest sister, he did deny it; but soon after confessed it, and signed it in the presence of five or six witnesses."

*Just. Withins.* — Thus you see, he persuaded him to tell a fine story of going to see my lord Brandon Gerard's lodgings, but the boy never told any such thing.

*L. C. J.* — No, he never told him a word of it, he swears. . . .

*Cl. of Cr.* — The Information of Mrs. Edwards, wife to Thomas Edwards, saith, "That about 10 o'clock in the morning on Friday the 13th of this instant July, this informant's youngest son William Edwards, aged about 13 years, came trembling to this informant, and in great amazement and horror told this informant, that the lord Essex had cut his throat in the Tower, and further said, That he the said William Edwards in the morning about nine o'clock, did see a hand cast out a razor out of the said lord of Essex's lodging window, which razor he saw on the ground to be bloody. And the said William Edwards was going to take up the said razor, but before he came to it, there came a maid running out of captain Hawley's house, where the said earl of Essex lodged, and took up the razor, which she the said maid forthwith carried into the said captain Hawley's house, and soon after he the said William Edwards heard her, as the said William Edwards did believe, cry out murder. And this informant further saith, That the substance of which the said William Edwards hath sworn in this information, he the said William Edwards on Friday last did declare to this informant and her whole family, several times attesting it to be true, and several times since." . . .

*L. C. J.* — Ay, that is the boy's Information.

*Cl. of Cr.* — Here is another, it is dated August the 8th, 1683. The Information of Jane Lodeman, aged

about 13 years, did in the presence of these, whose names are here under written, declare as followeth, "That the said Jane Lodeman was in the Tower on Friday morning, the 13th of July last, and standing almost over against the late earl of Essex's lodging window, she saw a hand cast out a razor out of my lord's window, and immediately upon that she heard shrieks, and that there was a soldier by my lord's door, which cried out to those within the house, that somebody should come and take up a razor which was thrown out of the window, whereupon there came a maid with a white hood out of the house, but who took up the razor she cannot tell."

"This is subscribed

"JOHN BOOM,  
"WM. SMITH."

*Cl. of Cr.* — Here is another paper, August the 8th, 1683, Mr. William Glasbrooke does declare, That one Jane Lodeman, aged about 13 years, inhabiting in the same house where he the said William Glasbrooke lodged, did on Friday the 13th of July last past, between the hours of 10 and 11 in the morning, in the presence and hearing of him the said William Glasbrooke declare to her aunt, "That the earl of Essex had cut his throat, which upon her aunt was very angry with her, whereupon she the said girl did declare, that she was sure of it, for she saw him throw the razor out of the window, and that the razor was bloody, and that she heard two groans or shrieks (which of the two words she used, he the said William Glasbrooke is not certain); of this he the said, William Glasbrooke is ready to make oath.

"This is subscribed

"WM. GLASBROOKE,  
"MARGARET SMITH."

*Att.-Gen.* — He carried his stuff about him, it seems, wherever he went.

*L. C. J.* — It is stuff indeed. Good God, what an age do we live in!

*Att.-Gen.* — It is not taken upon

oath before any magistrate, but cooked up to amuse the country, as if they were formal Informations. . . .

*Att.-Gen.* — My lord, we have gone through our evidence for the present to show how this man has endeavored to spread this matter to the scandal of the government. We shall end here at present to see how he has improved his confidence, by what defense he will make to all this proof. . . .

*Braddon.* — My lord, I desire the family of the Edwards may be called.

*L. C. J.* — Name them, Who are they? How can we tell who your witnesses are? . . .

*Braddon.* — Mr. Edwards, and Mrs. Edwards. [Who came into court.] . . .

*L. C. J.* — Well, What do you ask Edwards?

*Braddon.* — What day was the first day I saw you, and had discourse with you, and what was the discourse I had with you?

*Edwards.* — It was the 17th of July.

*Braddon.* — What did you tell me then that your boy reported?

*Edwards.* — I told you what I acquainted the court withal before, that the boy had brought home such a report.

*Braddon.* — Had the boy ever denied it before I saw you?

*Edwards.* — That day you came to speak with me about it, as I was informed by my wife and my daughter, the boy did deny it.

*Braddon.* — Was it before I came, or after I came that he denied it?

*Edwards.* — It was after you came.

*Braddon.* — What were the inducements that made him to deny it?

*L. C. J.* — He tells you himself, because it was false.

*Braddon.* — I desire the elder sister Sarah Edwards may be called. . . .

*Crier.* — Here is Sarah Edwards now. [Who was sworn.]

*Att.-Gen.* — This is not the sister, this is the mother of the boy.

*L. C. J.* — Well, what do you ask her?

*Braddon.* — What discourse had you with your boy about ten o'clock that Friday morning I met you?

*Mrs. Edwards.* — I had no discourse, but what my child told me.

*Braddon.* — What did your child tell you? . . .

*Mrs. Edwards.* — What was it, Sir, he came and told me? Why, the boy told me, Mother, says he, I have been at the Tower, and seen the king's majesty, and his royal highness, and says he, the earl of Essex has cut his throat; and Lord, Mother, says he, and wept. Lord, child, said I, I am afraid you are going to make some excuse to me that I should not beat you, being you have played truant; no, Mother, says he, I did not. He continued in this for a little while, and then afterwards did deny it.

*Braddon.* — What did he deny?

*Mrs. Edwards.* — What he had said to me.

*Braddon.* — Did he deny that he had been at the Tower? Or that the earl of Essex had cut his throat?

*Mrs. Edwards.* — No, he denied what he said he saw.

*Braddon.* — What was that?

*Mrs. Edwards.* — He said, he saw an hand out of a window, and a razor fell down, and he went to take it up, and there came out a woman, or a maid, a short fat woman came out, and took it up, and went in again.

*Mr. Wallop.* — And he said this crying and weeping you say?

*Mrs. Edwards.* — Yes, he did so.

*Braddon.* — Did he deny it before such time as I had been there?

*Mrs. Edwards.* — No, you was once at my house before, and spake to my husband, and then you came the same day again. . . .

*L. C. J.* — Hark you, Mrs. Edwards, before you go. The boy denied it, it seems, in two or three days after he had given out such a report?

*Mrs. Edwards.* — Yes, my lord, he did.

*L. C. J.* — How came he to deny it?

*Mrs. Edwards.* — I will tell you how. When this gentleman came and acquainted my husband with his business, it put us all into a great damp; and my husband said, Now both my boys were gone to school, and says he, after the gentleman was gone, to my daughter Sarah, Do not you say anything to your brother when he comes in, but let him alone, and we will talk to him. So with that she was grievously affrighted, and so amazed, that as soon as he came in, she said, Prithee Billy, deal truly, and do not you tell any lie to save your breech, for here has been a gentleman to inquire something about what you said; why, sister, says he, will anything of harm come? Truly, child, says she, I do not know; and upon that he did deny it.

*L. C. J.* — Did you tell Mr. Braddon, he had denied it? . . .

*Braddon.* — Mrs. Edwards, did not the boy come to you, and cry out, he should be hang'd, and then did deny it?

*Mrs. Edwards.* — Yes, that he did.

*Braddon.* — From whence did he come, that he was in such a fright?

*Mrs. Edwards.* — I can't tell that, Sir.

*Braddon.* — Did not your eldest daughter chide him and threaten him?

*Mrs. Edwards.* — Yes, she did bid him speak the truth.

*Att.-Gen.* — And then he denied it?

*Mrs. Edwards.* — Yes.

*L. C. J.* — Ay, says she to him, Billy, do not, to save thy breech, tell a lie, but speak the truth; why then, says he, the truth of it is, there was no such thing.

*Braddon.* — My lord, she says it was after his sister had chid and threatened him.

*Sol.-Gen.* — You are a little too fierce upon the woman, Mr. Braddon, you do not observe what she says.

*S. Edwards.* — Yes, the second time before he came into the house.

*Braddon.* — I desire the old gentleman may be asked this question.

*Mr. Thompson.* — Call Mr. Edwards again. . . .

*Braddon.* — Mr. Edwards, Pray will you answer this question? Did not your son, when he was asked why he denied it, say that it was fear and discouragement, through his sister's threats, was the cause? Pray speak the truth.

*Edwards.* — I cannot tell whether the child did say so; something of that nature he did say.

*Mr. Thompson.* — Call Anne Burt.

*L. C. J.* — We have got such strange kind of notions, nowadays, that forsooth men think they may say anything because they are counsel. . . . But we plainly see through all. This was the design from the beginning, the king and the duke of York were in the Tower at that time, and it must be thought and believed that they had designed this matter, and so then all the people must be ruined in case they would not say the earl murdered himself, though indeed others had done it. . . .

*Braddon.* — My lord, as to the making such an inference, or any reflection as your lordship mentions, I am as far from it as anybody here. . . .

Then *Anne Burt* appeared, and was sworn.

*Braddon.* — Mrs. Burt, I desire to know what discourse you had with Mrs. Edwards, and that family? . . .

*Mrs. Burt.* — I went to make a visit to Mrs. Edwards, and I had not been there half an hour but in comes this gentleman; now I had asked no questions about the business, but in he comes and desired to speak with Mrs. Edwards; Mr. Edwards was called, and when he came in with Mr. Edwards, the gentleman sat down in the room, and told Mr. Edwards he had heard a report of something his son had spoken, but he desired to have it from his son's

own mouth, and the boy was called in (this is a real truth, Sir, for I do not know whether I may stir from this place where I am alive or no); And when the boy came in, the gentleman said to him, if it be true that you have reported, own it; if not, do not own it; for, said he, it is a dreadful thing to be found in a lie, I would have you read the 5th Chapter of the Acts, where a man and a woman were struck dead for telling a lie. Sir, said the boy, it is true, and what I said I will speak it before any justice of peace in the world. And then he asked him what he had reported, and the boy made a repetition of what he had seen and said before, that he went into the Tower and came to the first row of houses that goes along. And at the first house he saw nobody look out at the window, nor at the second house, but he looked up at the third house, and he took his hand and showed thus, said he, I saw a man's hand he did not say, but an hand throw a razor out, of this fashion, and he imitated it with his hand. Said the gentleman, was it not the wrong window, or the wrong house? I will not take the thing upon this credit, take your other brother down, that was a bigger boy than this, and, says he, go down to the house, and show your brother the window where you saw this. The two boys went down, and he showed his brother the place where he saw the hand —

*L. C. J.* — Were you present at his showing?

*Mrs. Burt.* — Will your lordship please to give me leave —

*L. C. J.* — And pray give me leave too. I ask you, Were you present? For you tell it as if you knew it yourself.

*Mrs. Burt.* — Both the boys came up and said so.

*L. C. J.* — You should have said so then, that they told you it, for you are upon your oath, and must affirm nothing but your own knowledge. . . .

*Mrs. Burt.* — My lord, I heard what I say with my own ears.

*L. C. J.* — But you talk of a thing you did not see with your own eyes, as if you had seen it. . . .

*Mrs. Burt.* — I tell what is truth, what I heard and saw; for, said Mr. Braddon, I believe it was not the right window, when the boy came up and said he had showed the window. And this gentleman, I cannot hit his name right (he is a stranger to me), he and Mr. Edwards went down with the boy, to see whether it were the right window of the house where my lord died (which where it is I cannot tell any otherwise than has been reported, or whether there be one room or two of a floor I do not know); and when he came up again he called for a sheet of paper, that he might write from the boy's mouth, and that he might not differ one word from what the boy had said himself. And when I saw Mr. Braddon begin to write I went away, for I thought it may be the gentleman might expect I should set my hand to it as a witness, and I did not desire any trouble.

*Braddon.* — I desire this question may be asked her, my lord, Do not you remember it was said the boy denied it?

*Mrs. Burt.* — Yes, it was said, the boy did deny it. . . .

*Mrs. Burt.* — Because his sister, as his mother told me, had been talking to him.

*L. C. J.* — As his mother told you, prithee, woman, speak your own knowledge, and not what another body told thee.

*Mrs. Burt.* — Pray, give me leave, my lord —

*L. C. J.* — I tell thee, I will not give thee leave to say what thou shouldest not say. . . .

*Mrs. Burt.* — My lord, I have done. I come here to speak the truth, and so I do.

*L. C. J.* — Nay, prithee be not so full of tattle, so full of clack.

Then a little girl came into court.

*L. C. J.* — What age is this girl of? How old art thou, child?

*Girl.* — I was 13 last Saturday.

*L. C. J.* — Do you know the danger of telling a lie? *Girl.* — Yes.

*L. C. J.* — Why, what will become of you if you tell a lie?

*Girl.* — The devil will have me.

*L. C. J.* — Give her her oath. What is thy name, child?

*Girl.* — Jane Lodeman.

Then she was sworn.

*L. C. J.* — Child, do not be afraid of anything in the world, but only of telling anything but what is true; be sure you do not tell a lie, for if, as you say, you shall be in danger of hell-fire by telling a lie, much more will you be in danger if you swear to a lie. Now, what do you ask her?

*Braddon.* — What did you see in the Tower that morning the earl of Essex died?

*Lodeman.* — I saw a hand out of a window, but I cannot tell what window it was, but it was a hand throw out a razor.

*Braddon.* — And what did you hear after that?

*Lodeman.* — I cannot well remember, but it was either two shrieks or two groans that I heard presently after.

*L. C. J.* — What time of the day was it, child?

*Lodeman.* — It was between 9 and 10 of the clock.

*L. C. J.* — Who was with you besides yourself there?

*Lodeman.* — There were more besides me, but they went away.

*L. C. J.* — Who were they, child?

*Lodeman.* — A great many that I did not know.

*L. C. J.* — And how came you to take notice of it?

*Lodeman.* — And there was a coach stood just at the door.

*L. C. J.* — Tell us some of them, child, and that were there besides thyself, speak the truth, be not afraid. Thou sayest a great many people were there, and all the people must necessarily see it.

*Lodeman.* — They were people I did not know.

*L. C. J.* — But they all saw it as well as you?

*Lodeman.* — So I suppose they did.

*L. C. J.* — And you heard a shriek or two, you say?

*Lodeman.* — Two shrieks or two groans, I can't well remember which.

*L. C. J.* — How high was the window?

*Lodeman.* — Not above one pair of stairs high.

*L. C. J.* — How high from the ground might it be? *Lodeman.* — Not above one story.

*Mr. Thompson.* — Whereabouts in the Tower was it?

*Lodeman.* — Sir, it was as you go upon the mount.

*Mr. Wallop.* — Whose lodging do you think it was?

*Lodeman.* — I did not know whose it was, but folks said it was the earl of Essex's.

*L. C. J.* — Who did you tell this to?

*Lodeman.* — I told nobody till I came to my aunt, and I told her.

*L. C. J.* — What is her name?

*Lodeman.* — Margaret Smith.

*L. C. J.* — Did you ever tell this to that man? *Lodeman.* — Yes, afterwards I did.

*L. C. J.* — How came he to inquire of you about it?

*Lodeman.* — He came and asked me, and I could not deny it.

*L. C. J.* — Ay, but how came he to ask you?

*Lodeman.* — There was a gentlewoman that was at our house, and she heard of it, and spake of it at a gentlewoman's at dinner, and so he came to our house to inquire about it.

*L. C. J.* — Who is that gentlewoman? What is her name? *Lodeman.* — Susan Gibbons.

*L. C. J.* — Let me see the information of this girl, that Mr. Braddon had taken?

*Cl. of Cr.* — Yes, my lord, there it is.

*L. C. J.* — Do you know my lord

of Essex's lodgings? *Lodeman.* — They said it was his.

*L. C. J.* — Did you know it of your own knowledge? *Lodeman.* — No, Sir, I did not.

*Mr. Thompson.* — Pray what became of the razor that was thrown out of the window, after it was thrown out?

*Lodeman.* — I saw a woman in a white hood come out, but I did not see her take it up.

*Sol.-Gen.* — Girl, you say, that when you were at this place in the Tower, and saw this matter, there were a great many people there besides yourself? *Lodeman.* — Yes, Sir.

*Sol.-Gen.* — Did the razor fall among the people that stood there, or did it fall out in the street, or how?

*Lodeman.* — Sir, it fell within the pales.

*Sol.-Gen.* — And was the passage easy into the pales? *Lodeman.* — Yes.

*Sol.-Gen.* — What, they must climb over, must they?

*Lodeman.* — No, you need not climb over, there is a door to go in. And when people went in the soldier opened the door.

*Sol.-Gen.* — Who went in with the soldier? Did you see anybody go in?

*Lodeman.* — There was a man went in, but I know not who he was.

*Sol.-Gen.* — Did the soldier stand at the door when this razor was thrown out?

*Lodeman.* — I cannot tell that, a soldier used to be at the door.

*Sol.-Gen.* — The woman came out of the lodging, did she not? *Lodeman.* — Yes.

*Sol.-Gen.* — Did she go in again?

*Lodeman.* — I did not see her go in again.

*Sol.-Gen.* — Did she go into the pale?

*Lodeman.* — I did not see her go into the pales.

*Sol.-Gen.* — Did you see the razor after it fell upon the ground? *Lodeman.* — No.

*Sol.-Gen.* — Was it bloody?

*Lodeman.* — Yes.

*Sol.-Gen.* — Very bloody ?

*Lodeman.* — Yes.

*Sol.-Gen.* — Did you see nobody take it up ?

*Lodeman.* — No, I did not.

*Sol.-Gen.* — Come hither, child ; are you sure it was a razor, or a knife ?

*Lodeman.* — I am sure it was a razor.

*Sol.-Gen.* — Was it open or shut ?

*Lodeman.* — It was open.

*Sol.-Gen.* — What color was the handle ?

*Lodeman.* — Sir, I cannot tell, I see it but as it flew out.

*Sol.-Gen.* — Was it all over bloody ?

*Lodeman.* — No.

*Sol.-Gen.* — All but a little speck ?

*Lodeman.* — It was very bloody.

*L. C. J.* — Blessed God, what an age do we live in ! Girl, you say, you did not know it to be my lord of Essex's window ?

*Lodeman.* — No, but as they told me.

*L. C. J.* — Nor you did not see anybody take up the razor ? *Lodeman.* — No.

*L. C. J.* — But you are sure you did not ?

*Lodeman.* — I am sure I did not.

*L. C. J.* — But, child, recollect thyself, sure thou didst see somebody take it up ?

*Lodeman.* — No, I did not.

*L. C. J.* — I ask thee again, Didst not thou know it to be my lord of Essex's window ?

*Lodeman.* — No, but as they told me.

*L. C. J.* — Did you hear nobody speak to the maid that came out ?

*Lodeman.* — Nobody at all.

*L. C. J.* — No ; prithee is that thy hand, child ? Show her the paper, the uppermost part of it.

*Lodeman.* — Sir, I cannot write.

*L. C. J.* — Who put thy name to it ?

*Lodeman.* — Sir, I do not know, no more than the Pope of Rome.

*L. C. J.* — Whose handwriting is that ?

*Lodeman.* — I cannot tell, I never could write in my life.

*Braddon.* — Those are the names of such as heard her say it.

*Att.-Gen.* — Yes, you have cooked it up bravely.

*L. C. J.* — You shall see what a brave managery you have made of this poor child. Read the Information.

*Cl. of Cr. [Reads.]* — “ The eighth of August, 1683, Jane Lodeman, aged about 13 years, did in the presence of these whose names are underwritten, declare as follows, That the said Jane Lodeman was in the Tower on Friday morning, the 13th of July last, and standing almost over-against the late earl of Essex's lodging window, she saw a hand cast out a razor out of my lord's window, and immediately upon that she heard shrieks ; and that there was a soldier by my lord's door, which cried out to those within the house, that somebody should come and take up a razor, which was thrown out of the window, whereupon there came a maid with a white hood out of the house, but who took up the razor she cannot tell.”

*L. C. J.* — Here it is said “ the soldier cried out,” but now she says, the soldier she does not know was there, and she heard nobody speak to the maid. . . .

*Sol.-Gen.* — Were you carried by Mr. Braddon before any magistrate, or any justice of peace ? *Lodeman.* — No.

*Sol.-Gen.* — Did he take the examination himself ? *Lodeman.* — Yes.

*Att.-Gen.* — Did not he desire you to go before a justice of peace to be sworn ?

*Lodeman.* — No, Sir.

*Sol.-Gen.* — Did he write it himself ?

*Att.-Gen.* — Ay, he writ it, and took it, and this woman that is coming here, is a witness to it.

*L. C. J.* — What is this woman's name ?

*Braddon.* — This is the aunt, Margaret Smith. [Who was sworn.]

*L. C. J.* — Well, what say you to her?

*Braddon.* — I desire to know, what this girl said to you, when she returned from the Tower the 13th of July?

*Mrs. Smith.* — She said to that effect that she speaks now. . . .

*Att.-Gen.* — Mistress, Did you send to Mr. Braddon, to inform him of what the girl had said? or did he come to you?

*Mrs. Smith.* — Sir, I never saw him before in my days.

*Att.-Gen.* — He came first to you then?

*Mrs. Smith.* — Yes: he hearing of it, came as a stranger to me.

*Braddon.* — Did I, directly, or indirectly, offer you, or your niece, anything?

*Mrs. Smith.* — No, never in this world.

*Braddon.* — Did I ever desire her, or you, to say anything but what was true?

*Mrs. Smith.* — No, Sir; you ever encouraged the girl to speak truth; and bid her speak nothing but what was truth. . . .

*Braddon.* — Swear William Glasbrooke. [Which was done.]

*L. C. J.* — Well, what do you ask him?

*Mr. Freke.* — My lord, we desire to know of him, whether he was by on the 13th of July, when the girl gave this report?

*Glasbrooke.* — I was up two pair of stairs when she came in.

*L. C. J.* — What is your name, Sir?

*Glasbrooke.* — William Glasbrooke.

*Cl. of Cr.* — Ay, here is his Information, among those that were taken about Braddon.

*Glasbrooke.* — She came in to her aunt, that went out just now before me, and I heard her very loud with her aunt, saying, the earl of Essex had cut his throat in the Tower. Her aunt chid her upon it; and her aunt chiding her, she said, she was sure it was true; for she saw a bloody razor, with a bloody hand, thrown out of the window.

*Mr. Freke.* — Was this the day of my lord Essex's death?

*Glasbrooke.* — It was the day the king was in the Tower, and, as was reported, the day he was killed. . . .

*L. C. J.* — Now my lord of Essex cut his own throat, and after threw the razor out of the window.

*Glasbrooke.* — 'Tis what the girl did declare.

*Att.-Gen.* — Does not this girl usually tell lies?

*Glasbrooke.* — I have before that time taken her in a lie.

*Att.-Gen.* — Did you acquaint Mr. Braddon with that?

*Glasbrooke.* — I cannot tell that I did.

*Att.-Gen.* — Do you remember that you told Mr. Braddon, That she was a girl that told truth?

*Glasbrooke.* — No, I never did that; for I was always of another persuasion about her. . . .

*Braddon.* — These two children told me, they never saw one another till they were examined at the Council.

*L. C. J.* — Well, well; Go on with your witnesses.

*Braddon.* — Where is William Smith? [Who appeared and was sworn.] I desire to know of you, Mr. Smith, what you heard the girl say, when I was there?

*Smith.* — I heard the girl tell us, That she saw a hand cast out a razor, and either the hand was bloody, or the razor, I cannot tell which; but she said it was out of the window, where she said the earl of Essex lodged.

*L. C. J.* — Did she say the earl of Essex did it himself?

*Smith.* — She said she saw an hand cast out a razor.

*L. C. J.* — Did she tell you, it was the earl of Essex's lodging window?

*Smith.* — She said it was that lodging.

*L. C. J.* — Ay, but she says now she does not know it to be his lodging.

*Braddon.* — My lord, she said she was told it was his lodging.

*L. C. J.* — But you have made her



to say positively, it was his lodging, and that he threw out the razor.

*Sol.-Gen.* — Pray, Sir, where did you first hear this report of this girl?

*Smith.* — There at the house where she was.

*Sol.-Gen.* — Were you alone when you went to the girl the first time?

*Smith.* — No, I went with Mr. Braddon.

*Sol.-Gen.* — Did you hear anything of it before? What did induce you to go along with Mr. Braddon? What were the arguments that prevailed with you to go with him?

*Smith.* — I did not know where he was going; Mr. Braddon called me at the shop, as I stood at the door, and asked me if I was busy, or would go with him? So I went with him to the tavern.

*Sol.-Gen.* — You never heard one word before of the girl's report?

*Smith.* — No, I did not.

*L. C. J.* — What else did the girl tell you?

*Smith.* — I cannot say what else she said. This I remember that I have told you.

*L. C. J.* — Did she name the earl of Essex's lodgings?

*Smith.* — I am sure she said the lodging where the earl of Essex lay.

*L. C. J.* — Did she name the earl of Essex?

*Smith.* — She did name the earl of Essex's lodgings.

*L. C. J.* — Did she in so many words say, That it was the earl of Essex's lodgings?

*Att.-Gen.* — Your lordship sees, they give one evidence, and she another.

*Smith.* — I cannot say whether she did in so many words say so, or no; but she said, that she saw a hand toss out a razor, and either the hand was bloody, or the razor, and it was where my lord of Essex's lodgings was.

*L. C. J.* — But she did name my lord of Essex's lodgings? *Smith.* — Yes, she did.

*L. C. J.* — Well, what else did she say? Tell us all she said.

*Smith.* — She said, there was a man stood below, and she heard two shrieks, and the man did say, here is a razor; and a woman came out, or one in woman's clothes, with white headclothes. Mr. Braddon asked if she see anybody take it up, and she said, no; but she heard a man say here is the razor, and she saw a woman come out.

*L. C. J.* — You are sure that is all you heard her say? *Smith.* — I think so.

*L. C. J.* — Recollect yourself, pray, good Mr. Smith.

*Smith.* — I do not know that I heard anything else. . . .

*Mr. Wallop.* — My lord, I shall leave it to your lordship and the jury, how far they think the defendant guilty of this information.

*Att.-Gen.* — My lord, We have indeed given as great an evidence as ever was given I think of any offense. But to clear up the matter, that it was impossible for any man, unless the most maliciously and villainously inclined against the government and peace of the kingdom, that can be, to imagine such a thing, much less spread such a report, we will call you two or three witnesses to prove, that the earl of Essex murdered himself.

*L. C. J.* — It is necessary, Mr. Attorney, I think, for you so to do, to satisfy the world, though to a discerning eye there is enough given from the evidence this day, to make it appear to be a most malicious and scandalous contrivance, to hawk about for every idle rumor, to pick up children of such tender years, and make them swear to anything to serve a turn.

*Att.-Gen.* — My lord, we do not call these witnesses as if there were any doubt of it in the world. . . .

It is not to satisfy the court nor the jury, who I believe are all of them already sufficiently satisfied, but it is to satisfy the world, that may have entertained some prejudices from this conspiracy. Call Mr. Bomeney in. . . .

Then *Bomeney* was sworn.

*L. C. J.* — Did you wait upon this unfortunate gentleman, my lord of Essex?

*Bomeney.* — Yes, my lord.

*L. C. J.* — Well, what do you know of his death?

*Bomeney.* — I went with him from Whitehall, and I stayed with him all the while he was in the Tower.

*L. C. J.* — How came he by that unhappy end, pray?

*Bomeney.* — When we were at his lodging, my lord used to call for a penknife to cut his nails of his hands and feet, and he then had long nails, and said to me, give me your penknife to cut my nails; said I, my lord, I have none, I came in haste, but I will send to-morrow for one; and therefore I sent our footman, one William Turner; to whom I gave a little note for provisions, and among other things which I writ directions to the steward to send, there was a little line; "Pray send a penknife for my lord." He brought some provisions, but he did not bring a penknife on the Thursday, because he said he had none, but he would send one the morrow after; I sent William Turner, the morning after very early, and gave him another little note for provisions; and, among other things, I writ in the note, "Do not forget the pen-knife for my lord." . . . I went to my lord, and when my lord asked me if I had gotten him a penknife, I said the footman was not come, but I hoped it would come immediately, because I sent him early. And I was turning from the chamber, thinking I had done with my lord, and my lord called me again, Hark you, *Bomeney*, said he, I can do it with one of your razors. My lord, said I, I will fetch one, so, I went into my closet and fetched one. And I went to my lord, and when he had it, he did as if he picked his nails with it, and was walking in the chamber. . . . I went down into my closet again, and at the same time that I was in my closet, there came the footman, and

one with him that brought the provisions, and he gave me the penknife, and gave me a little note, that he had brought with the provisions, which, he said, Mr. Billingsly, that was our steward, bid me to show that to my lord. I took it, and went up to show it to my lord; I found nobody in my lord's chamber, there was a closet there, in which was a close-stool, and that I found shut, and thinking my lord was there, I would not disturb my lord, but came down again, and stayed a little while, in so much as I thought my lord by that time might have been come out. I went up again, and found nobody in the chamber, but the closet door shut still, I went against the door, and knocked three times, and said, My lord, my lord, and nobody answered: then I looked through the chink of the door, between the door and the wall, and I could see blood, and a little part of the razor. Then I called to the warder, and the people of the house, and they came up and found him there.

*Att.-Gen.* — Had you much ado to open the door, or could you open the door easily?

*Bomeney.* — No, the door could not be opened easily, I know not how they opened the door, but I think Russel the warder, when he came up, pushed at the door, but could not open it very far, because my lord's foot was against the door, and so they had much ado to open the door. . . .

*Att.-Gen.* — Did you find the razor?

*Bomeney.* — Yes, it lay by him.

*Att.-Gen.* — What became of the razor?

*Bomeney.* — The coroner's jury had it.

*L. C. J.* — Was there any window in that room, where the close-stool was?

*Bomeney.* — Yes, there was a window.

*L. C. J.* — Was there a casement to that window?

*Bomeney.* — Yes, I think there might.

Just. *Withins*. — Which way does that window look?

*Bomeney*. — I cannot, very well remember, my lord.

Just. *Withins*. — Which way do you think?

*Bomeney*. — I believe it is upon a yard. . . .

*Sol.-Gen.* — Then we will call Mr. Russel the warder he speaks of. [Who was sworn.]

*Att.-Gen.* — Pray will you give my lord an account at that time where you were, and what was done?

*Mr. Russel*. — I was in the chamber, next opposite against my lord's chamber. . . . I was then waiter at that time, and stood upon the guard; and my lord asked Mr. Bomeney, whether the penknife was come; and he told my lord, no. Then says he, lend me your razor, that will do it. And my lord took the razor in his hand, and the door was open and he went two or three turns in the room, with the razor so. This I saw, the door being open, as I stood in the passage. My lord, by and by Mr. Bomeney goes down, and my lord shut the door to him, and Mr. Bomeney stayed below a little while, and afterwards comes up again. . . .

My lord, there was nobody went up or down all the time, but Bomeney. He came up, and seeing my lord was not come out of his closet (this I did stand and hear) so he puts by the hanging, and looks in, and sees my lord in his blood, lying in the closet; and he makes an oration, a great noise; with that I stepped two or three steps, hearing him make such an oration, and I found the key was on the outside of the door, and I opened the door, and saw him lie in his blood.

*L. C. J.* — Could you open the door with ease?

*Russel*. — Yes, I could put it a little way open, and there saw him.

*L. C. J.* — But you could not put it quite open?

*Russel*. — No, for his legs lay against the door.

*L. C. J.* — Was it a narrow closet?

*Russel*. — Yes, a very narrow closet.

*L. C. J.* — In what posture did my lord lie?

*Russel*. — He lay all along on one side.

*L. C. J.* — Where lay the razor?

*Russel*. — By him. But I did not take so much notice of the razor, for I was surprised with the sight.

Just. *Holloway*. — Was there any window in the closet?

*Russel*. — Yes, that looks into captain Hawley's yard. And the window is quite northward.

*L. C. J.* — Which way does that window look?

*Russel*. — Quite the other way, into the back yard.

*L. C. J.* — Then there is no way out, nor light, nor casement out into the foreyard?

*Russel*. — No, my lord, it is backward, and it is paled in, only into the house there is a door.

*Att.-Gen.* — Was there any door out of the street, that way?

*Russel*. — No, there is one door that goes out from the entry to go into the yard.

*L. C. J.* — Has anybody else access to come to the yard, but what must come through Hawley's house?

*Russel*. — No, nobody.

*Sol.-Gen.* — We will call captain Hawley himself.

*L. C. J.* — Warder, do you remember there was any coach that stood there?

*Russel*. — No, there was no such thing.

*L. C. J.* — I ask you for this reason, because here was a girl that spake of a coach, that came through the house I suppose, and so through the entry out of that door into the yard.

*Att.-Gen.* — Where is Lloyd the soldier? for, my lord, as there was a warder above, so there was a soldier that stood at the door below. And while he stayed there, there could not anyone come in, nor near, but he must observe them.

*Sol.-Gen.* — Pray, my lord, be pleased to ask Mr. Bomeney, how long he lived with my lord?

*L. C. J.* — How long had you lived with my lord of Essex? *Bomeney.* — Six years.

*Just. Withins.* — You waited on him in his chamber, I suppose?

*Bomeney.* — Yes, in the nature of his *valet de chambre*.

Then *Lloyd* was sworn.

*Mr. Recorder.* — Hark you, *Lloyd*, you were the sentinel. Give an account where you stood that day that my lord of Essex murdered himself? *Lloyd.* — At my lord's door.

*Att.-Gen.* — Which door?

*Lloyd.* — At my lord of Essex's door.

*Att.-Gen.* — Were you abovestairs, or below at the street door?

*Lloyd.* — Below at the street door.

*Just. Withins.* — Did anybody come into the house that morning?

*Lloyd.* — Nobody came in, all the while I stood there, that I knew of.

*Just. Withins.* — Were you there at that time when my lord killed himself?

*Lloyd.* — I was there when the noise was made of it abovestairs. . . .

*Att.-Gen.* — Did any maid go out of the house?

*Lloyd.* — None at all.

*L. C. J.* — What, not in a white hood?

*Lloyd.* — No.

*L. C. J.* — Why, didst not thou call to the maid to come and take up the razor, that was thrown out of the window of captain Hawley's house?

*Lloyd.* — There was no razor at all thrown out, that I saw.

*L. C. J.* — Did not you open the pales for her to go in, and take up the razor? *Lloyd.* — No.

*L. C. J.* — Was there any other soldier there besides you? *Lloyd.* — No.

*L. C. J.* — Then you must be he that cried out, or nobody?

*Lloyd.* — I saw no razor, nor did not cry out to anybody. . . .

*Att.-Gen.* — My lord, We will then

only call captain Hawley. [Who was sworn.]

*Sol.-Gen.* — Pray, Captain, tell what you know of this matter?

*Capt. Hawley.* — My lord, All the account I can give, is, that about four or five o'clock in the morning, I went to open the gates, that being the usual hour to open the gates. And I was at the gate then when a warder came, and told me, my lord of Essex had killed himself, and that was between nine and ten o'clock. When I came into the house, I went upstairs, and saw nobody in the room, nor no blood; said I, to the warder, what, do you make a fool of me? Here is nothing: says one of the warders, look into the closet: I went to the closet, and could not open the door above this wideness, and I looked in, and saw the razor all in blood, and my lord lay on his arm in this fashion. I could not tell, whether he was dead or no, but I thought it was not my business to stir him. Then my lord Constable was ordered to come and secure, and examine all the servants.

*L. C. J.* — Pray, Captain Hawley, where does the casement look into?

*Capt. Hawley.* — The house, ever since I came to it, is just as it was, and the house having settled, the casement won't open above thus far: and it is so low, and the pales are nine or ten foot high, that it is impossible for anyone to throw anything out of the window three foot hardly. It is one of the horrid reports that ever was heard of, and the unlikelyest thing, they cannot throw anything out of the window to be seen.

*Att.-Gen.* — My lord, I think it is not necessary to call any more witnesses. . . .

*L. C. J.* — Have you any more Mr. Braddon?

*Mr. Braddon.* — My lord, I have only this to say for myself. It has not been proved directly, or indirectly, that I used any evil arguments to persuade these witnesses to testify what was false; but I deal

with them with all the candor, that any person in the world could use; and used all the caution that I could, to hinder them from speaking anything that is false. There has been nothing proved of evil practice used by me. . . .

*L. C. J.* — Gentlemen of the jury, the evidence has been very long, that has been given both for and against the persons, against whom this information is exhibited. . . .

Gentlemen, 'Tis a concern of an high nature, and if you do believe these persons that are defendants, or either of them to be guilty; such as you believe to be guilty, you must find guilty, and of such as you be-

lieve them guilty. And if in case they shall by you be found guilty, the court is to take care to inflict a punishment, if it be possible, suitable to their offense.

Then the court arose, and the jury afterwards gave in a private verdict, which the next morning was repeated in court and recorded. And by that verdict they found the defendant, Laurence Braddon, Guilty of the whole matter charged upon him in the information, and the defendant Hugh Speke Guilty of all but the conspiring to procure false witnesses, and of that they found him Not Guilty.

**392. EARL OF THANET'S TRIAL.** (1799. *HOWELL'S State Trials*. XXVII, 821.)

*Court of King's Bench, April 25, 1799*  
*Counsel for the Crown.*

Mr. *Attorney-General* [Sir John Scott, afterwards Lord Chancellor Eldon];

Mr. *Law* [afterwards Lord Ellenborough, and Lord Chief Justice of the Court of King's Bench];

Mr. *Garrow* [afterwards a Baron of the Exchequer];

Mr. *Adam* [afterwards Lord Chief Commissioner of the Jury Court, and a Baron of the Exchequer of Scotland];

Mr. *Wood* [afterwards a Baron of the Exchequer];

Mr. *Fielding*;

Mr. *Abbott* [afterwards Lord Chief Justice of the Court of King's Bench].

*Solicitor* — Mr. *White*, *Solicitor* for the affairs of his Majesty's Treasury.

*Counsel for the Defendants, the Earl of Thanet, Mr. Ferguson, and Mr. O'Brien.*

The Honorable *Thomas Erskine* [afterwards Lord Chancellor Erskine];

Mr. *Gibbs* [afterwards Lord Chief Justice of the Court of Common Pleas];

Mr. *Best* [afterwards a Judge of the Court of King's Bench];

Mr. *MacKintosh* [afterwards Recorder of Bombay].

*Solicitor* — Mr. *Lowten*.

*Counsel for the Defendant, Mr. Browne* — Mr. *Rous*.

*Solicitor* — Mr. *Foulkes*.

*Counsel for the Defendant, Mr. Thompson* — Mr. *Rayne*.

*Solicitor* — Mr. *Bonney*.

The Information was opened by Mr. *Abbott*, and is as follows:<sup>1</sup> . . .

Mr. *Attorney-General*. — May it please your Lordships and Gentlemen of the Jury — I can very unfeignedly assure you, that I should have felt infinite satisfaction, if, in

any view that I could take of what my country required of me, I could have determined not to have instituted the present prosecution. . . .

—Gentlemen, the information states to you, that at a special session of Oyer and Terminer, held at Maidstone in the month of May last, Mr. O'Connor together with several other persons were tried for the crime of high treason, of which they had been accused by a grand jury of the county of Kent. The information states, that the jury had found four of the defendants, Mr. O'Connor being one of the four, not guilty of the offense with which they were charged. The information states, that before he was discharged, these defendants (and you will give me leave to point out particularly to you the substance of the different charges in this information) did, in open court, and before any discharge, make a riot, and attempt to rescue him out of the custody of the sheriff; that they assaulted three persons named in the first count of the information, John Rivett, Edward Fugion, and Thomas Adams; that they riotously impeded and obstructed the commissioners of his majesty in the due and lawful holding of the session. The second count charges them with having, before the discharge of Mr. O'Connor, assisted him to rescue himself out of the custody of the sheriff, and having assaulted Thomas Adams, who was acting in aid of the sheriff. The third count charges them with having made a riot in open court, and been guilty of the assault. The fourth count charges them with a riot in open court, without the circumstance of the assault; and the last count charges them with a riot, without any addition of circumstances: and it will be for you to determine whether they are guilty of all, or

<sup>1</sup> [The italics and small capitals for passages of the witnesses' testimony are found in Howell's edition. — ED.]

The diagram is a floor plan of a courtroom, oriented with the judge's bench at the top. The plan includes the following areas and labels:

- Judge's Bench:** At the top center, labeled "JUDGE'S" with a height of "20 Ft. 9 In." and "Curtain Partition".
- Counsel for the Crown:** A large rectangular area on the right side, labeled "COUNSEL for the CROWN". It contains a "TABLE" with six seats for "Mr. Ferguson", "Mr. Scott", "Mr. Plumer", "Mr. Dallas", and "Mr. Gurney". A "Solicitor General" and "Mr. Abbot" are also indicated. The height is "27 Ft. 6 In.".
- Counsel for the Prisoners:** A rectangular area at the bottom, labeled "COUNSEL for the PRISONERS". It includes a "Solicitors Desk" and "Solicitors &c". The height is "27 Ft. 4 In.".
- Jury Box:** On the left side, labeled "JURY". The height is "9 Ft. 11 In.".
- Officers of the Court:** A small area on the left, labeled "OFFICERS of the COURT to: Mr. Stoughton, Mr. Clifford W.C.". The height is "4 Ft.".
- Entrances and Stairs:** On the far left, "Narrow Street of Maldenstone" and "High Street of Maldenstone" are labeled. On the far right, "High Street of Maldenstone" is labeled. Stairs are indicated by "Up" and "Down" arrows.
- Other Labels:** "Mr. Marshall W.C.", "Mr. Joy", "Mr. Jackson", "Mr. Heath W.C.", "Mr. Justice Fuller", "Mr. Justice Lawrence", "L. J. Ramsey W.C.", "Without Bar", "Mr. Shelden W.D.", "Mr. Warren W.D.", "Under Sheriff", "O'Connell W.C.", "Smith W.D.", "Rind W.C.", "O'Connell", "Bishop", "O'Connell", "Galar", "Bar", "3 Ft.", "4 Ft.", "5 Ft.", "6 Ft.", "7 Ft.", "8 Ft.", "9 Ft.", "10 Ft.", "11 Ft.", "12 Ft.", "13 Ft.", "14 Ft.", "15 Ft.", "16 Ft.", "17 Ft.", "18 Ft.", "19 Ft.", "20 Ft.", "21 Ft.", "22 Ft.", "23 Ft.", "24 Ft.", "25 Ft.", "26 Ft.", "27 Ft.", "28 Ft.", "29 Ft.", "30 Ft.", "31 Ft.", "32 Ft.", "33 Ft.", "34 Ft.", "35 Ft.", "36 Ft.", "37 Ft.", "38 Ft.", "39 Ft.", "40 Ft.", "41 Ft.", "42 Ft.", "43 Ft.", "44 Ft.", "45 Ft.", "46 Ft.", "47 Ft.", "48 Ft.", "49 Ft.", "50 Ft.", "51 Ft.", "52 Ft.", "53 Ft.", "54 Ft.", "55 Ft.", "56 Ft.", "57 Ft.", "58 Ft.", "59 Ft.", "60 Ft.", "61 Ft.", "62 Ft.", "63 Ft.", "64 Ft.", "65 Ft.", "66 Ft.", "67 Ft.", "68 Ft.", "69 Ft.", "70 Ft.", "71 Ft.", "72 Ft.", "73 Ft.", "74 Ft.", "75 Ft.", "76 Ft.", "77 Ft.", "78 Ft.", "79 Ft.", "80 Ft.", "81 Ft.", "82 Ft.", "83 Ft.", "84 Ft.", "85 Ft.", "86 Ft.", "87 Ft.", "88 Ft.", "89 Ft.", "90 Ft.", "91 Ft.", "92 Ft.", "93 Ft.", "94 Ft.", "95 Ft.", "96 Ft.", "97 Ft.", "98 Ft.", "99 Ft.", "100 Ft."





any of the charges stated in this information.

Gentlemen, I will endeavor now to open to you as much of this case as may enable you to understand as much of this evidence as is offered to you. . . .

Gentlemen, the trial at Maidstone was, as I need not tell those to whom I have the honor to address myself, an extremely long one. The witnesses on both sides had been desired to withdraw from the court previous to the commencement of the trial. In the natural course of proceeding, the witnesses for the defendants were called after the witnesses for the prosecution; and the noblemen and gentlemen who gave evidence in favor of Mr. O'Connor and the other defendants in that trial for high treason, after respectively giving their evidence, remained in court. . . . You will have plans of the court offered to you by and by in order to make the evidence more intelligible. . . .

The witnesses were, therefore, directly opposite the jury, and the prisoners at the bar were removed somewhat behind the counsel, who sat, as it were, in the place where I am now standing, there being some little distance between them and the prisoners, who were in the bar behind. . . .

When the verdict of Not Guilty was pronounced, Mr. O'Connor endeavored (it will be for you to decide whether or not with the coöperation of the defendants whose names occur upon this record) to get out from the place in which he stood as a prisoner, with a view to get out of court, and for the purpose of not being answerable to some demands of justice which he, and those who were acting with him, had reason to believe would be made upon him, if he stayed till he was regularly discharged.

Gentlemen, one of the defendants in this case, I mean Mr. Thompson, a member of parliament, was bound, certainly, from his situation as a

subject of this country, and bound from the high situation in which he stands in the country, not to be acting in the execution of such a purpose as this information imports; but you will find that he, together with Mr. O'Brien, had taken great pains, in the course of the afternoon . . . to know with certainty, whether there was any demand of justice upon Mr. O'Connor, supposing him to be acquitted of the present charge.

Now, gentlemen, be so good, without my entering into a detail of that evidence, to attend to the circumstances as to the conduct of the different defendants, during the time the learned judge was executing the painful duty of passing the sentence of death — giving your attention also to what was the conduct of the several defendants, when this notice had been publicly given in Court, the moment that that sentence was finished; and unless I am deceived indeed, with respect to the effect of that evidence, you will have no difficulty in coming to this conclusion, that those defendants did mean to take Mr. O'Connor out of the reach of the demands which it had been publicly declared justice had upon him. . . .

#### EVIDENCE FOR THE CROWN

Mr. Sergeant *Shepherd* [afterwards Lord Chief Baron of the Exchequer of Scotland] sworn. — Examined by Mr. *Garrow*.

We have collected from the record, that you were one of the commissioners appointed to try certain persons at Maidstone? — I was.

Did you attend upon the bench upon that occasion? — I did.

Do you remember the circumstance of the jury, after they had retired, coming into court to deliver their verdict? — I do.

Are you acquainted with the person of my lord Thanet? — I am. I had seen my lord Thanet examined as a witness on that day for Mr. O'Connor; I did not know his person before.

Are you acquainted with the person of Mr. Dennis O'Brien? — I am.

Are you acquainted with the person of Mr. Gunter Browne? — I cannot say I am. . . .

Are you acquainted with Mr. Fergusson, a gentleman at the bar? — I am.

Are you acquainted with Mr. Thompson? — I am acquainted with the person of Mr. Thompson; but I do not recollect seeing Mr. Thompson at Maidstone.

Be so good as state to the Court, whether, after the jury had given in their verdict, and judgment of death had been pronounced upon the prisoner who was convicted, you made any observation upon any of these persons, or their conduct? — After the jury had given their verdict, and, indeed, I think, at the time the jury gave their verdict, my lord Thanet was standing before the bar at which the prisoners stood, with his back to the prisoners, and his face, of course, towards the Court. I am not quite sure whether my lord Thanet was on the bench at which the solicitors for the prisoners stood, or whether there was any space between the bench and the bar; that I could not sufficiently observe.

Mr. *Garrow*. — It may not be improper here to state (and we shall certainly prove it), that there was no such space. . . .

Mr. Sergeant *Shepherd*. — My lord Thanet stood with his face towards the Court, and his back to the prisoners; he was rather to the right hand of O'Connor; I do not mean upon a line with O'Connor, of course, but rather to his right hand.

Mr. *Garrow*. — May I interrupt you to ask, whether the right-hand side was the side upon which the jailer was placed?

Mr. Sergeant *Shepherd*. — I am not quite sure whether it was the side on which the jailer was placed; it was the side on which O'Coigly, the convicted prisoner, stood; and it was the side on which the Bow-

street officers afterwards endeavored to advance.

Mr. *Erskine*. — The side nearest to the great street of Maidstone?

Mr. *Garrow*. — Certainly so, which is the side on which we all know the jailer is placed. You recollect the jailer has a box on that side next the great street? — I recollect he has; and therefore it was certainly on that side on which the jailer was placed. Mr. O'Brien stood, or sat, at that time, I do not exactly recollect which — but Mr. O'Brien was on the same line with lord Thanet, but rather to the left hand of Mr. O'Connor. Whether there was any person between my lord Thanet and Mr. O'Brien, I do not recollect.

When I interrupted you, you were about to state something of the Bow-street officers advancing? — I think something had been said before the jury brought in their verdict. When there was an expectation that they were coming, something had been said about the Bow-street officers being there. There was a sort of noise or buzz in court; and somebody said, I do not know who, that the Bow-street officers were making a noise. In consequence of that it was, that I observed one of the officers, I think Rivett — it was either Fugion or Rivett; I am not quite sure that I recollect the person of one from the other —

You had seen them, and heard them give evidence? — I had, and I rather think it was Rivett, whom I observed standing at the corner of the bar; and they were desired to be quiet — not particularly the Bow-street officers, but the Court desired that everybody would be quiet; and they were quiet; and the jury then brought in their verdict. When the jury pronounced their verdict of Not Guilty upon Mr. O'Connor, some person, but whom I do not recollect, said, "Then they are discharged"; other persons sitting round the table said, "No, they are not discharged"; and at that time Mr. O'Connor, I think, had

raised his knee to the bar, as if to get over; whether he was pushed back, or pulled back, I do not know; but he was restored to his former position behind the bar. A question was put to the Court by somebody — whether by the prisoners or the counsel for the prisoners, or by-standers, I cannot tell — but some one said, "Are they not discharged, my lord?" or, "Have they not a right to be discharged?" or some such terms. Mr. Justice Buller, I think, said, "No, they are not to be discharged yet; put the other prisoners back, and let O'Coigly stand forward." I do not pledge myself for the exact words, but certainly to that effect.

I will trouble you to repeat that, according to the best of your recollection? — "Put the other prisoners back, and let O'Coigly" (who was the convicted prisoner) "stand forward." I should have told your lordship, that when it was asked, "whether they were not to be discharged?" before the riot, if I may so speak, began, one of the Bow-street officers, I think, got up upon the bench, or form I should rather say, and said, "No, my lord, I have a warrant against Mr. O'Connor"; whether he added, "for treason," or "for high treason," I do not recollect. It was immediately upon the officer's saying that, that Mr. Justice Buller said, "They are not discharged"; I do not mean in answer to that; but he said, as a direction of the Court, "they are not discharged; put the others back, and let O'Coigly stand forward."

I would ask you, whether that form, upon which the officer raised himself to address the Court, was near the place where, as you before described, the Bow-street officers were before the bar, and near lord Thanet? — Certainly. He set his foot upon the end of the form before which lord Thanet stood, with, certainly, I think, the interval of three or four persons.

Was that expression of the officer's

addressed audibly to the Court? — Certainly; I heard it most distinctly, and, I think, every one must have heard it.

Did he produce a paper? — Yes; he said, "No, my lord, they are not to be discharged. I have a warrant against Mr. O'Connor"; and he certainly extended his hand with a paper in it.

After that direction which you have stated had been given by the Court, what then passed? — Mr. Justice Buller proceeded to pronounce sentence upon the prisoner O'Coigly. During the first part of the time that he was pronouncing sentence, my attention was particularly attracted to O'Coigly, the prisoner. I was looking at him, and attending to him.

The form of the sentence was introduced by a prefatory address? — Yes; during the former part of it, my attention was directed to him. Towards the conclusion of the sentence, I think just as Mr. Justice Buller came to that part of the sentence which pronounces the specific punishment, I observed lord Thanet and Mr. O'Brien standing in the same position as they had stood before, and I observed Mr. O'Brien turn round, and look up at Mr. O'Connor. . . . He looked up at Mr. O'Connor, and then looked down to the place before him, which cannot be so well expressed in words as by an imitation of the manner; he looked down with a very slight motion, certainly an inclination of his head. Lord Thanet was standing with his back against the bar, behind which Mr. O'Connor stood. I can describe it no other way, than standing square, as I do now. I did not see lord Thanet make use of any motion or gesture, at that time, certainly. The moment the last word of the sentence had been pronounced by Mr. Justice Buller, the instant he had finished, Mr. O'Connor raised himself upon the bar; he jumped with his left foot upon the bar; he put his left hand upon the shoulder

of Mr. O'Brien, and, I think, his right upon lord Thanet's shoulder, jumped over the bar between lord Thanet and Mr. O'Brien, passed Mr. O'Brien towards the door of the court, which was on that side next the small street of Maidstone —

That is, from the Bow-street officers? — Yes; then I lost sight of Mr. O'Connor. Whilst Mr. O'Connor was getting over the bar, which, though it takes some space to describe, was done almost in an instant, the Bow-street officers were pressing, endeavoring to get towards him, for the purpose of stopping him, I suppose.

That is, in the narrow pass between the back of the seat for the counsel for the prisoners, and the bench that was made for the accommodation of their solicitors? — Yes; lord Thanet certainly stood in the position in which I had observed him. There was a great noise, of course, took place at that time, at the moment when Mr. O'Connor was getting over the bar; and some people calling to stop him, there was a great noise certainly. Lord Thanet stood, in the way that I have described to your lordship, in the pass; the officers were endeavoring to press by him; and he stood till, I think, in a very short space of time, he held up his stick with both his hands over his head. There was then a great deal of confusion; persons got upon the table; and there was a press, in the narrow pass, of officers and persons from that side of the court, attempting to press towards the door to which O'Connor had rushed; and other persons, whom I cannot say, appearing to me to push the other way, as if to prevent them from passing. I saw sticks raised, and fists raised, by individuals; but who did so, I cannot speak to. There became then a general confusion in that part of the court, so that I lost sight of particular individuals; the candles were some of them thrown down; they were upon the table; and there was

a general riot and confusion, certainly, in that part of the court, and in most other parts of the court; at that time a great number of persons had got upon the table, and there was certainly a great deal of confusion. In a very short time, somebody called out, "O'Connor is stopped"; and he was brought back again to the bar. I should state to your lordship, that, just at the time that I lost sight of lord Thanet, and of the particular individuals, a person had got upon the table (which drew off my attention from what was going on at the bar), and had drawn a saber which was lying there.

That was part of the baggage of Mr. O'Connor, which had been produced upon the trial? — It was. He drew that saber, and placed himself between the judges and the part of the court where the confusion was, obviously to prevent any persons from advancing towards the judges — if I may use the phrase, to defend the judges. I did not at that time see the face of the person who had it; and, therefore, I had some apprehension it might be in the hands of some imprudent man, who might do mischief; if I had known who it was, I should have known that he had discretion enough not to misuse it.

It was Mr. Stafford, the witness, was it not? — Yes; I said to him, not seeing his face, "Don't strike!" When I saw who it was, I was satisfied. After the riot had ceased, a number of persons got upon the table towards the judges; some to ask questions upon the subject of the legality of this warrant; and others, whether the prisoners were not entitled to their discharge; and others, certainly, to allay the fervor that seemed to be at that time operating upon the minds of many persons who were in court; to restore order, in fact; I should, perhaps, use that phrase. The particular conversations and expressions that were used by any of those persons upon

the table, I cannot pledge myself to recollect.

I will take the liberty of asking you, — I believe you were at a distance from the learned judge, Mr. Justice Lawrence? — I was. Mr. Justice Heath and Mr. Justice Buller both sat between me and Mr. Justice Lawrence.

Therefore, I would ask you, whether you had an opportunity of hearing any particular conversation addressed to the learned judge who is now present? — No; I think I remember Mr. Sheridan speaking to Mr. Justice Buller, or Mr. Justice Heath, or both; and I remember lord Thanet being upon the table after Mr. O'Connor was brought back, apparently to me conversing with the learned judge, Mr. Justice Lawrence.

What he said, you did not hear? — I did not; for at that time there was a great deal of noise in the court.

Was it after that, that you observed Mr. Sheridan talking with the learned judge? — I think it was; the object of Mr. Sheridan seemed to be, to allay the tumult; and then he crossed the table, and conversed with the learned judges. . . .

Mr. Sergeant *Shepherd* cross-examined by Mr. *Erskine*.

I have very few questions indeed to put to you. You state, that when the verdict of Not Guilty had been pronounced, some persons, but whom you do not know, seemed to inquire, as if for information, whether the prisoners were to be discharged or not? — Not quite so; not to inquire; but some persons exclaimed, "Then they are discharged."

Who those persons were, you do not know? — I do not.

You say that you observed lord Thanet standing fronting the Court, as I am now fronting the Court? — Yes, certainly.

With his back to the prisoner? — Certainly so.

He was in that position when the jury came in with their verdict? — I think so.

You have observed that Mr. O'Brien looked round to Mr. O'Connor, and then looked down, as you have described it; did lord Thanet continue all that time in the same position? — The time when Mr. O'Brien looked round, was a very short time before Mr. O'Connor jumped over the bar; from that time, certainly, lord Thanet had continued in the same position, standing as I described.

While the learned judge was passing sentence of death upon O'Coigly, did lord Thanet still continue in the same position? — Certainly he did. . . .

You then describe, that upon the officers coming in, and pressing through this narrow place, the next that you saw of lord Thanet was, with a stick with both his hands up? — Yes; I did not mean that the officers came in then, but that they had come in some time before, having declared that they had a warrant; but, certainly, upon Mr. O'Connor jumping over the bar, the officers rushed forward to follow him; after they had made several pushes it was, that I saw lord Thanet in that position.

*Did you ever observe any change in the position of lord Thanet, from the time you first saw him, till you saw him in the situation you have now described to the Court? — I did not observe any change.*

*But a stick over his head? — Yes; and, perhaps, I should say this — it seemed to be, when he held it in that way, that it was to defend his head.*

The Rev. *William Hussey* sworn. —

Examined by Mr. *Adam*.

I believe you are a clergyman of the church of England? — I am.

Were you at Maidstone at the trial of Mr. O'Connor and Mr. O'Coigly? — I was.

Were you there at the time the jury were out, deliberating upon their verdict? — Part of the time.

Were you in court at the time they returned with their verdict? — I was. . . .

In what part of the court did you first see lord Thanet? — The first time, when he came to give his evidence; and the next time, at the table fronting the judges, and afterwards sitting under the bar at which the prisoners stood.

Upon a bench, with his back to the prisoners? — With his back to the prisoners.

Do you remember seeing the Bow-street officers there? — I saw a person who, I was informed afterwards, was a Bow-street officer. I did not know, at that period, that he was a Bow-street officer.

Do you recollect the jury delivering their verdict? — I do.

Can you state to my lord and the Court, anything that struck your attention upon the jury delivering their verdict of Not Guilty, with respect to Mr. O'Connor? — After the jury returned their verdict of Not Guilty, I observed Mr. O'Connor make a feint to get over the bar; he put up his foot, as if he would get over.

Did you observe anything more pass at that time? — I cannot speak expressly as to the direct period of time at which I saw the circumstance happen; whether it was at that period, or a future period, I must say that I cannot immediately recollect.

What was that circumstance? — That the earl of Thanet was in that situation which I before mentioned, sitting with his back towards the bar, nearly under the prisoners, or under the jailer; and as the person was pressing forward from that side of the court to get towards the prisoners —

Lord *Kenyon*. — What person? — I cannot say who the person was; I was informed afterwards he was a Bow-street officer; and, indeed, from the circumstance of his mentioning to the jury what was the matter — he said he had a warrant to apprehend Mr. O'Connor — I supposed him to be a peace officer.

Mr. *Adam*. — Then, as this per-

son, who held a paper in his hand, and pressed forward — ? — I saw no paper in his hand; *lord Thanet seemed to press himself against the bar with his body inclined somewhat towards that person, apparently with an intention to interrupt his progress towards the prisoner.*

In what situation was Mr. O'Connor at that time? — Mr. O'Connor, at that period, was standing at the bar.

Go on, and state what you saw after this. — Upon my word, from the confusion that was in the court, I do not recollect any particular circumstance that I can take upon me to speak to.

The Right Hon. *Charles Lord Romney* sworn. — Examined by Mr. *Wood*.

Was your lordship in court at the time of the trial of the prisoners at Maidstone? — Yes.

In what part of the court did your lordship sit? — Next to Mr. Justice Lawrence, upon the bench. . . .

After the riot began, what did your lordship observe? — When the riot first began, I looked very much towards the prisoner O'Connor, and saw him get over the bar, and go towards the narrow street. I looked at the other part of the court, where there were individuals forcing a passage through, which were the Bow-street officers; I saw them forcing their way, and blows were struck. I paid particular attention to Mr. O'Connor, and then, almost at the same moment, turned my eyes to a different part upon the table, where there was a sword brandishing about; I do not know whether it was drawn or not, for I could not see at that time; but I should imagine that it was drawn; upon which I thought things seemed to bear a very serious aspect, and I let myself down from the bench, where I was sitting, and crossed the table directly to where I saw the prisoner escaping from. I dipped my head under the broadsword that was brandishing about; I got immediately to the end

of the table, near that part of the court where the prisoner escaped from; and as soon as I got there, I immediately saw the prisoner O'Connor brought back to that part of the table by several javelin men and others. I then immediately said to the javelin men, "Form yourselves round the prisoner, and let no one approach you," or, "Let no one come round you," or words to that effect; "for he is not yet" (I meant to say, and imagine I did say) "discharged." I was told afterwards that I had said wrong; for I had said, he was not acquitted; upon which I answered, I might very possibly make use of the word *acquitted*; but, if I did, it was a mistake; I meant *discharged*.

Mr. Garrow. — Will your lordship mention who it was that said that? — I think it was Mr. Fergusson: he said, "My lord, you are mistaken; you said, 'He is not acquitted' — he is acquitted." I think it was Mr. Fergusson. I have no doubt myself, as Mr. Fergusson mentioned it, but that I did make use of the word *acquitted*, in the hurry; I have no doubt of it: it was not my intention to say, he was not acquitted, but that he was not discharged; I meant to make use of the word that I heard Mr. Justice Buller make use of from the bench.

Mr. Wood. — Does your lordship recollect whether the Court had said anything, before that, about his not being discharged? — Yes; and I meant to make use of the word *discharged*, because I had heard Mr. Justice Buller use the word *discharged*. . . .

Did your lordship notice any particular persons that were acting in the riot? — . . . I certainly could not say who it was in the passage that was struck by the Bow-street officers; for when I looked to that part, the confusion was very great, and the blows very frequent in that part.

Did your lordship hear any conversation between lord Thanet and

Mr. Justice Lawrence, after Mr. O'Connor was secured? — It is really a very considerable time since the riot; and, at the same time, as many different things were going on at that moment, I cannot positively swear; and, therefore, unless I was perfectly convinced, it can be of no consequence.

Lord Kenyon. — It is my duty, and I am bound to say, your lordship must recollect as well as you can. — If your lordship will give me leave to say, that at this distance of time, ten or eleven months, I really cannot swear whether I heard it at the time, or whether it was a conversation afterwards, that such and such things had passed; and, therefore, as I cannot answer positively, I must, for myself, beg leave to decline answering it. . . .

The Right Hon. Charles Lord Romney cross-examined by Mr. Gibbs.

You say, you intended to say that the prisoner had not been discharged; but you had been informed by some one, that you had said he was not acquitted; and then you corrected yourself, and said you meant to say, *discharged*? — I have no doubt but that, in directing my speech to somebody in the hurry of the business, I said he was not acquitted.

There was but one person who said that? — Mr. Fergusson said it repeatedly: and then I said, "I meant to have said, *discharged*; if I had said *acquitted*, it was a mistake"; and then Mr. Plumer came up, and I told him that Mr. Fergusson had said so.

Lord Kenyon. — There can be no occasion to go into all that conversation. . . .

Sir John Mitford (his Majesty's Solicitor-General) sworn. — Examined by Mr. Fielding.

Have the goodness to describe what was your particular situation in the court at Maidstone? — You mean after the jury had withdrawn, I suppose?

If you please. — I went up to Mr. Justice Buller and spoke to him; and then I placed myself immediately under him, opposite to Mr. O'Connor, upon whom I kept my eye fixed when the jury came into court and gave their verdict. *I observed Mr. O'Connor and Mr. Fergusson; I particularly fixed my eyes upon them. I observed Mr. Fergusson speaking to Mr. O'Connor, and Mr. O'Connor put his leg over the bar: I called out, "Stop him." Mr. Fergusson said, "He is discharged." I said, "He is not discharged." Mr. Fergusson then addressed Mr. O'Connor, and said, "You are discharged." I repeated, "He is not discharged," I believe more than once. I observed the jailer leaning over towards Mr. O'Connor, and I think he took hold of him.*

Mr. Garrow. — The other prisoners were between the jailer and Mr. O'Connor, were they? — Two of them were, and the other two behind Mr. Binns and Mr. O'Coigly; and then Mr. Allen and Mr. Leary were behind. Then Mr. O'Connor drew back his leg: there was then a disturbance immediately under Mr. O'Connor, and some person or persons pressing forward, and Mr. Fergusson made some complaint to the Court upon the subject; then Rivett, the officer, who appeared to be the person pressing forward, said —

Mr. Fielding. — When you say *pressing forward*, in what kind of direction was that pressure? — Towards Mr. O'Connor.

That was not forward towards the body of the court, but towards Mr. O'Connor? — It was towards the body of the court, in order to get to Mr. O'Connor, and place himself under Mr. O'Connor, as I conceived. Rivett said, he had got a warrant against Mr. O'Connor; and the gaoler also said something upon the same subject, but I do not recollect the particular words; and Mr. Justice Buller spoke to the officers, as I understood, to keep the

prisoners back, or some expression of that description, and then almost instantly began addressing Mr. O'Coigly.

Lord Kenyon. — With a view to pass the sentence? — With a view to pass the sentence. I recollect that this was almost instantaneous; because I was about to speak to the Court; and it was so sudden, that I thought it was indecent to interrupt Mr. Justice Buller, otherwise should have spoken to the Court.

Mr. Garrow. — Mr. Attorney-General had retired from the court? — He had retired from the court, and had desired me to speak to Mr. Justice Buller upon the subject, which I had done after Mr. Justice Buller had passed sentence upon Mr. O'Coigly. I fixed my eye particularly upon Mr. O'Connor, and I observed Mr. Fergusson, and some other persons whom I did not know, encouraging Mr. O'Connor to go over the bar. Mr. O'Connor appeared for a little while to hesitate, but it was only for a moment; he then sprang over the bar, and leaped into the lower part of the court, between the bar and the jury box, which was on the right hand of the judges. From that time I did not see Mr. O'Connor until he was brought back by the officers; for at the same instant that Mr. O'Connor jumped over the bar, three or four persons whom I did not know leaped over from the box opposite the jury box upon the table.

Mr. Garrow. — Was that box the box where the witnesses had been examined? — Where the witnesses had been examined, and where persons who attended the trial through curiosity had been. They went to the spot where the riot was, and jumped among the rioters: all the lights, except those before the judges, and the lights which hung in the middle of the court, in a kind of branch or chandelier; I do not recollect exactly what sort of a thing it was; it gave a considerable light — but all the other lights were extinguished.



Mr. Garrow. — The chandelier that hung over the prisoners? — In the middle of the court; there were, I think, three patent lamps in it; it gave a great deal of light. *Mr. Fergusson, at the moment that Mr. O'Connor jumped over the bar, turned himself round, and appeared to me to follow Mr. O'Connor; but I cannot positively say that he did so, because the persons who rushed from the other side of the court, came between me and him; but I recollect that when they were passed I did not see him. I then attended to the prisoner O'Coigly, apprehensive that he might escape; and that attracted my attention in some degree from what was passing in the riot; he was perfectly tranquil, and I was convinced, from his behavior, that he did not mean to stir; and therefore my attention was drawn back again to the riot. Mr. Knapp's clerk, Mr. Stafford, jumped upon the table, and drew Mr. O'Connor's sword (a kind of broadsword, I think), which was lying upon the table; and he flourished it over the heads of the persons who were engaged in the riot below. I got up to speak to him, to desire him to put up the sword, which, after some time, he did; and soon after Mr. O'Connor was brought back. Mr. Stafford being between me and the rioters, prevented me from seeing what passed after the riot was over. I do not recollect anything material except lord Thanet; that is, a person whom I understood to be lord Thanet. I did not know lord Thanet's person; that is, I did not recollect him; I had seen him many years ago. *I saw a person whom I understood to be lord Thanet come across the table; and I saw him in conversation with Mr. Justice Lawrence; that conversation was a little warm, but I did not hear the particulars of it. When my lord Thanet left Mr. Justice Lawrence, and went across the table again, I heard him say, "I thought it was fair he should have a run for it."**

Was that addressed to the judge in parting from him and going across the table? — I think it was not addressed to the judge, but as he turned from the judge: *he said it rather in a tone of anger; I think it was in consequence of what had fallen from Mr. Justice Lawrence, which I did not exactly hear. I do not recollect anything else.*

Mr. Fielding. — *Will you have the goodness to explain what you meant by "encouraging Mr. O'Connor to get over the bar"? — It was not immediately encouragement, by any words that I could hear; but by action, as if he was encouraging him to come over the bar, and by insisting that he was discharged.*

Sir John Mitford cross-examined by Mr. Best.

*While Mr. Fergusson was speaking to Mr. O'Connor, he was in his place at the bar? — He was.*

*There was a vast number of other persons at the same time speaking to Mr. O'Connor? — Yes.*

I believe it was generally understood in the court at that time, that Mr. O'Connor would be acquitted? — I do not know whether they were congratulating him; it was after he was acquitted. . . .

Mr. Justice Heath sworn. — Examined by Mr. Attorney-General.

Your lordship, I believe, was one of the commissioners of Oyer and Terminer at Maidstone? — I was.

Did your lordship observe any riot that took place? — I did; and if you will give me leave, I will state all that I observed. I was applied to in the course of the day by a messenger from the secretary of state, who informed me that a warrant was issued for the apprehension of Mr. O'Connor, in case he should be acquitted, and desiring to know if the Court would permit him to execute that warrant if he should be acquitted; and we gave leave. After the verdict had been given, and, I believe, after sentence of death had passed, this messenger very unadvisedly went from that corner of the

box where the prisoners were confined, to that corner which was near the door, and said aloud, "My lord, may I now execute my warrant?" Presently after, I saw Mr. O'Connor thrust one leg over the box, and then draw it back again: afterwards, in the space of a minute, I saw him leap over the box. I could not see any person between him and the door at that moment. Immediately a great scuffle and a riot ensued, and a great deal of fighting, such as I never saw before in a court of justice; it appeared to me to be between the constables with their staves on one side, and those who favored the escape of O'Connor on the other. I know not from whence the favorers of Mr. O'Connor came; it being dark, I could not see exactly the number of the combatants; it was dark in that place where they were fighting; but from the exertion of the constables in plying their staves, it seemed to me that there must have been ten or twenty, I suppose, all fighting together. I saw a man with a naked saber, brandishing it over the heads of the combatants. One of the officers of the court, I believe, came up to me with a brace of pistols, which, I believe, belonged to Mr. O'Connor, and lay upon the counsel table, saying, "I have secured these at last." This combat, I suppose, might last five, six, or seven minutes; I cannot exactly say how long; but in the course of it, I saw Mr. Fergusson standing upon the table, together with many others; he turned round towards the commissioners, and said, I believe particularly addressing himself to me, "My lords, the constables are the persons that are the rioters; they are the occasion of it," or words to that effect. Before I could give him an answer, he turned round again towards the combatants; it was impossible, from the noise, for him to hear anything I could say to him. My attention was chiefly turned from him to the more interesting scene of the fight; but I must do him the justice to

*say, that, in the very short time I saw him, which was not above a minute or so, I did not observe him say or do anything to encourage the riot. I thought myself in great danger, and that we were all so. I could not guess at the view of the rioters, how far it extended, or whether they had any and what arms; indeed we were more alarmed, because we had intelligence beforehand, that there was a very disaffected party in the town. — That is all I have to say.* Charles Abbot, Esq., sworn. — Examined by Mr. Law.

Were you in court when the jury brought in their verdict? — I was.

Did you observe any motion made by Mr. O'Connor towards quitting the bar? — I do recollect that Mr. O'Connor made a motion with his body, as if he would leave the bar. Mr. Fergusson, almost at the same instant said, "He is discharged." Mr. Solicitor-General then called across the table, "No, stop him; he is not discharged." Just at the same instant, one of the officers, either Rivett or Fugion, but I cannot say which, got upon the form and pressed forward towards Mr. O'Connor, and at the same time said he had a warrant; there was then a little confusion for a short space of time, but not very long; the prisoners resumed their places, and Mr. Justice Buller proceeded to pass the sentence upon Mr. O'Coigly. During this time I had been sitting almost immediately under Mr. Justice Buller, very nearly so. At the very instant that Mr. Justice Buller had closed the sentence, I observed Mr. O'Connor leap over from the bar towards his left hand; a very great tumult and confusion immediately took place; and, shortly afterwards, I saw a person, whom I soon learned to be Mr. Stafford, draw a saber. and went to that corner of the table where the confusion was. Mr. Garrow cautioned him not to strike; and he did not appear to aim the saber at anybody, but merely to keep it moving over their heads. When

this second tumult began, I rose up and stood upon the form upon which I had been sitting; so that I was standing before Mr. Justice Buller and Mr. Justice Heath, with my back towards them. When the confusion began to abate, I turned round, and entered into some conversation with Mr. Justice Buller; and soon after this, while I was in that situation, I saw my lord Thanet standing on the table, nearly before Mr. Justice Lawrence, which was towards my right hand. *I heard Mr. Justice Lawrence speak to lord Thanet to this effect, "I think it would be an act of kindness in Mr. O'Connor's friends, to advise him to go quietly to the prison, lest some mischief should happen." I do not pretend to state the learned judge's words; but the substance, I believe, I am correct in. Lord Thanet then turned abruptly round towards his right hand, which brought his back towards me; and I did not distinctly hear the first words that he uttered, but the concluding words were either "to have a run for it," or "fair to have a run for it." I will not be quite certain of the word "fair"; but of the words "to have a run for it," I am quite certain. I have the more particular recollection of this, because, shortly afterwards, I observed Mr. Sheridan at the same part of the table, and heard Mr. Justice Lawrence speak to him to the same effect that he had before spoken to my lord Thanet. Mr. Sheridan answered with great civility, either that he had done so, or that he would do it: it was the different manner of Mr. Sheridan to that of my lord Thanet that made me recollect that. . . .*

Mr. Law. — Have you any doubt of the words spoken by lord Thanet, "to have a run for it"? — I have not.

John Rivett sworn. — Examined by Mr. Garrow.

Did you attend at Maidstone as a witness upon the trial of O'Connor and others? — I did.

Was any application made to you

by one of his majesty's messengers, to assist in apprehending Mr. O'Connor, if he should be acquitted by the jury? — Yes, there was.

Did you, in consequence of that, go into the court with a view to give that assistance? — Yes, I did.

Who went with you? — Fugion, my brother officer.

He was another officer of the police? — Yes, and the messenger; we all three went into the court together.

Is Fugion since dead? — He is. . . .

At which end of the bar were you? were you on the side the farthest from Mr. O'Connor, or the nearest? — Nearest to the jailer, which was the right-hand side of the bar.

While you were in this position had you any conversation with a gentleman you understood to be Mr. Thompson? — Yes.

State it to the Court. — The gentleman whom I understood to be Mr. Thompson, a member of parliament, asked me, "What I did there?" I made him little or no answer. He then said, "What business have you here?" or words to that effect; "have you got anything against Mr. O'Connor?" meaning, as I supposed, a warrant; I did not know what his meaning was. I replied, "No." I believe he asked Fugion likewise, to the best of my recollection. . . .

What then passed? — I then observed a gentleman, whom I knew to be Mr. O'Brien, at the farther end of the court: I observed Mr. O'Brien whispering something to Mr. O'Connor over the bar.

Describe particularly where Mr. O'Brien was placed during that time? — He was on the left-hand side of the bar, by Mr. O'Connor; I was on the right-hand side, and he on the left: a few minutes might elapse, when Mr. Thompson put up his finger to catch the eye of Mr. O'Brien, and beckoned to him; a few minutes might elapse, when Mr. O'Brien came to the same side where I stood.

Did Mr. Thompson still continue standing by you? — Yes, he did.

How long was this before the verdict was given? — While the jury were out, considering their verdict.

When Mr. O'Brien came to the place where you and Mr. Thompson were standing, what took place? — Mr. O'Brien and Mr. Thompson spoke to each other; but what they said I cannot tell. Mr. O'Brien then addressed me, and said, "Have you got a warrant against Mr. O'Connor?" I said, "No." Then he said, "Then Fugion has."

Do you mean that he made use of Fugion's name? — Yes; Fugion was present, and he answered immediately that he had not. He said, "Fugion, have you got the warrant?" He addressed himself to Fugion: Fugion said, "No." Then Mr. O'Brien said, "Then the messenger has."

Had Wagstaffe his badge as king's messenger on at that time? — I do not recollect.

Do you mean to say that he addressed himself to the messenger? — No; he said, "Then the messenger has." I then replied, "I can answer only for myself." Mr. O'Brien then said, "I will bet you three guineas," I think it was, to the best of my recollection, "that you have." Fugion said, "Done," I believe, or words to that effect. Mr. O'Brien then left the side of the court that I was on, and returned to the left-hand side where Mr. O'Connor was, and whispered something to Mr. O'Connor; but what I cannot tell.

What observation did you make at that time, with respect to any other persons in the court, as to any change of position? — It remained quiet till the jury were coming in: a number of gentlemen seated themselves directly before me in the place where I stood.

That was upon the bench made for the prisoners' attorneys? — Yes.

Many gentlemen seated themselves there? — Yes.

Did you know any of those persons? — Not that were sitting down before me; some time had elapsed, when there was some noise when the jury were coming into court, "Make way for the jury," or something to that effect. I then endeavored to get as nigh Mr. Watson, the jailer, as I possibly could. I went to step my foot up to get nigh the bar, and I was pulled down again by my leg; I turned round, and the person who pulled me down, I supposed, was Mr. Thompson.

Do you mean to say you know it was Mr. Thompson; or, from the situation he was in, that you apprehended it was Mr. Thompson? — Exactly so.

You do not aver the fact positively? — No; but when I turned round he was close to me.

And therefore you conclude he was the person that pulled you? — Yes. The jury then came in, and I endeavored to get up again as near the bar as I possibly could.

When you use the expression, that you endeavored to get up as near the bar as you could, was there anything that prevented you from getting there? — Only the gentlemen sitting there.

With what view was that? — With a view to assist in securing Mr. O'Connor if he should attempt to make his escape.

*Upon your endeavoring to get as near the bar as you could, what happened? — The jury were in, and the Court called "Silence." The jury had given their verdict — Mr. O'Connor and the others, Not Guilty; and Mr. O'Coigly, Guilty; and then I got up nigh the bar. I observed something in Mr. O'Connor that struck me as if he meant to make his escape; at that moment there was some noise in the Court, and Mr. Fergusson says, "What business has that fellow there, making such a noise?"*

Lord Kenyon. — *Whom was that addressed to? — It was addressed to the Court, I believe. Upon that I got up upon one of the benches, and ad-*

dressed the judge, and told him my reasons for being there. I told his lordship I had a warrant from the duke of Portland to arrest Mr. O'Connor; the judge replied, "I should have him," or words to that effect; and desired the jailer to take care of all the prisoners for the present.

Which of the judges was that? — Judge Buller; then the sentence was passed upon Mr. O'Coigly. As soon as the judge had so done, Mr. O'Connor immediately jumped out of the bar: there was then a very great confusion in Court; those gentlemen who had so placed themselves before me, stood up; I called out, "Shut the door, shut the door," several times.

After Mr. O'Connor had jumped over the bar, which way did he take? — He took to the left.

He took the direction going from you? — Yes.

That was as we have been describing, towards the narrow street? — Yes; I then endeavored to get forward, but was prevented by those gentlemen who had so placed themselves quite before me and Fugion, and the messenger.

Now describe particularly what passed which prevented you, with your assistants, from following Mr. O'Connor? — I was pulled down, or shoved down, twice or three times; but by whom, I am not able to say. I THEN JUMPED FORWARD AS WELL AS I WAS ABLE, AND WAS ENDEAVORING TO PURSUE MR. O'CONNOR; MR. FERGUSON JUMPED UPON THE TABLE, AND WITH A STICK FLOURISHED IT IN THIS WAY, TO PREVENT MY GETTING FORWARD.

Flourished it over your head? — He flourished it with an intent, as, I presume, to stop me.

Was Mr. Fergusson in his professional dress? — Yes, he was. I THEN SPRUNG AT HIM, AND WRENCHED THE STICK OUT OF HIS HAND, AND HE RETURNED BACK TO HIS FORMER SITUATION.

He went from off the table, and returned to his place at the table? — Yes; otherwise I should have struck him with the stick which I had

wrenched from him, if he had not that moment got away.

Describe what more took place? — AS SOON AS I RECOVERED MYSELF, I WAS THEN KNOCKED DOWN BY SOME PERSON WHO DROVE AGAINST ME — NOT WITH A STICK; AND AS SOON AS I HAD RECOVERED MYSELF, I SAW THE PERSON WHO HAD SO SHOVED ME DOWN; I IMMEDIATELY STRUCK HIM WITH MY STICK: I REPEATED MY BLOWS THREE OR FOUR TIMES; THAT PERSON CALLED OUT, "DON'T STRIKE ME ANY MORE." I REPLIED, "I WILL; HOW DARE YOU STRIKE ME?" That person I so struck was, as I understood while I was in court, the earl of Thanet.

Are you quite certain that the person you struck and repeated your blows with a stick, was the person who shoved you down? — Yes.

And that person, whilst you continued in court, you understood was my lord Thanet? — Yes.

Should you know his person now? — I think I should.

Look round the court, in all parts of it, and see if you see his lordship here — is that the person you struck who sits next Mr. Gibbs? — I believe it is; I cannot positively say, because I have never seen the gentleman but once since that time.

From the appearance of his lordship, from his person and make, do you now believe him to be the person? — I cannot positively say.

Have you reason to believe that that gentleman is the person? — I have some reason to believe so, FROM HIS SIZE.

Did you afterwards, in the course of your continuance in court, see lord Thanet in any other part of the court? — He was pointed out to me immediately after.

Upon the spot? — Upon the spot.

I do not know whether you recollect how he was dressed? — No, I do not.

Who was the person that told you that the name or title of the person, with whom you had the contest, was lord Thanet? — Mr. O'Connor, after

being secured and brought back again into the bar.

Mr. O'Connor gave the title of lord Thanet to the person with whom you had had the contest? — Yes.

Lord Kenyon. — Was it a conversation addressed by Mr. O'Connor to you? — It was.

Mr. Garrow. — After you had given these blows to the person supposed to be lord Thanet, what passed? — I observed Mr. O'Connor was in custody — he had been secured by the doorway; I then assisted in getting him back to the bar. . . .

John Rivett cross-examined by Mr. Erskine.

You have stated to my lord and the jury, that, from something that passed, you expected Mr. O'Connor to attempt to make his escape? — Yes.

I take it for granted, that the apprehension that he wanted to make his escape, induced you to go forward? — Yes: I got as near the bar as I could.

It made you more desirous, with the other officers, to push forward quickly? — Surely so.

If you had had no reason to suppose Mr. O'Connor was endeavoring to escape, and that others had a disposition to assist him, I take it for granted you would have gone on more leisurely? — No doubt.

But the apprehension that you had, that you might be disappointed in the execution of your warrant, made you go on with considerable rapidity? — I went swifter than I should have done if I had not been molested, no doubt.

The line that you were going in at that time, was a place not very unlike where I am standing now, immediately before the prisoners? — Yes.

That is to say, a place like that I am now standing in, divided by something like this from the place where the counsel sat? — Just so.

You say that you jumped forward as well as you were able, and were endeavoring to pursue Mr. O'Connor,

when Mr. Fergusson jumped upon the table, and with a stick flourished in this way, to stop you? — Yes.

That was the first obstruction you met with? — No; I was pulled by the leg.

But, except that pulling by the leg, after you pursued your progress through the solicitors' box, the first interruption you met with was by Mr. Fergusson jumping upon the table? — No: I had been pushed down before that.

Had you struck anybody before that? — No.

Had you shoved or pushed anybody? — I cannot tell that; in the confusion I might.

You had not seen lord Thanet till after this had passed with Mr. Fergusson? — To my knowledge I had not.

Lord Thanet is a very strong, big man? — Yes, he is so.

Then you had not seen lord Thanet till after you had been with Mr. Fergusson, at this time upon the table? — No, I had not.

And you had shoved against several others? — I probably might, in the endeavor to get forward. . . .

After you saw Mr. O'Connor jump over the bar, and when you were apprehending that you might be disappointed in arresting him, you went forth with all the rapidity you could. Now, how came you to leave the course which directly led to him to go up to the table where Mr. Fergusson stood? — There had been a great many gentlemen in the corner, and I got a little farther to the right.

Towards the table where Mr. Fergusson was? — Yes.

He was standing upon the table, and you upon the ground? — No; upon the bench: I might be upon the ground sometimes; for I was up and down several times.

Mr. Fergusson was upon the table, flourishing a stick over you, in his wig and gown, and you forcibly wrenched it out of his hand? — Yes; and if he had not got away,

he would have recollected me another time.

Now you take upon you to say, that when this transaction took place, he returned to the table, and went to his seat? — He turned back, and went from me to the table.

Did he go towards Mr. O'Connor? — No; he turned towards the judges.

*Then it was not until after this transaction had passed, when Mr. Fergusson had flourished his stick in this manner, and had gone away towards the judges, that you met with lord Thanet? — Just so.*

*What interval of time might there be between Mr. Fergusson's going away in the manner you describe, and your meeting with lord Thanet? — A very few minutes; a minute or two.*

Where was it you met with lord Thanet? — A very little distance from me.

Was he in the counsel's seat, or where? — I do not know what you call the counsel's seat; he was upon the benches. As soon as I turned from Mr. Fergusson, I was immediately shoved down.

Was the person you took to be lord Thanet upon a bench by where the table stood? — I cannot say.

*Had he a stick? — He had no stick, that I recollect.*

Then, lord Thanet having no stick, what assault did he make upon you? — With his fist, in this way, shoved me down as I was going forward; he shoved me back.

*And then you struck him? — Yes; as soon as I recovered myself, I struck him two or three blows.*

*With what? — The stick that I took from Mr. Fergusson.*

My lord Thanet had no means of parrying that blow? — No; he did not attempt to strike me afterwards.

Where was he at the time you struck him two or three times? — When I hit him the first time, he fell upon his side, this way.

Did you strike him after that? — Yes.

Mr. Fergusson was gone away? — Yes.

Mr. Fergusson did nothing to endeavor to extricate lord Thanet from you? — No.

Did you strike anybody else but lord Thanet? — I do not know that I did; I might by accident.

If you struck anybody else, besides lord Thanet, it was by accident? — Yes.

Did you see either Fugion, Adams, or Wagstaffe, who were there, strike anybody? — No, I did not.

Mr. Garrow. — Do you remember seeing Fugion strike anybody? — No.

You said you were not before acquainted with the person of Mr. Thompson? — No.

Should you know him again now? — I should think that little gentleman is him.

Mr. Gibbs. — This gentleman? [*putting his finger on Mr. Thompson.*] — No; the next gentleman.

This gentleman? [*putting his finger on Mr. Bonney.*] — Yes; I think that is him.

Sir Edward Knatchbull, bart., sworn.

— Examined by Mr. Adam.

Were you at the trial of O'Coigly, O'Connor, and others, at Maidstone? — I was.

Were you present in court at the time the riot took place? — I was.

Will you state to my lord and the jury, whether you saw Rivett, the Bow-street officer, engaged with any person, and with whom? — Previous to the sentence being passed upon O'Coigly, I saw Rivett, the Bow-street officer, on the prisoner's right hand; he produced some paper, which I understood at the time to be a warrant from the duke of Portland, to secure the person of Mr. Arthur O'Connor; after that, there was some conversation passed between the judge and Rivett, which I do not immediately recollect. *I saw lord Thanet seat himself under the prisoners at the bar, immediately at the conclusion of the sentence being passed upon O'Coigly. I saw Rivett, who appeared to me to be placed in a situation in order to prevent Mr.*

him? — I came quite up to the end of the bar with him.

At that time, what was the number of the people standing about? — They were directly opposing the officers from coming, when I was at the corner of the bar with him.

Do you know the person of Mr. Fergusson? — I do not.

Did you see any person in a bar wig and gown? — Yes.

In what situation was he? — He was one of those who wanted to obstruct the officers from coming forward.

What did you observe him to do? — I saw them stand all of a body together, so that the officers could not pass to take him.

Do you remember any complaint being made to the judge, by any person, of having their head broke? — Yes; a gentleman said, "What recompense am I to have? I have got a broken head;" but I do not know who it was.

Was that the person that you spoke of with a black collar? — I cannot say.

Had he a bald head? — I cannot say.

*Henry William Brooke* sworn. — Examined by Mr. *Abbott*.

I believe you have some situation in the secretary of state's office? — Chief clerk in the alien department.

Were you at Maidstone at the trials? — Yes. . . .

Do you recollect what happened immediately after the jury had pronounced their verdict? — I recollect that Rivett, one of the Bow-street officers, attempted to get up on the side where the jailer sat.

Did he declare the purpose of his attempting to go that way? — To the best of my recollection, he said, he had a warrant from the secretary of state to arrest Mr. O'Connor.

Did you observe that any attempt was made to resist this person who was endeavoring to come forward? — I observed some persons endeavoring to pull him back. . . .

Did Mr. O'Connor do anything?

— Mr. O'Connor placed, as far as I recollect, his left hand upon the side of the bar where he stood, and leaped over.

Did you hear any voices crying out anything? — At that time the tumult became general: I heard some cry out, "Stop, stop;" and others, "Run, run."

Are you able to identify any person who was resisting Rivett? — I saw a person, to the best of my recollection, who was dressed in a gray coat and a black collar, and his head was bald on the top.

What did you see that person doing? — He seemed to have hold of the officer's coat.

Of Rivett's coat? — Yes.

Did you afterwards learn who that person was? — I afterwards understood that person to be a captain Browne.

Did that person, after the tumult was over, prefer any complaint to the Court that you recollect? — I cannot identify the person of the gentleman that endeavored to make a complaint to the Court of ill usage; but there was some gentleman upon the table, who complained, whether generally, or to the bench, I cannot say, "Am I to be ill-treated in this way?" or to that effect.

Was that the person with a bald head and black collar? — I cannot say.

*Did you know Mr. Fergusson the counsel? — I have not the honor of Mr. Fergusson's acquaintance: but I had his person pointed out to me as being Mr. Fergusson.*

*Did you see him do anything? — He appeared to have SOMETHING in his hand; but whether it was a stick or a sword that lay upon the table, or what, I cannot say — but he was brandishing it over the heads of the people.*

Was he in his professional dress at this time? — He was.

*Henry William Brooke* cross-examined by Mr. *Erskine*.

Where was Mr. Fergusson standing when you apprehend, rather than express, that you saw him brandish



ing something which you do not describe, but which you think was a stick or a sword? — He was standing near the side of the court upon which Mr. O'Connor stood.

Upon the ground, upon the bench, or upon the table? — He appeared to me, as far as I can charge my recollection, to have been upon a bench; he appeared to be elevated from the ground.

This was after the sentence had been pronounced, and after Mr. O'Connor had gone out of the dock? — It was about that time, as far as I can recollect.

At the time of the confusion in court, was it not? — It was at the time of the confusion.

John Stafford called again. — Examined by Mr. Law.

I will not examine you to the preliminary circumstances which have been proved by several witnesses. Confine yourself now to the time that Mr. O'Connor was endeavoring to get over the bar. At that period of time, did you see any of the defendants, and particularly Mr. Fergusson or lord Thanet, do, or endeavor to do, anything? — At the instant that Mr. O'Connor leaped over the bar, I saw my lord Thanet and Mr. Fergusson: I had been paying particular attention to Mr. Justice Buller in passing sentence: and the moment that he was done, I turned my eyes round to the bar, and saw Mr. O'Connor in the act of getting over; he had his left hand upon the bar, and his right hand extended: my lord Thanet stood next to him, to the right of him; Mr. Fergusson, at that instant, was in front of him, with his back to me, facing Mr. O'Connor.

Mr. Erskine. — Where did you sit at this time? — Supposing this to be the court at Maidstone, I sat directly under the jury.

Mr. Law. — You sat so that you could observe the whole of the transaction? — Clearly; but the whole of the transaction was of that sudden nature, that I was rising part of

the time; I rose, and seized one of the sabers which lay upon the table, and which was a part of Mr. O'Connor's baggage.

Did you see lord Thanet or Mr. Fergusson do anything in aid of Mr. O'Connor in the act of escaping? — *When Mr. O'Connor extended his arm, he either laid it upon lord Thanet's shoulder, or Mr. Fergusson's arm; lord Thanet being between me and Mr. Fergusson, I could not distinguish on which of them he put his hand.*

Did you see any obstruction given by them to any persons in passing from one part of the court to the other? — *I did not observe lord Thanet make any obstruction; Mr. Fergusson had his back turned to that side of the Court from whence the officers were endeavoring to approach to the bar.*

With his back towards the great street of Maidstone? — Yes. At the instant I am now speaking of, I was upon the table.

Did you see anything in particular done by Mr. Fergusson? — *Mr. Fergusson extended his arms in this manner, seemingly to me to keep the persons back who were forcing themselves forward. I saw no other act done by him.*

Then did Mr. Fergusson appear to you to be putting himself in a position to stop the way? — Certainly so.

To stop the way for whom? — I said before, to stop the way of the persons who were approaching that side of the court where the officers were.

Were any persons at that time attempting to come from the side of the court where the officers were, to the side where Mr. O'Connor was? — Rivett and the Bow-street officers were. *I at this time stood upon the table with a drawn saber in my hand.*

Did you see anybody, before that, have hold of the flap of Mr. O'Connor's coat? — Yes; before Mr. O'Connor got from the bar, I observed that Mr. Watson the jailer had got hold of the tail of his coat.

Was it at the same period of time when you saw the officers rush forward, and Mr. Fergusson attempt to stop the way in the manner that you have described? — Yes; the whole transaction was of the shortest duration possible: *Mr. Fergusson forced himself between Mr. O'Connor and Mr. Watson the jailer*; Mr. Watson the jailer reached across; he sat on the other side from where Mr. O'Connor the prisoner sat; he reached across behind Binns, and seized the flap of O'Connor's coat, as he was getting over the table; the coat was extended for a small distance between O'Connor and the bar, and Mr. Fergusson forced himself in between the two, and Mr. Watson let go his hold.

*Do I understand you, that by the action of Mr. Fergusson, the jailer was separated from his prisoner? — That I cannot say: the jailer might have let go his hold without the action of Mr. Fergusson; it appeared to me to be in consequence of the action of Mr. Fergusson.*

Do you know the person of Mr. O'Brien? — No, I do not. . . .

You mentioned standing upon the table with this saber in your hand: did you strike anybody, or create any confusion? — I certainly struck no one; I menaced many that I saw, apparently to me, endeavoring to force Mr. O'Connor out; I brandished the saber, and cried out very loudly, "Keep back," and made motions as if I would strike; but I did not strike any one.

From the observations you were enabled to make, to what cause and to what efforts did you attribute the riot? — The riot must be attributed, most certainly, to Mr. O'Connor's attempt to escape, and the assistance that his friends gave him. I did not know of any warrant there was to apprehend him, till I heard Rivett call out in the manner I have described, before the sentence was passed.

Did you observe any other circumstances of actual assistance

given by the friends of Mr. O'Connor to his escape, besides those you have mentioned? — No; the transaction was so short, it was impossible to observe minutely.

*John Stafford cross-examined by Mr. Erskine.*

This scene of confusion you represent as almost instantaneous, and to have continued but a very short time? — Yes.

You were sitting as clerk to Mr. Knapp, under the jury box? — Yes.

And your face, of course, towards the great street of Maidstone? — Yes.

Now, after Mr. Justice Buller had pronounced sentence of death upon O'Coigly, did you see O'Connor jump out of the bar? — I did.

Where do you mean to represent that you saw Mr. Fergusson at that time? — *Mr. Fergusson did not attract my eye till I was upon the table*; seeing the act of O'Connor, I immediately sprung up.

You did not see Mr. Fergusson till the confusion had advanced? — It was just at the very instant; they all happened almost at the same time.

Mr. Fergusson did not attract your attention till you had got upon the table in consequence of that instantaneous confusion having begun? — I got upon the table in consequence of seeing Mr. O'Connor leap over.

Then, when your attention was first attracted to Mr. Fergusson, it was in the midst of the confusion? — Yes.

Several persons appeared to be pressing forward, and there seemed to be a scuffle? — Yes.

You observed lord Thanet very distinctly? — I had never seen lord Thanet before that day — I saw him give his evidence — I saw him afterwards, I think, sitting between Mr. Dallas and Mr. Fergusson; and I think I cannot err, when I say, I am sure it was lord Thanet.

Did you not see distinctly the

person you took to be lord Thanet ? — Most distinctly.

How far was he from you ? — I am sure, not more than two yards ; for the space between the table and the bar is very small ; and it was between the table and the bar that I saw lord Thanet.

Where the counsel sat ? — Not in the seat where the counsel sat.

At this time you were upon the table, and saw Mr. Fergusson in the midst of the confusion : was he upon the table where you were, or in his place ? — Neither upon the table, nor in his place.

Where then ? — Immediately behind where he had formerly sat ; he had sat in the front of O'Connor, and he had got just behind the seat where he had sat before.

You had a sword which you brandished for the purpose of keeping off any danger that might happen ? — Yes.

Do you mean to represent that Mr. Fergusson was at that time in the solicitor's box ? I do not know whether I can call it the solicitor's box or not ; *he sat at the extremity of the seat wherein the solicitors sat* — he was certainly directly before me at the end of the trial.

At that time, was not Mr. Fergusson surrounded by a great number of people, who were pushing and shoving, and making a disturbance ? — The persons behind him were certainly crowding upon him ; but there was a small space before him that was vacant.

Was there not a pressing upon him every way ? — No, not from the table.

Were there not persons in the place where the solicitor's box was, pushing and crowding at the time Mr. Fergusson extended his arms ? — Certainly ; but I saw him only pressed on the side that I describe.

Do you mean to swear that you saw Mr. Fergusson shift his place where he had been, and go nearer to Mr. O'Connor ? — No, I did not see him shift it.

Mr. Garrow. — There was a low-backed seat for the counsel for the prisoners ? — Yes.

Behind that was a space and bench for the solicitors ? — Yes.

And if I understand you right, Mr. Fergusson appeared to you to be over that low back to the counsel's seat ? — Yes, certainly so.

Between the back of the counsel's seat and the bar ? — Yes ; I had not immediately before this observed where Mr. Fergusson was.

The Honorable Robert Clifford sworn.

— Examined by Mr. Garrow.

I shall not trouble the Court to hear from you over again the detail of the circumstances. . . .

When the jury returned, and had given their verdict, what observations did you make respecting either lord Thanet, Mr. Fergusson, Mr. O'Brien, Mr. Thompson, or Mr. Browne ? — When they had returned a verdict of Guilty against O'Coigly, I observed Mr. O'Connor put his left leg over the bar of the dock, I believe they call it, leaning upon his left hand ; lord Thanet rose up, and Mr. O'Connor's hand was within this distance (six or seven inches) of lord Thanet's left shoulder — it was below his head : I did not see it touch his shoulder, because Mr. Fergusson rose up, and was exactly between lord Thanet and myself.

Mr. Erskine. — Where did you sit ? — I sat as marshal under the jury box.

Mr. Garrow. — *Be so good as to describe that rising of Mr. Fergusson's ? — They ran off all together — they followed Mr. O'Connor, as it appeared to me — I bent myself as far as I could to see, when so many people came jumping from the witness box, that I was almost overpowered.*

The witness box was opposite the jury box ? — Yes ; and they all went off to the left hand, behind the crier's box.

Lord Kenyon. — Do you mean that they all ran off together ? — *Mr. Fergusson and the rest of them*

went off towards the narrow street of Maidstone.

Mr. Garrow. — There you lost sight of them, on account of the number of persons that came to intercept your view? — I was sitting here, and they all went there.

Did you see anything more of the conduct of lord Thanet? — I saw no more of them after that; I saw a gentleman, that was almost bald, come and complain that he had received a blow upon his head, and asked, "Whether there was no redress for the blow he had received?"

Did you learn afterwards that that was Mr. Gunter Browne? — I understood his name was Browne.

Did you see him favoring the escape of O'Connor? — No. . . . William Cutbush sworn. — Examined by Mr. Garrow.

I believe you are a clock maker at Maidstone? — Yes.

Were you in court at Maidstone when sentence of death was passed upon a prisoner of the name of O'Coigly? — Yes, I was.

Upon that occasion, did you see Mr. O'Connor do anything? — Yes; I saw him get over the bar.

At that time did you see lord Thanet; and if you did, what did you see him do? — After that, I saw a man with a sword in his hand beating over a gentleman's head.

The Court have been sitting many hours, and have heard the general detail of the transaction; be so good as to answer my questions: did you see lord Thanet? — I did.

Did you see his lordship do anything, and what? — I saw Rivett strike lord Thanet over the back; I did not know it was Rivett at that time; I knew lord Thanet very well.

Where was lord Thanet at the time that Rivett struck him? — Two or three yards from Mr. O'Connor, or thereaway.

Was lord Thanet nearer to the great street of Maidstone, than he was to Mr. O'Connor, or to the nar-

row street? — They were all on the left side.

You were on the side on which Mr. O'Connor was endeavoring to get out? — Yes.

What was the first thing you saw? — I saw nothing till I saw the sword hit upon lord Thanet's back.

That was not Rivett? — Yes, it was; he hit lord Thanet upon the back with a sword; I did not know it was Rivett till afterwards.

Were any of the lights put out? — One.

Did you hear any expression about putting out the lights? — Yes; I heard some person say, "Put out the lights." . . .

Robert Parker sworn. — Examined by Mr. Garrow.

Were you in court at Maidstone when the jury returned into court with their verdict, in the case of O'Connor and others? — Yes.

Were you near the undersheriff? — I was very near; behind him.

Nearest the great street of Maidstone, and far from O'Connor? — Yes.

Did you see anything happen upon that verdict being brought in? — Upon the verdict being brought in he put his leg over the bar, feeling himself discharged, as he afterwards explained; a Bow-street officer then stepped up and said, "There was a warrant to detain him;" Mr. O'Connor then put his leg back again, and said, "He thought he was discharged," and one of the judges said, "He was not to be discharged," or something of that sort; and he was quiet till sentence was over.

Did you see lord Thanet? — Yes; I saw him on a seat at the front of the bar; I am perfectly sure I saw lord Thanet.

After sentence had passed did you see the Bow-street officers make any attempt to pass the bar where Mr. O'Connor stood? — Mr. O'Connor jumped over the bar, and then the Bow-street officers both advanced in order to stop Mr. O'Connor; the jailer called out, "My lord, am I to

let him go?" or something to that effect, and there was a contention; several persons were assisting Mr. O'Connor to get out at the opposite door, and the Bow-street officers were attempting to stop him.

*Did you at that time see lord Thanet? — I did.*

*In what situation? and what was he doing? — Lord Thanet evidently appeared to me to be obstructing the officers in their attempt to stop Mr. O'Connor.*

Did you see any other person engaged in the same attempt? — Not any one whose person I then knew.

Did you observe any person whose dress was remarkable? — I saw a gentleman in a bar gown and wig endeavoring to assist the escape of O'Connor; but at that time I did not know the person of the gentleman. . . .

*Robert Parker* cross-examined by Mr. *Gibbs*.

You say, lord Thanet appeared to you to be obstructing the officers; did you see him do anything? — I saw him resisting with his hands.

Pray when was this? before or after the sentence? — It began immediately after the sentence; it began upon Mr. O'Connor getting over the bar.

What did he do with his hands? — The Bow-street officers pushed forward; and against one of them it was that he was making resistance.

Pray which of them? — I cannot tell; I do not know which; I did not know either of them.

Did you see the warrant? — Yes; I saw it handed over to be read.

Can you tell whether it was against either of those two men, or against the messenger, that he was making that resistance? — I cannot.

But you saw him put his hand against one man that was coming forward? — Yes, certainly.

You said that you saw a gentleman in a bar gown that appeared to assist O'Connor? — Yes.

What did you see him do? — I

recollect that gentleman was ranged with the counsel for the prisoners; and then he turned round with his face to the bar, and was in that manner contending to resist their advancing towards the prisoner.

He was standing upon the ground and reaching over? — Yes.

Standing, as I may be standing now, supposing this to be the bar? — Yes; supposing you were turned round, it would be exactly so; he turned round towards the bar.

*End of the Evidence for the Crown.*

#### DEFENSE

The Honorable *Thomas Erskine*. — Gentlemen of the Jury: It now becomes my duty to address you. . . .

You have heard attentively the accusing testimony: AUDI ALTERAM PARTEM. . . .

We are here, therefore, upon a mere question of fact. You cannot but have observed, that the attorney-general and myself, instead of maintaining opposite doctrines, perfectly agree upon the principles which ought to govern your decision. The single object of inquiry is, the truth of this record. Is the charge proved to your satisfaction? or, rather, *will* it be so proved, when the *whole* cause has been heard.

In adverting to what the charge is, I need not have recourse to the abstract I had made of the information. The substance and common sense of it is this: that Mr. Arthur O'Connor had been brought, by legal process, into the custody of the sheriff of Kent; that a special commission had assembled at Maidstone, to try *him* and others for high treason; that, upon the opening of the commission, he had again been committed by the Court to the same custody; that he was afterwards again brought up to the bar, and found not guilty; and that, after he was so acquitted, but before

he was, in *strict form*, discharged by the order of the Court, the defendants conspired together, and attempted to rescue him. This is the essence of the charge. The disturbance of the Court, and the assaults stated in the different counts of the information, are only the overt acts charged to have been done, in pursuance of this purpose, to rescue the prisoner. The *criminal purpose* to rescue Mr. O'Connor is the fact, therefore, of which you must be convinced, to justify the verdict which the crown has called upon you to pronounce.

Before I proceed to address myself to you upon the evidence, . . . I will begin by relieving your attentions from the consideration of all circumstances that are neither disputed, nor fairly disputable, either as they are the result of what you have heard already, or as I think they must remain when the whole case is before you. I admit, then, that Mr. O'Connor, when he heard the verdict of the jury in his favor, was disposed to leave the court. The presumption, indeed, as it arises out of universal practice, as well as out of the law that warrants it, is, that he, as well as others, thought that the verdict of Not Guilty entitled him to do so. Neither can it be disputed that a warrant did in fact exist, and that its existence was known, since it appears that the officers stated in open court that they had one; and it is not material for me to dispute, nor is it, perhaps, disputable, that Mr. O'Connor knew of their intention to arrest him; and, if he did know it, human nature is stronger than all the evidence in the world, to convince every man of his disposition at least to escape from it. . . .

Having admitted these facts, I, in my turn, have a right to bring to your recollection, that it is an indisputable fact, resting upon the whole of the crown's evidence, that the officers, strongly impressed with

this idea, rushed suddenly and impetuously forward, on Mr. O'Connor's stepping over the bar when the verdict of Not Guilty was delivered; and indeed Rivett, upon his cross-examination, distinctly admitted, that, owing to the apprehension of a rescue, he rushed into court with more precipitation than under other circumstances he could have justified, and that a great bustle and confusion existed before he approached any of the defendants, or even saw their persons. This *admitted* origin of the disturbance removes all difficulties from the consideration of the cause; and Mr. Justice Heath declared, that there was a scene of confusion and violence in court, such as he had never seen, nor could possibly have expected to see, in a court of justice. The single question, therefore, is, *What share the defendants had in it?* Did the disturbance arise from any original acts of theirs? or were they, on the contrary, first pressed upon by the officers and their assistants, who, though they might be engaged in what they mistakenly supposed to be their duty, from an expectation of resistance, necessarily created confusion by their forcible entry into a crowded court? Were the defendants engaged in any conspiracy or combination to deliver Mr. O'Connor? That is the great, or rather the only question; because, if this does not appear from the evidence, all their acts, even if they were ultimately to remain as they appear at present, are perfectly consistent with the conduct of gentlemen suddenly and rudely trampled upon in a tumult, though without, perhaps, being the particular objects of violence by those who created it.

The natural course of considering which of these propositions ought to be adopted by reasonable men, is, to set out with tracing a motive. There can be no offense without some corresponding inducement to commit it. . . .

Now, I have always understood

it to be the great office of a court of justice, when evidence is to be opposed to evidence, to consider the probabilities of the transaction: indeed, a judicial decision is nothing else but the bringing up facts to the standard of reason and experience. I have already described the situations of the only two defendants whose cases you can have occasion to consider; the one, as a high peer and magistrate of the kingdom, with the natural consciousness of the duties inseparable from exalted stations; the other, standing in a manner for his very existence upon the dignity and decency of his deportment in the courts, which habit, as well as principle, had taught him to reverence and respect. . . . Under these circumstances, you are asked to believe that lord Thanet and Mr. Fergusson — . . . *without any motive upon earth brought home to them by any part of the evidence*, engaged publicly in a scene of audacious riot and violence, in the public face of the most dignified court; in the presence of all its numerous officers; of an acute and intelligent bar; of the sheriff and all his train; of a jury composed of the principal gentlemen of the county, and of all that concourse of attendants. . . .

Gentlemen, the mind of man cannot avoid collecting and accumulating these absurdities; but they are too important to be thus run over; they must be viewed separately, to have their proper effect.

First, then, let us search for a motive strong enough to impel honorable men to encounter such desperate difficulties, in the pursuit of a dishonorable, useless, and impracticable purpose. . . .

It seems, they were not indifferent to the deliverance of Mr. O'Connor; for, upon his acquittal, they hastened to the bar, and congratulated him on the verdict! They certainly did so, in common with many others; and although the impulse of personal kindness which directed them was honorable,

it may be set down, not so much to the individuals, as to the characteristic benevolence of Englishmen. . . . Long, long, may this remain the characteristic feature of our country! When Mr. O'Connor, therefore, was pronounced not guilty, was it any proof of a conspiracy to rescue him from other charges, that he was congratulated on his deliverance, which he was not only entitled to by the verdict of the jury, but which the evidence on the trial, and the judge's remarks on it, had previously and distinctly anticipated? The question, therefore, again recurs — Were the defendants the active authors of the rescue, for the purpose charged in the indictment? The MOTIVE is gone already. . . .

The next consideration, in weighing the probabilities, is, how this purpose, supposing it still to exist, without any corresponding interest, was possibly to be accomplished? — for men cannot be presumed to engage in the most perilous enterprises, not only without inducement, but without even a shadow of hope or prospect that their object is practicable. . . . Mr. O'Connor stood at the bar where my learned friends now sit, surrounded by hundreds of persons not attempted to be implicated in any design to favor his escape; on the right, and on the left, and behind, were the public streets of Maidstone, from whence no passage without observation was to be expected; and before they could even be approached, an outlet must first have been made through groves of javelins in the hands of those numerous officers which the exemplary attention of the sheriffs of Kent has always provided for the security and dignity of the Court. It was, therefore, not merely improbable, but *naturally impossible*, to deliver, or even hope to deliver, a prisoner from the public bar of such a court, in the view of all its judges, its counsel, and attendants, without the support of great force and numbers. and with-

out, likewise, a previous concert and combination to direct them with effect. . . .

Gentlemen, the next question upon the score of probability is this: supposing that, contrary to everything either proved or asserted, the defendants *had* felt an interest in the escape of Mr. O'Connor, and *had* conceived it to be *practicable*, could they possibly have hoped to escape detection — more especially lord Thanet and Mr. Fergusson, whose persons were so notorious — the one, from his high rank and residence in the county whose principal inhabitants surrounded him; and the other, from being in his professional dress, in the place assigned to him as counsel on the trial, and, in the very midst of his companions, engaged in the business of the Court? . . .

The next recourse to probability, if your judgments, as in all other cases, are to be governed by reason and experience, is, if possible, still more unanswerable and decisive.

Supposing the defendants, *without interest or motive, and without the possibility of success, and without even a chance of escaping from detection and punishment*, to have, nevertheless, publicly insulted and disturbed the Court by acts of disorder and violence, WHO MUST HAVE BEEN THE WITNESSES TO SUCH A SCENE? . . . The proof of this fact, to which the whole Court must have been, as it were, but one eye, and an eye of indignation, is not supported by any one person, either upon the bench, or at the bar, or amongst the numerous officers of the Court. On the contrary, we shall see, by and by, the difference between the testimony of a reverend judge of England, and that of a Bowstreet officer, when I come to advert to the evidence of Mr. Justice Heath, which is directly and positively inconsistent with Rivett's, on whose single and unsupported testimony this extravagant and incredible part of the case is alone supported.

But, it seems, they have given judgment against themselves, by their demeanor and expressions upon the occasion. Lord Thanet, it seems, said to Mr. Justice Lawrence, as Mr. Abbott expressed it, who did not hear what the learned judge had said, to which lord Thanet's words were an answer, "that it was fair he should have a run for it;" — words which cannot be tortured into any other meaning, more especially when addressed to one of the judges of the Court, than that, speaking in extenuation of Mr. O'Connor's conduct, who had visibly made an effort to escape, he thought it fair that a person so circumstanced should have a run for it, if he could; a sentiment which, by the by, no man in his senses would have uttered, more especially in such a quarter, if he had felt himself at all implicated in a criminal endeavor to assist him; . . . it was *after* the riot (as it indeed must have been), that Mr. Justice Lawrence conversed with lord Thanet, saying to him, amongst other things, "that he hoped Mr. O'Connor's friends would advise him to submit to his situation." Now I may safely assert, that, high as lord Thanet's rank is, that learned judge would not have spoken to him as a person from whom he solicited and expected assistance, if he had himself observed him, or if he had known him to have been observed by others, disturbing the order of the Court. . . . Mr. Justice Lawrence was one of the youngest of the learned judges who presided at the trial, with stronger health than belonged to all of them, which enabled him to keep up his attention, and to observe with acuteness; he was, besides, deeply interested in whatever concerned the honor of the Court; and the elevation of the bench on which he sat gave him a full view of every person within it. Indeed, lord Thanet, at the time this misdemeanor is imputed to him, was directly before him, and under him.



and not farther from him than lord Kenyon at this moment is from me. . . . If *he to whom the discourse was addressed*, and who was the best judge of the fair construction to be put upon it, had considered it in the light it has been represented and relied on, he might have been called as a witness. . . .

Gentlemen, let us now pause a little, to consider the effect which I feel myself entitled to derive from these observations. — I consider myself to have advanced no farther in the argument than this —

First, That there was no assigned nor assignable motive for the criminal purpose charged by the indictment.

Secondly, That it was a purpose palpably impracticable, and which, therefore, no reasonable men could possibly have engaged in with any prospect of success.

Thirdly, That whatever might have been the probable issue of such an enterprise, detection and punishment were certain.

Fourthly, That admitting the evidence you have heard to be free from all errors, the defendants did not conduct themselves like men engaged in such a pursuit, nor appear to have been supported in a manner reasonably, or even possibly, consistent with the alleged conspiracy.

Fifthly, That, although the witnesses against them, if the transaction had been justly represented, must, probably, have been the greater part of the Court, and certainly all that part of it elevated both by situation and authority above the rest; yet that there has been not only no such concurrence of testimony against the defendants, but, on the contrary, the most correct and respectable witnesses have concurred in destroying the remainder of the proof.

Sixthly, That the expressions imputed to lord Thanet cannot possibly affect him, without supposing that he publicly gave evidence

against himself, even to one of the judges, who, upon the evidence of his own senses, had authority to have punished him upon the spot.

Lastly, That it appears, by the whole body of the proof, that the confusion arose when the officers burst with improper and indecent precipitation into court; that it began and ended almost in the same breath; and that, during the short moment of its continuance, there was such a scene of tumult and confusion as to render it impossible for the most attentive observer to give any clear and distinct accounts of the transaction.

If these conclusions, gentlemen, be the unavoidable result of the crown's evidence when brought to the common standard of man's reason and experience, it appears to me, that you are bound to return a verdict for all the defendants, even if I should call no witnesses. . . . This proposition, however, cannot be supported by general observations, nor by that general appeal to the proof which I have been engaged in; it must be examined accurately in the detail. . . .

The first witness examined for the crown is Mr. Sergeant Shepherd, who was joined with the judges in the special commission. This examination is highly important in every part of it; because, when it becomes necessary to compare the evidence of different witnesses in order to arrive at a safe conclusion from the whole, nothing can be so satisfactory as to find some person on whose testimony the judgment may repose with safety. My learned friend (as all who knew him must have anticipated) delivered his evidence with the greatest clearness and precision, and in a manner most dispassionate. . . .

Mr. Sergeant Shepherd says, "*Lord Thanet was standing before the bar at which the prisoners stood, with his face turned towards the Court; he was rather to the right hand of Mr. O'Connor, nearest to the great street*

of Maidstone where the jailer sat." Speaking of Mr. O'Brien, he said, that "he stood in the same line, but rather to the left of Mr. O'Connor, that something had been before said by the Bow-street officers, who were making a noise, and had been desired to be quiet. When the verdict of not guilty was delivered, some persons (but whom I know not) said, 'Then they are discharged;' and somebody at the table replied, 'No they are not discharged.'" . . . "At this time," continued the learned sergeant, "Mr. Justice Buller said to the jailer, 'Put the other prisoners back, and let O'Coigly stand forward;' when one of the Bow-street officers stood up on a form, and said he had a warrant against Mr. O'Connor." This, you observe, was the first time there was any mention of a warrant in court. . . . Whilst Mr. Justice Buller was passing sentence, my attention," continued Mr. Sergeant Shepherd, "was directed to O'Coigly; and when he had finished, I observed Mr. O'Brien turn round, and LOOK at Mr. O'Connor and immediately afterwards LOOK DOWN with a very slight motion and inclination of his head." . . . This fact, therefore, delivered with the restraint which the integrity and understanding of the witness so properly suggested, affords no evidence whatever of evil design in Mr. O'Brien, much less of concert or combination with the other defendants. . . . It is, indeed, strongly in Mr. O'Brien's favor, that at the moment he looked down as described by the witness he could not be acting in concert with lord Thanet; for sergeant Shepherd saw lord Thanet at the very same moment, and swore that he was standing with his face to the Court, and that he never changed this position. The sergeant added that "when the last word of the sentence was pronounced, Mr. O'Connor jumped with his left foot upon the bar, and his left hand upon the shoulder of Mr. O'Brien," but who does not appear to have held out his hand to assist him. Mr. O'Brien,

on the contrary, though he could not have but continued in view for some time longer, is charged with *no one act whatsoever*; and it would be strange indeed, to convict a gentleman of a rescue, because, standing near a prisoner meditating an escape, he had laid his hand upon his shoulder. . . .

The remainder of sergeant Shepherd's evidence, as it applies to lord Thanet, is so absolutely decisive, that you will be driven to pronounce by your verdict, whether you give credit to this most respectable and observing witness, or to a Bow-street officer, who was himself the author of the confusion; for the sergeant added, that "*when Mr. O'Connor had jumped over the bar, and he had lost sight of him, the officers rushed into Court to arrest him, and a great noise ensued; and AT THIS TIME*" (GENTLEMEN, THE TIME IS MOST MATERIAL AND CRITICAL, BECAUSE IT CAN APPLY TO NO OTHER THAN THE PRECISE TIME SWORN TO BY RIVETT), "*I saw lord Thanet*," said the sergeant, "*standing as I have described him, with both his hands over his head*," — which he also described to you by putting himself in the same defensive posture, as far more expressive of his situation than any words could communicate. This, I say, is the single point of time to be looked at; for the remainder of the sergeant's original evidence, applying to a subsequent period, described a scene of great confusion, in which he said he could discover nothing distinctly; that many persons were upon the table, some asking questions, and others endeavoring to restore order. It is not therefore, at *this* period that you are to look, since no part of the evidence at all applies to it: but at the moment when lord Thanet is alone affected by Rivett's evidence, the sergeant's testimony has a direct and decisive application; for, upon his cross-examination, he said in so many words, "*I never saw lord Thanet look round, or change his posi-*

*tion as I have before described it, till the very instant the officers rushed into court; and THEN I saw him with his stick held as I before described it; but I am BOUND to say, that he appeared to me to be acting on the DEFENSIVE WHOLLY."* This concluding evidence is an exculpation of lord Thanet, and must have been so intended. I did not even put the question to the witness; he himself conscientiously added, that he was BOUND (bound, of course, in justice to lord Thanet, who was accused of *active violence*) to say, that he appeared to be only acting IN HIS OWN DEFENSE. . . .

Mr. Sergeant Shepherd was properly selected as the first witness for the Crown. He sat, from his station as judge, in an elevated position, where he had a better opportunity of observing than others; and he accordingly appears to have observed everything which passed; yet, instead of fastening guilt on lord Thanet, he sees him from the time the jury returned into court, standing in one position; not looking round as if he was watching the motions of Mr. O'Connor, or engaged with others in attending to them; not even looking towards the side of the court from whence the arrest was to proceed, but upwards to the judges; not opposing his body as an obstacle in a narrow passage through which the officers were to pass: not presenting a front to them which a man of his strength, with the intentions imputed to him, must naturally have been expected to do; but standing as any other person attentive to the trial, till the officers, apprehending a rescue, rushed with violence into court, and pressed upon and assaulted him; for, had he not been pressed upon and assaulted, he could not have been seen by sergeant Shepherd in a posture of defense: and if he were first active in obstructing and assaulting Rivett, in the manner which he, and he only, has sworn to, why should not sergeant Shepherd have seen it? since his eye was

so constantly fixed upon lord Thanet, from the time the jury returned with their verdict till the confusion became general, which is subsequent to the period of Rivett's evidence, as to enable him to tell you that he did not shift his position, nor make a gesture or motion, till the officers and others rushed in upon him; and *then, i.e.* immediately at the same moment to which alone the evidence has any application, he sees lord Thanet with a stick over his head, which he thinks himself BOUND to express and even to *describe* to you as a passive posture of defense. This evidence, which so completely exculpates lord Thanet, is not less applicable to Mr. Fergusson, for, if he who is placed by all the witnesses as standing close by him, had been an active conspirator, armed with a stick, which he was flourishing over the heads of the officers, can you possibly suppose that he would have withheld his assistance from lord Thanet who was visibly overpowered, or that a man of lord Thanet's strength, though assisted by Mr. Fergusson, who is above six feet high, and a young man of great activity and strength, should be perfectly passive under the blows of Rivett, endeavoring only to save his person from violence, without retaliation, or even a motion to the accomplishment of his object?

The evidence of Rivett is farther exposed, by his having denied that lord Thanet had a stick — a fact established beyond all question; and by his swearing that he took the stick from Mr. Fergusson, and struck him with it; when it will appear by and by, that he took it from behind his own coat when he assaulted lord Thanet. This last fact, however, I ought to have passed over at present, because it arises out of my own evidence, which I do not wish at all to mix with my observations on the case of the crown.

Gentlemen, the other judges, with the exception of Mr. Justice Heath (whose testimony will also support

the innocence of the defendants), have not been examined, though their positions in court were so highly favorable; neither has the bar been examined, who, if lord Thanet had been in the situation which some of the witnesses have described, must have all seen it to a man; and their not having been called, affords a strong inference that their evidence would not have been favorable.

Mr. Hussey, who was next examined, said, "*I saw Mr. O'Connor attempt to get over the bar*" (a fact never disputed); "*and at that time lord Thanet was standing with his back to the prisoners. I saw somebody pressing forward, who said he had a warrant; but I saw no paper. Lord Thanet SEEMED to press himself towards the bar, and SEEMED TO BE DESIROUS to interrupt his progress.*" I dare say, the Rev. Mr. Hussey meant to tell you what he saw; but he has expressed nothing. What can be collected from such expressions? Can you convict any man upon evidence which imputes *no act*, but only a *seeming desirousness*? Lord Thanet SEEMED to press himself towards the bar, and *seemed* to be desirous of interrupting the officer's progress. Did the witness SEE him do the one or the other? If he had, he would of course have so expressed it; and if lord Thanet had actually done so, why should not Mr. Sergeant Shepherd have equally seen it, who observed him accurately *at the very same moment*? . . . The whole of Mr. Hussey's evidence, therefore, amounts only to this — that lord Thanet SEEMED to press forward, and that too, *at the very same moment* when Mr. Sergeant Shepherd described him as unmoved and motionless, with his back to the prisoner, and his face, of course, towards the Court. . . .

Lord Romney is the next witness, whose evidence was just what might have been expected from a person in his situation — highly interested in the honor of the county where

he has great hereditary estates and honors. . . . He was placed, besides, in that part of the court where he was entitled by his rank to sit, from whence he had an opportunity of observing what was transacting. Thus circumstanced, he says, "*I saw the Bow-street officers FORCING a passage, AND STRIKING BLOWS: — whom they struck I do not know; there was a sword brandishing on the table. Thinking things bore a serious aspect, I crossed the table, and saw the prisoner escaping; he was brought back by the javelin men. I said to them, 'Form yourselves round the prisoner, for he is not yet discharged.' I was told afterwards I had said, 'he was not acquitted.' I believe Mr. Fergusson said so: I have no doubt I made the mistake.*" — Gentlemen, undoubtedly lord Romney meant only to say, that Mr. O'Connor was not *discharged*; though the answer was not made to him by Mr. Fergusson; for I shall call the gentleman himself who answered him; not that it is in the least material, except that it proves that Mr. Fergusson was noticed at that time by lord Romney; and surely, gentlemen, if he had been acting like the fool and madman, and, I will add, like the knave he has been represented to you; if, in his professional dress, he had been publicly flourishing a stick upon the table, lord Romney, who was close by him, must inevitably have observed him; yet his lordship does not speak of him as out of his place, or as engaged in any act of disorder or violence.

Another most important fact is established by lord Romney's evidence; for, though his lordship said that he should have been so much hurt if the county had been disgraced, that his attention was not directed to individuals, and that in the confusion he could not tell who had been struck in the passage by the officers, yet he added, that *VERY MANY blows were struck, and MANY persons hurt*; yet Rivett says, that Fugion struck no blows; that

Adams struck no blows; that the messenger struck none; nor he himself any but those which were struck at lord Thanet. Rivett, therefore, according to his own account, was the only person engaged, and successfully engaged, against the rioters; yet you are desired to believe, that a large combination of strong and active conspirators were favoring an escape by violence. This is quite impossible; and the blows, therefore, which were observed by lord Romney, were the blows which the officers themselves wantonly inflicted; since it will appear hereafter, by witnesses whom the Court cannot but respect, and whose evidence cannot be reasonably rejected, that they rushed in like madmen, striking with violence the most harmless and inoffensive persons, which compelled others to put themselves into that passive posture of defense, that lord Thanet has been so frequently and so distinctly described in. . .

Gentlemen, I will now state to you the solicitor-general's evidence. He says, "*I kept my eye fixed on Mr. O'Connor. When the jury gave their verdict, I observed him and Mr. Fergusson; I particularly fixed my eyes upon them. I observed Mr. Fergusson speaking to Mr. O'Connor, and Mr. O'Connor put his leg over the bar: I called out, 'Stop him!' Mr. Fergusson said, 'He is discharged.' I answered, 'He is not discharged.' Mr. Fergusson then said to Mr. O'Connor, 'You ARE discharged.' I repeated, 'He is not discharged.' I observed the jailer lean over, and lay hold of Mr. O'Connor; some person was at this time pressing forward, and Mr. Fergusson complained to the Court. The officer was pressing into court, in order to get round to Mr. O'Connor.*"—Now, gentlemen, it is fit just to pause here a little, to consider this part of the evidence. The time filled by it is not above two or three minutes; for it is only the interval occupied by the sentence upon O'Coigly; and if a combination had existed between lord Thanet

and Mr. Fergusson, and other persons in the secret, is it probable that Mr. Fergusson would have made himself the conspicuous figure which I am supposing the evidence truly to represent him to have done? His conduct, besides, appears quite different from Rivett's account of it. Did he enter into private resistance or altercation? No; he made a regular and public motion to the Court; the judge yielded to the suggestion; the officers were directed to stand back for the present, and then the sentence was pronounced. This is not the natural deportment of a person engaged in a conspiracy. . . . The solicitor-general farther said, "*Rivett, the officer, said he had a warrant against Mr. O'Connor. Mr. Justice Buller spoke to the officers, commanded silence, and proceeded to pass sentence. When the sentence was finished, I observed Mr. Fergusson, and some other persons whom I did not know, ENCOURAGING Mr. O'Connor to go over the bar.*"—Here we must pause again.—Mr. Gibbs asked the witness, upon his cross-examination, "*Did you hear him say anything? Did you see him do anything?*"—The solicitor-general proved no one thing which Mr. Fergusson said or did. . . . By these observations I am not impeaching the evidence of the solicitor-general; I am commenting as a lawyer upon the result of it; and I do say, as a lawyer, that it is giving no evidence at all, to swear that a man encouraged, or appeared to be encouraging, without stating the facts on which that impression of his mind was founded. Mr. Solicitor-General went on to say, "*I did not see Mr. O'Connor till he was brought back by the officers; for at the instant that Mr. O'Connor jumped over the bar, three or four persons leaped from the witnesses' box upon the table, and mixed among the rioters; all the lights, except those before the judges, and the chandeliers, were extinguished. Mr. Fergusson, at the moment Mr. O'Connor jumped over the bar, turned round,*

and APPEARED to follow Mr. O'Connor; BUT I WILL NOT POSITIVELY SWEAR IT." I am very glad, gentlemen, that he did not; because it would have been unpleasant to swear that positively, which will be positively contradicted; by those, too, who are of as good faith, and who had as good an opportunity of observing. It is a mere misapprehension; and I would say to the solicitor-general, if I were to see him at his own table, or at mine, *that he is mistaken*. Indeed, in a scene of confusion, no man can tell what he sees with any certainty or precision, and images are frequently confounded in the memory. — The solicitor-general then said, *that Mr. Stafford jumped upon the table, and drew a sword*; and, speaking of lord Thanet, he said, *he went across the table, and that he saw him in conversation with Mr. Justice Lawrence*, the particulars of which he did not hear; *but that, when he went across the table again, he said he thought it fair he should have a run for it: he said it rather in a tone of anger, in consequence of what had fallen from Mr. Justice Lawrence*. Gentlemen, this last part of the evidence applies to a point of time when the disturbance was at an end: . . . you cannot therefore believe, that, under such circumstances, when lord Thanet could not but know that high offense had been given to the justice of the county, he should come voluntarily forward, in the hearing of the king's judges, and confess himself to be an accomplice in a high misdemeanor. These observations are not made to induce you to believe, that lord Thanet's expressions have been misrepresented to you; but to convince you, that the making them at the time, and to the persons to whom they were made, arose from a consciousness that he had no share in assisting Mr. O'Connor. . . . The right of Mr. O'Connor to deliver himself from such a warrant, if he could escape before it was executed on his person, was an opinion which

lord Thanet might correctly or incorrectly entertain; but to enhance the confession of such an opinion into an admission of the crime *in himself*, is contrary to every human principle and feeling, and, therefore, not a reasonable conclusion of human judgment. — Gentlemen, these are my observations upon the evidence of the solicitor-general, as it affects lord Thanet; and, as it applies to Mr. Fergusson, it is very important: for if Mr. Fergusson had been flourishing a stick in the manner which has been falsely sworn against him, what should have induced the solicitor-general to say, only in general terms, that he saw him *encouraging*? Will any of my learned friends maintain, that if the solicitor-general could have proved, in terms, that Mr. Fergusson had a stick in his hand, till it was wrested from him by the officers in repelling violence by violence, that he would not have distinctly stated it?

Gentlemen, Mr. Justice Heath was next examined; and there is no part of the proof more important, particularly as it affects Mr. Fergusson, than the evidence of that very learned, and, I must add, that truly honorable witness, who was one of the judges in the commission, and presiding at the trial. He said, that "*a messenger from the secretary of state had applied to the Court for liberty to execute a warrant upon Mr. O'Connor: that permission had been accordingly granted*." So that Mr. O'Connor was not to be ultimately liberated, but was to remain amenable to the process in the hands of the officers: that, "*after the verdict had been given, and the sentence pronounced, the messenger, VERY UNADVISEDLY, went to the corner most removed from the door, and said aloud, 'My lord, may I now execute my warrant?' Presently afterwards, I saw Mr. O'Connor put one leg over the bar, and draw it back again*." I have already reminded you, gentlemen, that at this time there was a doubt in the mind of some as to the effect of the verdict

to liberate the prisoner; and I admit that Mr. O'Connor, when he put his leg over the bar, knew of the existence of the warrant, and intended to evade it. Mr. Justice Heath then said, "*A violent riot and fighting took place, such as I never before saw in a court of justice. It seemed to me to be between the constables on one hand, and those who favored the escape of the prisoner on the other.*" This shows plainly that Rivett did not speak the truth, when he said that the blows were all on the side of the rioters against the officers; whereas the fray, as described by Mr. Justice Heath, arose at first from the activity, if not the violence, of the officers; which I will confirm hereafter by the most respectable testimony. "*It being dark*" (continued the learned judge) "*I could not see the numbers of the combatants; but I think there must have been ten or twenty engaged in it. I saw Mr. Stafford brandishing a sword over their heads. The combat might last for five or six minutes. I saw Mr. Fergusson, in his professional dress, standing upon the table with many others. He turned round, and said, 'My lord, the constables are the persons to blame; it is they that are the occasion of the disturbance.'* Before I could give him an answer, he turned round towards the combatants; and then my attention was drawn FROM HIM to the more interesting scene of the fight." — Every part of this evidence is a decisive exculpation of Mr. Fergusson. WHEN was it that Mr. Justice Heath saw him upon the table? I answer, at the very moment, nay at the *only* moment when blame is attempted to be imputed to him. By whom was he thus observed? Not by a common person, unqualified to judge, or uninterested in the order of the court, but by one of its highest and most intelligent magistrates. . . . It is therefore quite impossible, upon Mr. Justice Heath's evidence, to mix Mr. Fergusson with violence; for the learned judge distinctly stated,

that after having *seen and heard* him as he described him to you, he observed him *no longer*, his attention being drawn from him to "*the more interesting scene of the fight.*" Is not this a most positive declaration of Mr. Justice Heath, that the place where Mr. Fergusson stood, was *not* the scene of the fight, and that he was not personally engaged in it? for he turned his eyes *from* him to *the scene of the combat*, and of course to the persons of the combatants; whereas, if Mr. Fergusson, with a person so remarkable, and in the dress of his profession, had been *himself* a rioter, the learned judge must have pursued *him* with his eyes, instead of losing sight of him, and must have seen him more distinctly. But the truly honorably judge does not leave the exculpation of Mr. Fergusson to any reasoning of mine, having concluded his evidence with these remarkable words: "*I must do him the justice to say, that in the short time I saw him, which was not above a minute or two, I did not see him do, or hear him say, anything to encourage the riot. I thought myself in great danger, and all of us also.*" This testimony, gentlemen, is ABSOLUTELY CONCLUSIVE. . . . When we consider, therefore, that this learned and reverend person stood in the same situation with the first witness who was examined for the crown; that he had an opportunity, from his situation in court, of seeing everything which belonged to the scene of combat, as he termed it; and when he nevertheless so separated Mr. Fergusson from it as to feel himself *compelled* to say what he did in the close of his testimony, we ought to give to *his* words a weight beyond the voice of a thousand witnesses. . . .

The next witness was Mr. Abbott, a gentleman at the bar. "*He saw Mr. O'Connor make a motion to leave the Court, and heard Mr. Fergusson say he was discharged. Mr. Solicitor-General answered, that he was not discharged; and then either Rivett or*

*Fugion said he had a warrant; there was then a little confusion; but the prisoners resumed their places, and Mr. Justice Buller proceeded to pass sentence on O'Coigly. When that was finished, Mr. O'Connor leaped over the bar towards his left hand; a great tumult and confusion took place.* — No part of all this, gentlemen, was ever disputed. — “*I saw lord Thanet on the table nearly before Mr. Justice Lawrence.*” This is also nothing. If lord Thanet mixed in the riot, it could not be near Mr. Justice Lawrence, but in the other part of the court, where the prisoners were placed. — “*The learned judge spoke to lord Thanet, and said it would be an act of kindness in Mr. O'Connor's friends to advise him to go quietly to prison, lest some mischief should happen. Lord Thanet then turned round, and said — I did not distinctly hear the first words, but the concluding words were, 'TO HAVE A RUN FOR IT,' or 'FAIR TO HAVE A RUN FOR IT.'*” Gentlemen, I will not weary you with a long repetition of the same observations. I have observed more than once already, that if Mr. Justice Lawrence had considered lord Thanet as having done anything to promote the riot, he would have acted accordingly; and it would be, therefore, trifling with your time and patience to detain you farther with Mr. Abbott's testimony.

Gentlemen, we are now arrived at Mr. Rivett; and, retaining in your minds the testimony of the crown's most respectable witness, on which I have been so long observing, I shall leave you to judge for yourselves, whether it be possible that what he says can be the truth, independently of the positive contradiction it will receive hereafter. Indeed, the evidence of this man administers a most important caution to juries not to place too implicit a confidence in what is sworn with positiveness, but to found their judgments upon the most probable result from the whole body of the proof.

Rivett says, . . . “*Many gentlemen were seated upon the solicitors' bench,*” which has already been described to you as immediately before the prisoners, and without the counsels' seat, in which lord Thanet appears to have sat till he stepped into that of the solicitors, where he was heard to speak to Mr. O'Connor, and congratulate him on his acquittal. It was in this place, and before and after this time, that Mr. Sergeant Shepherd described him as standing unmoved, with his face to the court, and his back to the prisoners: Rivett went on to say, “*When the jury were coming in, I endeavored to go nigh to the jailer, when I was pulled down by the leg; and as soon as I turned round, I saw Mr. Thompson,*” who turns out not to have been Mr. Thompson. “*I thought Mr. O'Connor looked as if he intended an escape. At that time there was a noise and violence; and Mr. Fergusson said to the Court, 'What business has this fellow here, making a noise?'*” Now, gentlemen, this cannot be a correct statement as it respects Mr. Fergusson, since it has been sworn by all the crown's most respectable witnesses that he made it a regular motion from the bar, and the officers were desired to stand back. “*I told his lordship, I had a warrant from the duke of Portland to arrest Mr. O'Connor; and the judge said I should har-* him, and desired the jailer to take care of the prisoners for the present. The sentence was then passed on O'Coigly; and as soon as it was finished, Mr. O'Connor immediately jumped out from the bar; there was then a great confusion in court; the gentlemen who sat before me got up; Mr. O'Connor took to the left, and I called out to shut the door. I endeavored to get forward, but was prevented by those gentlemen who had placed themselves before me and the other officers. I was pulled and shoved down two or three times; but by whom I know not. I jumped forward as well as I was able, and was



*endeavoring to pursue Mr. O'Connor, when Mr. Fergusson jumped on the table, and with a stick flourished it in this way, to stop me. Mr. Fergusson was in his gown. I sprang at him, and wrenched the stick out of his hand, and then he returned from the table, and went to his seat."* I will not pause at this part of the evidence as it applies to Mr. Fergusson, but pursue it as it goes on to lord Thanet; because, if I can show you that its application to him is demonstratively false when compared with the rest of the crown's evidence, on which it must lean for support, it will destroy all its credit as it implicates Mr. Fergusson also. He says, "*I was then knocked down by a person who pushed at me with both hands, and I immediately struck that person three or four blows.*" . . . His words were, "*He shoved me with both hands;*" and, in his cross-examination he afterwards described it, "*I struck that person three or four blows: he called out, 'Do not strike me any more;' I replied, 'I will; how dare you strike ME?'"* You observe that he describes lord Thanet as having no stick, and as having struck him: whereas Mr. Sergeant Shepherd saw lord Thanet, at what must necessarily be the same point of time, standing with his face to the judges, and his back to the prisoners, motionless, as I have repeatedly described him, till he must have received violence from some other person, since the Sergeant saw him leaning back, and DEFENDING himself with a stick which he held in both hands over his head — an account, which, if any corroboration of such a witness could be necessary, I will establish by eight gentlemen who were present, and who will add, besides, in contradiction of Rivett, that lord Thanet was himself beat severely, and never struck the officer with either fist or stick. That lord Thanet *had a stick*, is beyond all controversy: and, having one, is it likely that a man of his strength and activity, engaged in

such an enterprise, would only push at his opponent with his *hands*, or that Mr. Fergusson, who is charged as being an accomplice, would have contented himself with flourishing a little stick over his head?

Mr. Attorney-General. — I do not find that Rivett has at all said that lord Thanet had a stick.

Mr. Erskine. — I have been reading his original examination. I will state his cross-examination by and by, and then set both of them against the truth. He says farther, and to which I desire your most particular attention, "*I saw Mr. Fergusson flourishing a stick about the middle of the table. I went that way, to avoid the persons who had stopped up the passage. He endeavored to prevent me; but I wrenched it from him, and struck him. I HAD NOT THEN SEEN LORD THANET.*" Now, gentlemen, I have only to beg that you will have the goodness to make some mark upon the margin of your notes of this fact, which the witness has had the audacity and wickedness to swear to. I use these severe expressions which I have applied to no other witness in the cause, because I never wantonly employ epithets that are unjust. He was in such a situation that he cannot be mistaken in what he swears; neither does he qualify it with his belief: but takes upon himself to marshal the proceedings in his memory, and to affirm POSITIVELY both as to persons and times. Yet I will prove Mr. Fergusson to have been within the bar in his place when Rivett speaks of him as on the table, and CERTAINLY WITHOUT A STICK. I will prove this — not by Bow-street officers, but by gentlemen as honorable as any who have been examined. Mr. Rivett told you too, "*that he came along from the great street where the Star Inn is, towards the prisoner, to arrest him; but that he went to the table to avoid the gentlemen who interrupted him in his passage towards him.*" Lord Thanet is one whom he positively fixed on as having done so. Lord

Thanet then interrupted him in his passage to the prisoner, which induced him to go to the table, where he had the conflict with Mr. Fergusson; and yet, according to his own deliberate declaration, he never saw lord Thanet till *after* the stick had been flourished by Mr. Fergusson over his head, and till after he had wrenched it out of his hand; or *then it was*, and for the *first* time, that he swears to have seen lord Thanet. This is totally inconsistent, not only with the whole course of the evidence, but even with his own. And I will prove, besides, by a gentleman who sat next his lordship, Mr. George Smith, the son of a late chairman of the East India company, a gentleman at the bar, and of independent fortune, that one of the first things Rivett did when he came into court, was, to press rudely upon him; and that lord Thanet, without having struck a blow, or offered any resistance, was attacked by these men in a most furious manner; which accounts for the attitude of defense in which he has been so often described.

No embarrassment or confusion can possibly attend the consideration of time; because from the evidence of Mr. Sergeant Shepherd there could be no interval. It was all in a moment. He saw lord Thanet sitting down: he rose, and stood with his face to the judges; and then the confusion began. But, at this time, I engage to prove most positively by many witnesses, that Mr. Fergusson was in his place at the bar, that he was forced upon the table in consequence of the tumult *after lord Thanet had been knocked down*, and that he had *NO STICK*. This, indeed, is incontestably established by the evidence of Mr. Justice Heath, who saw him in that situation till he removed his eyes from him to the scene of confusion, which he could not possibly have done if the confusion had not become general whilst Mr. Fergusson remained in his place; and so far was he from

seeking to mix himself with the riot which the officers were occasioning, that when sir Francis Burdett, a gentleman possessed both of strength and spirit (if a rescue had been the object), was coming hastily across the table, from seeing the situation lord Thanet was placed in, Mr. Fergusson, knowing that it would only tend to embroil instead of abating the confusion, took hold of him to prevent him, carried him bodily towards the judges, desired the officers to be quiet, and, addressing the Court, said publicly, and in his place, "My lord, it is the officers who are making all this disturbance."

What, then, is to be said for this Mr. Rivett, who swore that he never saw lord Thanet till *after* his conflict with Mr. Fergusson on the table, although Mr. Fergusson will appear to have at this time been in his place? Mr. Smith was as near lord Thanet as I am now, when Rivett rushed by him, and attacked him, Mr. Fergusson being still in his station at the bar.

Gentlemen, he said farther, in his cross-examination, that "*he struck lord Thanet several blows; that lord Thanet desired him to desist, but that he had struck him once or twice afterwards.*" This was after Mr. Fergusson had gone across towards the judges; so that the scene he describes, as relative to lord Thanet, is not immediately upon his first coming into court, but afterwards, when, having gone out of his course towards the prisoner from the resistance he had met with in the passage towards him, he was obstructed by Mr. Fergusson at the table: whereas all the witnesses agree in placing lord Thanet in the solicitors' box, the very passage which Rivett states himself to have left in consequence of resistance; and, therefore, he must have passed lord Thanet, in the solicitors' box, *before* he could have approached Mr. Fergusson at the table; and if he met with any blows or interruption from him at all, he must have met with them *immediately upon his*

entering the court; for Mr. Sergeant Shepherd's evidence establishes, that at that period violence must have been used on lord Thanet, as he was in an attitude of *defense*. Rivett farther said, that "*lord Thanet had nothing to defend himself against his blows,*" though sergeant Shepherd saw and described him with a stick; and that "*he saw no blows struck by anybody but himself.*"

What, then, is the case, as it stands upon Rivett's evidence? That no blows were struck but his own: though a learned judge has sworn to have seen many struck, and upon many persons; that he received no blows from Mr. Thompson — none from Mr. O'Brien — none from Mr. Fergusson — none from any of the defendants but lord Thanet, nor from any other person in the court. It is for you to say, gentlemen, whether this statement be possibly consistent with a widespread conspiracy to rescue a prisoner by violence, of which the defendants were at the head.

Sir Edward Knatchbull saw no blow given to Rivett. He said, "*I can by no means speak positively; but it appeared to me, that when somebody was endeavoring to keep Rivett back, HE struck lord Thanet with his fist. I saw no blow given to Rivett.*" So that Sir Edward Knatchbull's evidence, instead of confirming Rivett's story, mainly and importantly contradicts it. . . .

Thomas Adams, who was then Mr. Justice Buller's coachman, "*saw lord Thanet with a stick in his hand, and saw it lifted up.*" We had got rid of that stick upon Rivett's evidence, and now it comes back upon us again when it is convenient to have it lifted up. He describes the stick as lifted up in this position [*imitating the witness*]; whereas it could be in no such posture, as you must be convinced of from the observations I have already made to you; but this man's evidence is very material in this respect, viz. that in describing the assault of Rivett on

lord Thanet, he says, "*I heard lord Thanet say to him, 'What do you strike me for? I HAVE NOT STRUCK YOU:'*" — an expression of great importance in the mouth of such a person as lord Thanet; and falling from him at the very moment when it could have proceeded from nothing but consciousness; and an expression that I will confirm his having used by several of my own witnesses.

Mr. Brooks, who was next called, says, he "*saw Mr. O'Connor when the jury returned. Mr. Fergusson held a sword or stick over the heads of the people.*" A sword, or something else, given to us in this confused manner, adds no force to the evidence; more especially when, upon being asked if he can swear with positiveness, he admits that he cannot.

Mr. Stafford was then examined, who says, "*he sat under the jury box and could see lord Thanet distinctly.*" I particularly asked him that question, and how far distant he was from him: he answered me, "*Not above two yards from me — three times nearer than I am to you.*" He saw lord Thanet, then, distinctly, at two yards distance, and from the beginning to the end of the confusion; yet he swears, "*he did not observe him engaged in any obstruction.*" Afterwards when the tumult became general, this witness has been described as brandishing a drawn sword — no doubt, from a sudden apprehension of danger, and to avert it from that quarter. Now suppose Mr. Stafford had come down, out of mere curiosity, to Maidstone to hear the trial, and had been seen flourishing this drawn sword in the midst of the affray — what should have prevented Mr. Rivett from considering this gentleman as the greatest rioter of them all? Why might he not the rather have represented him as brandishing it to favor the escape of the prisoner? One cannot, indeed, imagine a case of greater cruelty and injustice; but what could have been his protection if Mr. Fergusson can be

convicted on the evidence you have heard? . . . Mr. Garrow said to him at the moment, "take care that you do no mischief," and undoubtedly Mr. Stafford neither did nor intended any; but that makes the stronger for my argument, and shows how little is to be built upon appearances which grow out of a scene of tumult. The case for your consideration, seems, therefore, to be reduced to this — whether you will believe the two learned judges, and the other respectable witnesses? or, whether you will depend upon the single and unsupported evidence by which violence has been imputed? Mr. Stafford, who was within two yards of lord Thanet, has completely acquitted him; for had he been in the situation in which Rivett has placed him, what could possibly have prevented him from seeing it? It was also sworn by Rivett, that Mr. Fergusson had a stick; but upon appealing to Mr. Stafford's evidence, who sat just opposite to him, we find that he had none; but that *he extended his arms seemingly to prevent persons approaching that side of the Court.* Mr. Stafford admits, that when he saw Mr. Fergusson it was in the midst of confusion; and it would be a harsh conclusion indeed, that Mr. Fergusson is guilty of the conspiracy charged on this record, because, upon being forced out of his seat by the tumult which surrounded him, as I will show you he was by several witnesses, he had extended his arms in the manner you have heard. Mr. Stafford added, that the jailer had hold of Mr. O'Connor's coat; that Mr. Fergusson forced himself between them, and that the jailer stretched his hand behind Binns to take hold of the prisoner. This must be a mistake; for Watson sat as where my learned friend Mr. Wood is at present [*pointing to him*] and Mr. O'Connor stood as where Mr. Raine is now sitting [*pointing to him*] and at no part of the time is it even asserted that Mr. Fergusson was in the box of the

solicitors, and consequently it was utterly impossible that he could have prevented the jailer from keeping hold of the coat of the prisoner. . . .

Next came Mr. Cutbush. My learned friends appeared to be soon tired of his evidence; and it seemed to produce an emotion of surprise upon the bench, that a witness, in such a stage of the cause, should give such extraordinary testimony. He said, "*I saw lord Thanet; he was two or three yards from Mr. O'Connor. I observed nothing particular till I saw Rivett striking lord Thanet on the back with a sword.*" Now, as it is admitted on all hands that no such thing ever happened, it affords another instance of the difficulty with which juries can collect any evidence to be relied on in a scene of uproar and confusion.

The evidence of the last witness, Mr. Parker, contains nothing which I need detain you with.

Gentlemen, I have now faithfully brought before you all that is material or relevant in the case of the Crown. . . .

I have therefore no more to ask of you, gentlemen, than a very short audience, while I bring before you the defendants' evidence. — My case is this:

It stands admitted, that the confusion had not begun when the jury returned with their verdict — that there was only a motion towards it when the officers were directed by the court to be silent, and to stand back. The period, therefore, to be attended to, is, the conclusion of the sentence on O'Coigly, when the officers, from their own account of the transaction, believing that Mr. O'Connor intended to escape from them, and giving them credit that such intention could not be frustrated without some violence and precipitation, rushed suddenly through the solicitors' box, where they met indeed with resistance, but a resistance which was the natural consequence of their own impetuous-

ity, and not the result of any conspiracy to resist the execution of the warrant.

To establish this truth with positive certainty (if indeed it is not already manifest from the whole body of the proof), I shall produce, as my first witness, Mr. George Smith, whom I before named to you, and who was one of the first persons in their way on their entering the court. He sat as near lord Thanet as I now stand to where his lordship sits before you, and who, upon the principle of this prosecution, should, above all others, have been made a defendant; for he will admit freely, that he endeavored to push them from him with his elbow, when they pressed upon him with great and sudden violence: he will tell you, that at this time Mr. Fergusson was in his place at the bar; that lord Thanet was in the place where sergeant Shepherd described him; that he was violently struck, without having given the smallest provocation, without having made any motion, directly or indirectly, towards the rescue of the prisoner, or even looked round at that time to the quarter where he stood: that lord Thanet, in order to escape from this unprovoked violence, so far from approaching Mr. O'Connor, endeavored to get nearer where the counsel sat, when Rivett, instead of advancing straight forward in pursuit of his object, which was, to arrest the prisoner, leveled repeated blows at him, as he was obliged himself to admit, while lord Thanet lay back in the manner which has been so often described to you, protecting his head from the blows he was receiving.

In the same seat was Mr. Bainbridge, a gentleman educating for the bar, a near relation of the duke of St. Alban's, and a pupil, I believe, of my honorable and learned friend, Mr. Wood; a person who cannot reasonably be suspected of giving false testimony, to encourage violence and outrage against the laws

of his country. Mr. Bainbridge will swear positively, that, when the officers came forward, lord Thanet was in the solicitors' box, and Mr. Fergusson in his place at the bar, where he remained till the witness saw him forced out of his place, and obliged to stand upon the table, *and that he had no stick*. What, then, becomes of Rivett's evidence, who swore he never saw lord Thanet till *after* this period, although it is admitted that it must have been by the tumult, in which he falsely implicated his lordship, that Mr. Fergusson was driven out of his place? This is absolutely decisive of the case: for it will appear farther, that Mr. Fergusson continued in his place after the period when lord Thanet was seen defending himself. . . .

The next witness I shall produce to you will be Mr. Charles Warren, son of the late highly celebrated physician. . . . Mr. Warren was placed at the table, attending in his gown as counsel, and had the most undeniable opportunity of seeing Mr. Fergusson, who sat near him, in his gown also. What Mr. Fergusson did, cannot be matter of *judgment or opinion* in such a witness, but matter of *certainty*. . . . Such extraordinary transactions address themselves directly to the *senses*, and are not open to qualifications of opinion or belief. For the same reason, Mr. Smith and Mr. Bainbridge must both be perjured, if the evidence of Rivett be the truth; and Mr. Warren (subject to the very same observation) will swear positively that he saw lord Thanet severely assaulted, and **THAT HE DID NOT STRIKE**. Is this a mere negative in opposition to Rivett's affirmative oath? Certainly not: for there are some negatives which absolutely encounter the inconsistent affirmatives, and with equal force. . . .

I will then call to you Mr. Maxwell, a gentleman of rank and fortune in Scotland, who lately married a daughter of Mr. Bouverie, member

of parliament for Northampton. He stood under the witness box, which may be as in that corner [*pointing to a corner of the court*], commanding a full and near view of everything that could pass; and he will confirm, in every particular, the evidence of Mr. Warren, Mr. Bainbridge, and Mr. Smith. I will also call Mr. Whitbread, who attended the trial as a witness, who was near Mr. Sheridan, and, like him, did everything in his power to preserve the peace. Mr. Whitbread's situation I need hardly describe to you. He is a man of immense fortune, acquired most honorably by his father in trade, and who possesses almost incalculable advantages, which are inseparably connected with the prosperity and security of his country: yet, from the mouth of this most unexceptionable witness, the most important parts of the evidence will receive the fullest confirmation. I shall also call Mr. Sheridan, who showed his disposition upon the occasion by his conduct, which was noticed and approved of by the judges. This will furnish the defense of lord Thanet and Mr. Fergusson.

As to Mr. O'Brien, it is almost injurious to his interests to consider him as at all affected by any part of the proof: he does not appear to have been at all connected with Mr. O'Connor. . . .

I am sure I could name above twenty, in this very place, upon proceedings for the obstruction of officers in the execution of their duty (proceedings most important to the public), where the evidence has been very contradictory, and where the noble and learned lord, not being able to detect perjury in the defense, has uniformly held this language to juries, and even to the counsel for prosecutions: "This is not a case for conviction; the defendant *may* be guilty, but there is not a sufficient preponderation in the evidence to pronounce a penal judgment."

These are the maxims, gentlemen, which have given to British courts of justice their value in the country, and with mankind. These are the maxims which have placed a guard around them in the opinions and affections of the people, which, I admit, is at the same time the sting of this case, as it deeply enhances the guilt of him who would disturb the administration of such an admirable jurisprudence. But if the courts of England are, on this very account, so justly popular and estimable; if they have been, through ages after ages, the source of public glory and of private happiness, *why is this trial to furnish an exception?* For myself, I can only say that I wish to do my duty, and nothing beyond it. Govern us who will, I desire only to see my country prosperous, the laws faithfully administered, and the people happy and contented under them. Let England be secure, and I am sure no ambition of mine shall ever disturb her. I should rather say, if I were once disengaged from the duties which bind me to my profession,

"Oh! for a lodge in some vast wilderness,

Some boundless contiguity of shade,

Where rumor of oppression and deceit,

Of unsuccessful or successful war,  
Might never reach me more!"

To conclude — if you think my clients, or any of them, guilty, you are bound to convict them; but, if there shall be ultimately before you such a case, upon evidence, as to justify the observations I have made upon the probabilities of the transaction, which probabilities are only the results of every man's experience in his passage through the world: if you should think that the appearances were so much against them as to have justified honorable persons in describing, as they have done, their impressions at the moment, yet that the scene of confusion was such that you cannot arrive at a clear

and substantial conclusion — you will acquit all the defendants. . . .

Mr. *Rous*. — My lord, I am of counsel for captain Browne.

Lord *Kenyon*. — When the attorney-general comes in I will put the question to him whether he thinks there is sufficient evidence against him or Mr. Thompson? . . .

Mr. *Attorney-General*. — . . . I am very ready, fairly to say, I should act very improperly if I showed any inclination to convict at all; and, therefore, I give up the prosecution with respect to him also. . . .

Lord *Kenyon*. — Gentlemen of the jury, as far as I can recollect the evidence, there is not sufficient evidence to call upon these gentlemen for their defense; if you think so, you will acquit them.

Mr. *Browne*, Not Guilty; Mr. *Thompson*, Not Guilty.

#### EVIDENCE FOR THE DEFENDANTS

Mr. *George Smith* sworn. — Examined by Mr. *Gibbs*.

You were present at this trial? — I was.

The row in which the solicitors sat represents that where we are now sitting, and the counsel before us? — It does.

And the place in which the prisoners stand was behind? — Yes.

In what part of the court were you? — Almost during the whole of the trial I sat in the solicitors' seat.

Are you at the bar? — I am.

I believe the prisoners stood in the place allotted for them, three in the front, and two behind? — Exactly.

Who were the three in front? — Mr. O'Coigly, Mr. Binns, and Mr. O'Connor; Mr. O'Connor was on the left as he looked at the judges, and on the right as they looked at him; Mr. Binns in the middle, and Mr. O'Coigly next the jailer; my seat was directly under the jailer, at the end of the seat.

Do you remember the time when the verdict was brought in? — Perfectly.

Did you observe anything happen at that time? — I recollect that Mr. O'Connor put his leg over the bar, and there was a press behind me, but a very trifling one, to get at him.

This was before sentence was pronounced? — Before sentence was pronounced.

Did that cease? — Yes: silence was called, and that disturbance ceased. The judge then proceeded to pronounce sentence; I was at that time sitting, as I have described, at the end of the seat directly under the jailer; and I leaned against a projecting desk, looking up at O'Coigly during the whole of the sentence, so that my back was to the Bow-street officers: that instant that the judge concluded his sentence, Mr. O'Connor put his leg over the bar, and the jailer caught hold of his coat.

At this time did you observe where lord Thanet sat? — At that particular moment I cannot say I saw my lord Thanet, but I know that he and Mr. Browne were both sitting on the solicitors' seat within one of me.

Where was Mr. Fergusson at this time? — I do not know; I did not observe him at that time.

You were proceeding to state what passed after the sentence was pronounced? — At the same moment that Mr. O'Connor put his leg over the bar, before I had recovered myself from the leaning position in which I sat, one of the Bow-street officers, I am not sure whether it was Rivett or Fugion, *set his foot upon my back*. I immediately started up and drove the man off, and asked him what he meant.

How did you drive him off? — With my elbow, and by starting up.

What was his answer? — *He damned me*, and told me he had business, and would press on.

Was there good room for him to get by, or was this a narrow place? — It was so narrow that it was impossible two people should pass

without contrivance; a short struggle followed between the officers and myself, for there were several people who were pressing behind, and I could not get out of the seat where I was without making that resistance.

How did you get out at last? — At last I struggled a great while with my elbows to make room for myself; I got up, stepped upon the division between the solicitors' and the counsels' seats, and from thence to the table; I then turned round immediately, and I then saw the same man pressing upon my lord Thanet, in the same way in which he had been pressing upon me.

You said lord Thanet and Mr. Gunter Browne were within one of you? — Yes.

Did you observe this immediately upon your extricating yourself? — *The instant I extricated myself, I turned round and saw a man pressing upon lord Thanet, with this difference, that when I resisted him, I did not observe that he had any staff or stick, but when I saw him with lord Thanet, he was striking lord Thanet with a stick, but what the stick was I cannot say; lord Thanet stood with a short stick in both his hands, dodging with his stick, and receiving the blows of the Bow-street officer upon that stick.*

Lord Thanet was guarding himself, with his hands up, from Rivett's blows? — Exactly so.

You do not know which officer it was? — I am not certain, I think it was Rivett.

Before this happened, Rivett had had a struggle with him? — I had had a struggle with Rivett in the first instance; and I should state, that during that struggle, Mr. O'Connor, who had endeavored to get away, had effected his escape from the jailer; and the consequence was, that the people pressed forward from the opposite end of the bench, to prevent Mr. O'Connor from effecting his escape; by which means every person who sat in that narrow seat, was placed, if I may say so, between

two fires: for the Bow-street officers were pressing up from one side, and the crowd were pressing up from the other side.

You say, as soon as you got from Rivett, you saw him *instantly engaged in this way with lord Thanet?* — Yes.

*Could Rivett, in the interval between the struggle with you, and the struggle you instantly saw him have with my lord Thanet, have got over to the counsels' table, and had a contact with a man who had a stick, and taken that stick from him? — Impossible; I think so at least; the interval was no longer than that which elapsed from my getting from the seat to the division, and from thence to the table.*

Which you did as expeditiously as possible? — Certainly; for I felt myself in danger.

When you say impossible, I need not ask you whether you saw the thing happen? — Certainly not.

*Had you your gown and wig on? — I had.* Very shortly after I got upon the table, a man took up one of the swords, and drew it, and flourished it about over the heads of the people; very shortly afterwards I saw this sword coming in a direction immediately to my own head; I avoided the blow by springing off the table into the passage leading into the street.

*Did you at any time see lord Thanet strike this officer, let him be whom he may? — I never saw lord Thanet in any situation but acting upon the defensive.*

*If lord Thanet had struck the officer, do you think you must have seen it? — Certainly; during the time I had my eyes upon him.*

*I think you told me you saw the officer first pressing by lord Thanet, and then striking him? — Yes.*

*And if he had struck the officer, you must have seen him? — Certainly, at that time.*

Do you remember lord Romney coming down from the bench? — Perfectly well.

Do you recollect upon lord Rom-



ney's saying the prisoner was discharged, or acquitted, any person making an observation to him? — I remember there was an altercation between lord Romney and myself, in consequence of his saying that the prisoners were not acquitted.

There was a misapprehension between the words acquitted and discharged? — I apprehend so.

However, you were the person that had the conversation with him? — Yes.

Mr. *George Smith* cross-examined by Mr. *Attorney-General*.

You insisted that they were acquitted, and lord Romney insisted that they were not acquitted? — Exactly so.

A *Juryman*. — I wish to ask whether you left the court during the riot? — No, I did not; I jumped off the table in consequence of a blow that I saw coming at my head, and I shortly after returned to the table again.

Did you observe lord Thanet leave the solicitors' box? — No, I did not.

Do you know whether he did, or not, leave the solicitors' box? — I cannot say, for the riot lasted a very short time after I had left the table.

Lord *Kenyon*. — Was the blow aimed at your head? — By no means; it appeared to me that all the blows struck by that sword were struck by a man that did not know what he was about.

Were there any wounds? — I heard there were, but I do not know of any.

Mr. *Bainbridge* sworn. — Examined by Mr. *Best*.

You are a student of the law? — I am.

Were you in court during the trials at Maidstone? — I was.

In what part of the court did you sit at the time of the riot? — When the jury returned, I left my place at the table, and went to the place where the solicitors of the defendants sat, to speak to Mr. Fergusson.

*Did you observe Mr. Fergusson dur-*

*ing this time? — Mr. Fergusson sat directly before me.*

*Did you observe lord Thanet? — Lord Thanet sat on my right hand, close to me.*

*So that you had a complete opportunity of observing them? — I had a complete opportunity till the fray began.*

Do you recollect the Bow-street officers coming in? — I remember observing the Bow-street officers standing on the right-hand side of the dock.

Do you remember seeing those Bow-street officers at the time the jury pronounced their verdict? — I did.

What did you observe them doing at this time? — I observed two standing with their eyes fixed upon Mr. O'Connor, as the impression struck me.

Do you recollect them after the sentence was pronounced? — Yes, I do.

What did you see them do at that time? — I observed one, whom I had from observation upon the trial known to be Rivett, put his knee upon the bench that came over into the solicitors' seat, and get over, and press directly forward.

You say he pressed forward: in what direction? — He pressed directly on to the bench where the solicitors for the defendants had sat, and the counsel for the defendants had sat.

Where was lord Thanet at this time? — My lord Thanet was on the right hand of me, and in the place where the solicitor for Mr. O'Connor had sat, I believe most part of the day.

*Where was Mr. Fergusson then? — Directly before me, IN HIS PLACE.*

Was Mr. Fergusson at that time in the solicitors' place, or the place appropriated for the counsel? — Mr. Fergusson was IN HIS OWN PLACE, and the place which he had kept the whole day.

Did you see the Bow-street officers attempt to pass lord Thanet? —

I saw the Bow-street officers attempt to pass lord Thanet; and lord Thanet, upon being pressed upon, moved, upwards, as if to prevent being overpowered or crushed, and got upon his legs.

*Did lord Thanet do anything to obstruct this officer? — To my opinion, nothing in the world.*

I think you say, on the contrary, he moved up? — He endeavored to get upon his legs; for the pressure of the people upon him was such, that, if he had not got up, he must have been totally knocked under the bench.

*At this time did you see whether lord Thanet struck this Bow-street officer, or not? — I never observed lord Thanet strike the Bow-street officer, or anybody else.*

*From the situation in which you were at this time, if he had struck him, do you think you must have seen him? — Certainly I must.*

*If lord Thanet, at this time, had been taking an active part in the riot, must you have seen that also? — I must have observed that too.*

*Did lord Thanet do anything to aid the escape of Mr. O'Connor, or add to the tumult which then prevailed in court? — Nothing in the world, that I saw.*

Did you observe Mr. Fergusson at this time? — I did.

Now I will ask you if Mr. Fergusson struck anybody? — I never saw Mr. Fergusson strike anybody; and, if he had struck anybody, I think I must have seen it.

*Did it appear to you that Mr. Fergusson encouraged Mr. O'Connor, or at all favored him in his escape? — Not the least, quite the contrary. . . .*

Could he [Rivett] have struck him [Ferguson], and wrested the stick out of his hand, without your seeing it? — I think not.

You were there during the whole of this tumult? — I was in court during the whole of the trial.

Was Mr. Fergusson any part of that time in the place allotted for the solicitors? — Never.

Was he ever nearer to Mr. O'Connor than the place for the counsel? — Never; I was between them.

Where did he go, when he quitted that place? — Towards the judges and away from the tumult.

*During the whole of this time, did Mr. Fergusson at all appear to encourage the tumult? — Quite the contrary, I think.*

Mr. Bainbridge cross-examined by Mr. Law.

You have said that Mr. Fergusson, so far from encouraging this tumult, acted quite the contrary? — Yes.

Am I to understand you, that he endeavored to dissuade them from riot? — *I heard him say to Mr. O'Connor, "Be quiet and keep your place, nothing can hurt you."*

Was that after the acquittal? — It was after the verdict of acquittal had been given, and before the sentence was passed upon O'Coigly.

But after the sentence was pronounced, did you observe Mr. Fergusson doing anything that was quite the contrary? — He seemed to say, "be quiet." . . .

You have told us, that, during the whole day, Mr. Fergusson kept the same place? — As to the same place, I believe he might have moved to the right; he might have been, perhaps, to the right of Mr. Plumer in the morning; but what I mean is, that he never moved out of the place where the counsel sat.

Then he must have been under your own observation the whole of the day? — Yes.

Did he never appear to be upon the table in the course of that day? — While the jury were retired, he went across the table, and, I believe, went to speak to somebody near the witnesses' box; but at that time people were conversing and walking about, but there was no idea of a riot then.

Will you say, after the verdict was brought in, he was never upon the table? — *He was never upon the table that I know of, till he was pressed upon by the Bow-street officers.*

Did you, during the day, see a stick in his hand, or that he had not had a stick? — I will swear that I did not see a stick in his hand.

And you had him so much under your observation, that you must have seen it? — As much as a person could do sitting in a court of justice; it was quite ridiculous to suppose he had a stick in his hand.

Were you a witness, or concerned in that trial? — No. I went from mere curiosity.

You did not go with Mr. Fergusson? — No.

And you will swear that he never had a stick in his hand? — I will swear I did not see a stick in his hand; and I think I must have seen it, if he had.

If you had him constantly in view, you must? — It cannot be supposed that I had my eyes upon him for fourteen hours.

WILL YOU VENTURE TO SWEAR THAT DURING THE RIOT HE HAD NO STICK? — I WILL.

*A Juryman.* — Did lord Thanet leave the court during the riot? — Lord Thanet moved, as Mr. Fergusson did; upon being pressed upon, he got upon the bench; and when he moved up, Rivett was above him; and trying to strike him; and Mr. Fergusson then said, "Whom are you striking, sir?"

*Juryman.* — Whether he saw lord Thanet, during any part of the period near the wicket gate that leads to the narrow street? — I saw lord Thanet, I think, during the whole riot; and I think, instead of being there, he went, when he did move, quite the contrary way, and not at all towards the gate.

Mr. Justice *Lawrence.* — From Mr. Fergusson complaining of a tumult, it seemed as if he wished to keep everything in order; who was the person that he complained of? — Rivett.

That was before the sentence was passed? — Yes.

How far was Rivett from Mr. Fergusson at that time? — I think

he must have been about three yards.

At that time was he not making use of this motion [*describing it*] and saying, "Keep back, where are you going?" — Yes, and I think Mr. Justice Buller then said, "What is the matter?" Mr. Fergusson then said, "Here is a person making a noise, and will force himself into the court." Mr. Justice Buller then said, "What do you mean?" He then said, "My lord, I have a warrant against Mr. O'Connor." He then told him to keep back.

Mr. *Warren* sworn. — Examined by Mr. *Mackintosh.*

I believe you were present at the trials for high treason at Maidstone? — I was.

Were you present the second day of those trials? — I was.

Where did you sit during the evening of the second day? — Just by the witness box, opposite to the jury.

After sentence was pronounced upon O'Coigly, tell us what you observed of the confusion that arose in the court? — After the sentence of death was pronounced upon O'Coigly, the first part of the affray that I recollect was this; Mr. O'Connor endeavored to get out of the dock; he got almost out of the dock on the left side; the jailer who was on the other side of the dock reached across the dock, and caught him by the coat; he detained him for a very short space of time in that situation; the coat tore, or slipped through his hands.

*At that time when the jailer had hold of Mr. O'Connor's coat, did anybody reach or step backwards between them? — Nobody.*

*Then Mr. Fergusson did not? — Certainly he did not.* Mr. O'Connor got away, either from the coat being torn, or slipping through the jailer's hands; he got down upon the ground, he soon mixed with the crowd, and I lost sight of him; as soon as he endeavored at first to get away, two persons, who had before appeared to be officers from Bow-

street, with several others, rushed forward to apprehend him. In their endeavor to apprehend him, the first person upon whom they appeared to rush with any great violence, was Mr. George Smith, who was sitting at the end of the seat of the solicitors for the prisoners: he was forced from thence, and came to the place where I was sitting. The next person that I observed forced from his seat was Mr. Dallas, one of the counsel for the prisoners; he came likewise and sat near me; the officers still rushed on towards the end of the counsels' seat, and of the solicitors' seat. At the farther end of the counsels' seat, or near the end of it, Mr. Fergusson was sitting to the best of my recollection.

*Had he a stick in his hand? — No stick that I saw.*

*Had you your eye upon him? and if he had, must you have seen him? — He is an acquaintance of mine, and he was in his professional dress; and if he had, I think I could not have mistaken it.* Lord Thanet was sitting upon the solicitors' bench, almost immediately behind Mr. Fergusson. By this time the confusion had become general, and a number of people had got upon the table, from all parts of the Court.

If Mr. Fergusson had brandished a stick, or presented it to Rivett, must you have seen it? — I certainly must.

I need not ask you if you did see it? — I did not see it; Mr. Fergusson had risen up, and lord Thanet had risen up.

Supposing it possible that a stick had been in Mr. Fergusson's hands, and it had escaped your eye, do you think it possible, from time and place, that Rivett could have wrenched it out of his hands before he attacked lord Thanet? — I do not think it possible he could have a stick of any sort.

Was lord Thanet nearer to Rivett than Mr. Fergusson? — I think he was rather; one of the officers, but I do not know which, I do not

know their persons, *pressed very rudely, as it appeared to me, upon Mr. Fergusson; I believe that Mr. Fergusson might shake his shoulder when he felt the man's hand upon it; that is all the resistance I saw made on the part of Mr. Fergusson.*

*What did you see pass between these officers and lord Thanet? — The first thing I observed particularly of lord Thanet was, that he was lying almost down upon his back upon the table, with a small stick or cane, which he held in both hands over his head or face, in this manner; one of the officers was striking him with a stick, and lord Thanet endeavored, with very little success, to defend himself by the use of this stick, which he held in both his hands.*

*Now, before that period of which you last spoke, did you observe lord Thanet give a blow or any provocation, to this officer? — I never saw him give a blow; I never saw him give any provocation; I never saw him in any other way than I have mentioned, till he left his seat; how he left his seat I cannot tell; they had risen up upon their seats; when they were pressed upon, they rose towards the left-hand side of the prisoner, as the prisoner faced the judges.*

Did they go out of sight? — No.

*Did they go off that table? — They were not upon that table; Mr. Fergusson was upon the table afterwards, but not on the table at any time that I have yet spoken to — lord Thanet was then lying upon the table. I am not able to say how lord Thanet got from that situation; I do not know that I took particular notice of what passed after, with respect to lord Thanet; Mr. O'Connor was brought into court, and then the riot ceased.*

Did you take any particular notice of Mr. Fergusson, between the last time you have been speaking of, and the time of Mr. O'Connor being brought into court? — No, do not recollect anything more. I

I need not ask you if you saw Mr. Fergusson brandish a sword? — No.

Did you see Mr. Fergusson, after the sentence of death was passed, go back to his old place? — I did not.

Were your eyes fixed upon that part of the court? — They were, most particularly; I was placed in a situation in which I could very well see.

So that it was impossible for Mr. Fergusson to have gone backwards from his seat, without having struck your eye? — I think it was impossible.

*Did you see Mr. Fergusson upon the table before lord Thanet was beat by Rivett? — I did not.*

Mr. Justice Lawrence. — In what part of the court were you? — Under the witness box; I rose from thence, and got upon the table, as other people did.

Mr. Mackintosh. — Did you see lord Thanet or Mr. Fergusson take any part in anything that had the appearance of disturbance or riot? — No, I did not. I saw lord Thanet defend himself; and I have stated, that I did not see Mr. Fergusson do any act at all, except shaking that man's hand off his shoulder.

Do you remember Mr. Dallas quitting his place before he began to address the jury? — I do, perfectly.

And Mr. Plumer also, I believe? — I do not.

Do you recollect Mr. Fergusson leaving his own place in consequence of that? — I am rather inclined to think it was so; but I cannot swear to that.

I understand you to swear most positively that Mr. Fergusson never interposed between the jailer and Mr. O'Connor? — I do most positively swear I do not think he did, and if he had, I think I must have seen it.

Mr. Warren cross-examined by Mr. Garrou.

The dock or bar, by which the Bow-street officers were placed, could only occupy five or six persons? — No more.

Only the jailer and the prisoners?

— It might be three yards long, perhaps.

You stated that after the sentence of death had been passed, and Mr. O'Connor had been left upon the floor, the officer pressed forward to apprehend him; what induced you to think these were officers rushing forwards for that purpose? — I took them to be the persons who had produced the warrant in court. When they had forced themselves up to the end of the solicitors' seat, Mr. Fergusson said, I think, "Here are two men obtruding themselves between the prisoners and the jury." Mr. Justice Buller said, "What are you about? sit down;" and one of them produced a paper saying either that it was a warrant to take up Mr. O'Connor, or a warrant upon a charge of high treason against Mr. O'Connor, or something to that effect; and, therefore, I supposed them to be Bow-street officers, or officers of justice. . . .

Mr. Maxwell sworn. — Examined by Mr. Erskine.

Were you in court, at Maidstone, during any part of the trial of Mr. O'Connor and others? — I was, frequently.

Did you hear Mr. Justice Buller pronounce sentence of death upon O'Coigly? — I did.

In what part of the court were you at that time? — At that time I was immediately to the left of the witness box, rather farther from the judge than the witness box.

Were you elevated above the Court? — I was elevated above the table where the counsel sat.

Did that elevation and position give you a view of that part of the court where the Bow-street officers entered, and where the solicitors for the prisoners sat? — That gave me a distinct view of that part of the court.

Do you remember, when Mr. Justice Buller had finished pronouncing sentence upon Mr. O'Coigly, do you remember any persons rushing forwards, as if to seize Mr. O'Con-

nor?—I remember some of the Bow-street officers, among whom I knew Rivett and Fugion, rushed violently to that place where Mr. O'Connor was.

At the time that those two persons, Rivett and Fugion, rushed forwards in the direction you have described, did you observe where lord Thanet was?—I did; my lord Thanet sat at that time in the solicitors' place.

Did you observe where Mr. Fergusson was at the same time?—Mr. Fergusson sat in his own place, where he had been as counsel for some time, on the bench before the solicitors' bench.

Which of them was nearer to that side of the court where the jury box is, and where Mr. O'Connor was?—I think lord Thanet was rather, perhaps, the nearest of the two; but there was very little difference.

Did you see anything pass between Rivett, the officer, and lord Thanet?—I did.

*Describe to my lord and the jury what you saw.*—After Rivett had forcibly overturned and driven from their places those who stood between him and Mr. O'Connor, he got to lord Thanet, who was one of the nearest. Lord Thanet, when he was pressed upon, got out of the place where he was, and went from the scene of tumult towards the table.

Was that farther from the prisoners than he was before?—Considerably farther from the prisoners than when he was first pressed upon.

*When lord Thanet retired in that manner out of the solicitors' box, over towards the counsels' table, did Rivett pursue his course on towards the prisoners in the line of the solicitors' box, or how else?*—He followed lord Thanet, and struck him repeatedly.

*Had lord Thanet struck Rivett before he went over from the solicitors' seat towards the table?*—Lord Thanet never struck Rivett before or after that.

Had you such a view of the situation in which lord Thanet was placed, and what he did, as to swear merely to your opinion and belief, or do you

swear it positively?—I had such a view, that I swear it positively; by that time I had quitted the place where I was, and got nearer to lord Thanet, and the other persons who were struck.

Were any other persons struck besides lord Thanet?—I saw several blows given, but I cannot say to whom, by the Bow-street officers, and those who followed them.

Do you know whether Rivett struck any person besides lord Thanet?—I do not positively know whether he struck any person or not.

*But you swear positively lord Thanet did not strike Rivett at all?*—He did not; but merely put himself in a posture of defense, and lying back upon the table.

Had lord Thanet a stick?—He had a small stick, which he held up over his head to defend himself; he was leaning back upon the table, an attitude in which it would have been difficult to have acted offensively.

Did you see lord Thanet subsequent to the time that he was in that situation?—I did.

You say that the officers, and particularly Rivett, rushed into the court, and having passed one or two that were before lord Thanet, attacked lord Thanet; *what length of time might elapse between Rivett first rushing in and the time he struck lord Thanet?*—A very short space of time indeed.

*Was it possible that before Rivett struck lord Thanet, he could have gone within the counsels' place, where you have described Mr. Fergusson to be, and have wrested a stick out of his hand before he came to lord Thanet?*—Rivett did not go to take a stick out of his hand, for he had no stick in his hand, he did not go up to Mr. Fergusson, but immediately went up to lord Thanet and struck him.

*If Rivett should have said here, that he never saw lord Thanet till after he had taken a stick from Mr. Fergusson, from what you observed, is that true or false?*—I should certainly

*say it was false, without any hesitation.*

During the time that you thus observed lord Thanet in the attitude of defense, retreating from the scene of tumult, and pursued by Rivett, where was Mr. Fergusson? — He was in his place, and remained in his place till he was pressed upon, and then he got out of the scene of tumult upon the table.

Did you see him while he was in his seat, and did you see him move from his seat to the table by the pressure that was upon him? — I did.

*If, whilst Mr. Fergusson was in his seat, or if while he was pressed upon when he rose from his seat, if in either of these situations he had not only had a stick, but had brandished and flourished that stick, I ask, must you have seen it or not? — I must have seen it; he was so directly before me, that it is quite impossible but I should have seen it; I CAN SWEAR THAT MR. FERGUSSON HAD NOTHING IN HIS HAND, BUT A ROLL OF PAPER IN HIS RIGHT HAND.*

And was in his professional dress? — He was.

If Mr. Fergusson had done any one act to encourage the tumult that was undoubtedly then existing, or done any one act inconsistent with his duty as counsel, or committed any one act of indecency or turbulence, must you have seen it? — I must.

Then let me ask you, upon your solemn oath, did he do any such thing? — He did not; on the contrary, he endeavored to keep quiet in the court, by admonishing the people in court to be quiet. Mr. Fergusson said particularly to Rivett, when he was striking lord Thanet, "Do you know whom you are striking? That is not a person likely to begin a riot."

Did you see where Mr. Fergusson went to after he was upon the table? — He got upon the table, and got farther from the scene of tumult; and I do not know whether he sat

down upon the table or not; he went towards the crown lawyers.

Did you see sir Francis Burdett? — I did; he at first stood by me in the witness box; and when the confusion began, he got nearer to the place of confusion at the same time that I did. I saw Mr. Fergusson remove sir Francis Burdett from the scene of confusion, and put him farther from it.

And you saw him also place himself at a distance from it? — Yes.

Did you afterwards see him go upon the table towards the judges? — I did; I saw him till all the violence was over.

*Then can you take upon you to swear positively, that neither Mr. Fergusson nor lord Thanet, during the tumult, went towards Mr. O'Connor? — They went in a directly opposite direction.*

*Do you swear that from your own opinion and belief, or from certain knowledge? — I swear it positively from certain knowledge.*

Mr. Maxwell cross-examined by Mr. Adam.

You saw Rivett and Fugion pressing forward? — I did.

Did you know them before? — I knew them from having seen them examined in court upon that trial.

Only from that circumstance? — Only from that circumstance.

During this affray you shifted your situation to another part of the court? — Yes; I got upon the table.

And you say you saw sir Francis Burdett shift his place? — He shifted his place at the same time.

From what part of the court did he come? — From the witness box; he stood on my right hand.

To what part of the court did he go? — He also went on to the table.

Do you mean that he remained upon the table? — I cannot say whether he remained upon the table, but he went there with me.

Did he remain on the table any considerable time? — The tumult was over very soon after that.

The counsel for the crown sat immediately under the witness box?

— They sat on the same side.

Round the angle? — Yes.

Therefore, it was necessary, when you and sir Francis Burdett shifted your places, that you should go over the heads of the counsel for the crown, to get to the table? — Exactly so; we jumped from the neighborhood of the witness box.

Do you remember, when sir Francis Burdett jumped from the neighborhood of the witness box to the table, did he not jump immediately from the table into the crowd? — I cannot say whether he did or not; but I saw him standing upon the side of the table, or sitting upon the side of the table, till Mr. Fergusson removed him.

But that was near the conclusion of the affray? — It was. . . .

Lord *Kenyon*. — Did you see Mr. O'Connor go out of the dock? — Yes.

How soon was he out of your sight? — I do not know that he was out of my sight.

Do you know the situation of the wicket? — Yes.

Where were Mr. Fergusson and lord Thanet during the time that elapsed between his leaving the bar and being brought back again? — Upon the table.

Did the crowd coming upon them prevent you from seeing them? — No: I was so situated that I saw them both distinctly; I was a great deal higher than they.

*Samuel Whitbread, Esq.*, sworn. —

Examined by Mr. *Gibbs*.

You were present, I believe, at the time of this trial? — I was in court the latter part of it, after I had been examined as a witness.

In what part of the court were you? — After having been examined as a witness I retired out of the witness box, behind, and came into the court again.

Whereabouts were you when the verdict was brought in? — Considerably behind the witness box.

Had you from thence a perfect view of the court? — Of the lower part of the court.

Had you a perfect view of the dock in which the prisoners were, the solicitors' seat, and the seat where the counsel sat? — I had certainly a view of the whole of that part of the court.

Between the verdict and the sentence we understand some Bow-street people came in, and spoke of a warrant? — There was some tumult, and that subsided upon Mr. Fergusson calling the attention of the Court to the cause of it. He waved his hand and spoke to them; he then turned to the bench, and said, "My lord," or some such word, just to draw the attention of the Court: upon that, Rivett, whom I knew before, said he had a warrant against Mr. O'Connor, and he thought he was going to escape. Mr. Justice Buller then said, "Patience," or some such word; and then sentence was pronounced.

After sentence was pronounced, did you observe O'Connor? — I observed him put his foot upon the front part of the dock, and get out of the dock: having carried my eye after him some time, my eye returned to the bar, and there I saw Rivett violently attacking lord Thanet; he had a stick in his hand: I did not see *him* strike a single blow; I saw many blows struck at him, and he was endeavoring to ward them off.

*Did it appear to you that lord Thanet made any attack upon Rivett to provoke this? — No; on the contrary, he was defending himself against a violent attack of Rivett's upon him.*

Where was lord Thanet at the time that you observed this? — I think he was close to the table, leaning back upon the table in the act of defending himself, with his hands up, in which I think he had a stick.

Did you see at this time where Mr. Fergusson was? — I did not observe Mr. Fergusson at that time: before the tumult had quite subsided, I



observed Mr. Fergusson upon the table, not far from the judges.

Had you your eyes upon lord Thanet from the time you saw Rivett striking him in this way? — No, I had not, because there was a great deal of tumult behind, and of persons trying to get out at the door behind the bench, and the bailiffs resisting their attempts, which engaged my attention some time.

Did you see Mr. O'Brien during this time? — I do not recollect that I did.

Did you know Mr. O'Brien well? — I knew him perfectly by sight.

If he had been acting in this scene, must you have noticed it? — In a scene of confusion many things must have escaped the observation of every person; but I think it is more than probable that I must have seen such a person as Mr. O'Brien, if he had been active.

*Samuel Whitbread, Esq., cross-examined by Mr. Attorney-General.*

How long did you remain at Maidstone? — The next morning, I think, I passed you on the road to London.

*Mr. Attorney-General.* — I beg your pardon, I did not recollect that circumstance.

Previous to the officers approaching the place where Mr. O'Connor was, had you heard that there was to be a rescue? — I had not.

*Richard Brinsley Sheridan, Esq., sworn. — Examined by Mr. Erskine.*

You were subpoenaed as a witness to attend the trials at Maidstone? — I was.

Were you in court at the time when the jury retired to consider of their verdict, and also when they returned with it? — I was.

And during the remaining part of the time till the tumult ceased? — During the whole of that time.

In what part of the court were you when the jury brought in their verdict? — Sitting with sir Francis Burdett in the witness box; that

box was raised very considerably above the table, so that I had a direct view of everything passing in the court.

Had you then an opportunity of perfectly observing the place where the solicitors sat, and the dock where the prisoners were, and the place where the counsel were? — A most perfect opportunity, without being in the least annoyed or mixed with the tumult.

Do you remember the jailer laying hold of Mr. O'Connor; perhaps you did not see that? — The first that I observed of the tumult was prior to the sentence being passed upon O'Coigly; I did not see Mr. O'Connor make an attempt to go, but I had observed to the high sheriff that I fancied he would come out, for that I had observed at the Old Bailey, that they had left the bar immediately upon the jury pronouncing them not guilty. The riot then commenced, and I observed some men pressing very violently towards the box where Mr. O'Connor was; my attention was taken up with that: Mr. Fergusson then appealed to the court, and said, "Here are two riotous fellows," or something of that sort, "disturbing the peace of the court." Rivett then said, "I have a warrant to apprehend Mr. O'Connor." Mr. Justice Buller desired him to be quiet, and then put on his cap to pass sentence, and everything subsided.

After that did you observe the Bow-street officers rushing in, in the way that we have heard? — The first thing I saw was Mr. O'Connor getting very nimbly over the front of the dock, and going towards the narrow street, and these men rushing after him. Certainly the man who could have thrown himself most in the way of the men, was Mr. O'Brien, if he had chosen to do it.

Are you acquainted with Mr. O'Brien? — I know him intimately.

Is he a strong man? — Certainly he is.

If Mr. O'Brien had been desirous of opposing himself to the officers, and to prevent them from going after him, might he? — He was precisely in the best situation to have done it.

Had you an opportunity of seeing whether he did or not? — He did not, and I am sure he was not there in the subsequent part of the tumult.

Can you take upon yourself to swear positively that he gave no manner of assistance? — Positively.

And Mr. O'Brien had an opportunity of affording the most essential means of escape to Mr. O'Connor, if he had chosen? — I think the whole idea was folly and madness, and that no assistance could have effected it.

But Mr. O'Brien did the contrary? — Yes; he retired behind the box, and I did not see him afterwards. I was very attentive to the whole of it, and was making my observations with the high sheriff, who more than once endeavored to persuade me to leave the witness box, and endeavor to quell it.

Did you see lord Thanet at the time the officers rushed in? — I did not see him till the time he was struck; I saw him struck.

Did he return the blow, or show anything like activity, or a disposition to activity? — I saw him when he was first pressed upon. It was not a tumult merely near the dock, but the whole court was a scene of general tumult, and a scene of panic, and certainly with the least reason — there was a tumult behind us in the witness box; there was a general calling-out not to open the doors, some calling out for soldiers and constables, and there did appear to me a sincere panic and apprehension that there was a planned rescue. I perceived plainly there was no such thing, and endeavored all I could to persuade them so. The officers were beating down everybody, forcing their way and pressing upon everybody. Lord Thanet had a stick in his hand, with which he was parry-

ing the blows, which came amazingly quick; it seemed to me an incredible thing that he was not extremely hurt, and he never returned a blow, but retired from the scene of tumult farther into the court away from the prisoners; sir Francis Burdett was with me; and by this time Mr. O'Connor was stopped, and they were bringing him back again; he had attempted to go towards the gate with the wicket, and I observed everybody to put up their hands and stop him; he might as well have attempted to get through a stone wall; if there had been six or eight persons there who were so disposed, he might perhaps have got as far as the door, but he could not possibly have got farther. I then saw a person upon the table, brandishing Mr. O'Connor's scimitar over the heads of the people; he seemed very much alarmed, and not knowing what he was about; I am sure it must have gone very near several persons' heads, it seemed quite miraculous that he did not do some mischief; in short, it was difficult to discover whether he meant to keep the peace or break the peace. Sir Francis Burdett saw that they had collared Mr. O'Connor, was frightened, and said with great agitation to me, that they would kill O'Connor, and he jumped over the railing; he could not go from where we were without jumping upon the table, and he ran forward; Mr. Maxwell followed him, or went at the same time; they both went towards Mr. O'Connor; I then saw very distinctly Mr. Fergusson stop sir Francis Burdett, and use some action, saying, "You had better keep away, and not come into the tumult at all:" I could not hear what he said, but it appeared so to me.

Did you see Mr. Fergusson from the beginning of this scene, when sentence of death was pronouncing? — I saw him plainly in his place, after the judge had passed sentence of death.

*Did you see the crowd press upon*

*Mr. Fergusson, and did you see him get upon the table? — I did not see him get upon the table; but as the crowd pressed upon him, he was forced upon the table.*

*Did Rivett attack lord Thanet before he could possibly have attacked Mr. Fergusson and wrenched a stick out of his hand? — He came immediately upon lord Thanet, when the tumult began.*

He could have had no conflict with Mr. Fergusson till after the conflict with lord Thanet? — Certainly not.

Do you know Mr. Fergusson? — Perfectly.

If he had been upon the table flourishing and waving a stick, in the manner that has been described, in his bar dress, must you not have seen it? — Yes; it must have been a most remarkable thing, indeed, for a counsel in his bar dress to have a stick flourishing in his hand — HE HAD A ROLL OF PAPER IN HIS HAND.

*Does that enable you to swear that Mr. Fergusson was not in that situation? — Certainly.*

Do you think if he had taken such a part in the riot, in the presence of the judges, that you must have observed it? — I must have observed it.

Did lord Thanet or Mr. Fergusson ever go nearer to Mr. O'Connor after he had jumped out of the dock, or did not lord Thanet and Mr. Fergusson retire farther from the scene of tumult? — They certainly did. Upon some farther conversation I got over this place myself, and went down, and the first thing I did was to speak to the man with the sword. I told him I thought he with his sword made half the riot himself; and he put it away. I passed lord Thanet, who, so far from staying in the riot, went towards the judges, as if he was going to make a complaint. I then went into the riot, and endeavored to persuade them that there was no such thing as an attempt to rescue O'Connor; and a man that had hold of him, who knew me, said there was; and added,

"These fellows are come down from London; they are Corresponding Society people, and they are come down on purpose to rescue him." One person in particular called to them not to believe me, and I laid hold of him, and said he should go with me to Mr. Justice Buller; I insisted upon his name and address, and he would not give it me. I then turned to the judges, and he ran away. So far was lord Thanet from going towards the wicket, that I passed him going up to the judges; and Mr. Fergusson remained with me, desiring them not to treat Mr. O'Connor so, and generally endeavoring to quiet them; the only moment they were out of my eye was while I was getting over this place.

*Richard Brinsley Sheridan, esq., cross-examined by Mr. Law.*

You saw lord Thanet distinctly from the time he was struck? — I do not mean with the stick, — I corrected that by saying, from the time he was assaulted and driven from the seat he was in at first.

Can you take upon you to say whether he gave a blow before he was struck? — I said from the time he was pressed upon or assaulted.

You say you saw lord Thanet going towards the judges, as if he was going to complain. Did you hear him make any complaint to the judges? — I did not hear him, certainly. . . .

I ask, as an inference from their conduct, as it fell under your observation, whether you think lord Thanet or Mr. Fergusson, or either of them, meant to favor Mr. O'Connor's escape, upon your solemn oath? — Upon my solemn oath I saw them do nothing that could be at all auxiliary to an escape.

That is not an answer to my question. — I do not wish to be understood to blink any question. . . .

My question is, whether, from what you saw of the conduct of lord Thanet and Mr. Fergusson, they did not mean to favor the escape of

O'Connor, upon your solemn oath? — The learned counsel need not remind me that I am upon my oath; I know as well as the learned counsel does, that I am upon my oath; and I will say that I saw nothing that could be auxiliary to that escape.

After what has passed, I am warranted in reminding the honorable gentleman that he is upon his oath: my question is, whether, from the conduct of lord Thanet or Mr. Fergusson, or either of them, as it fell under your observation, you believe that either of them meant to favor O'Connor's escape? — I desire to know how far I am obliged to answer that question. I certainly will answer it in this way, that from what they did, being a mere observer of what passed, I should not think myself justified in saying that either of them did. Am I to say whether I think they would have been glad if he had escaped? that is what you are pressing me for.

No man can misunderstand me; I ask, whether, from the conduct of lord Thanet or Mr. Fergusson, or either of them, as it fell under your observation, you believe upon your oath that they meant to favor the escape of O'Connor? — I repeat it again, that from what either of them did, I should have had no right to conclude that they were persons assisting the escape of O'Connor.

I ask you again, whether you believe, from the conduct of lord Thanet or Mr. Fergusson, or either of them, upon your oath, that they did not *mean* to favor the escape of O'Connor? — I have answered it already.

Lord *Kenyon*. — If you do not answer it, to be sure we must draw the natural inference.

Mr. *Sheridan*. — I have no doubt that they *wished* he might escape; but from anything I saw them *do*, I have no right to conclude that they did.

Mr. *Law*. — I will have an answer: I ask you again, whether from their conduct, as it fell under your observation, you do not believe they

*meant* to favor the escape of O'Connor? — If the learned gentleman thinks he can entrap me, he will find himself mistaken.

Mr. *Erskine*. — It is hardly a legal question.

Lord *Kenyon*. — I think it is not an illegal question.

Mr. *Law*. — I will repeat the question, whether, from their conduct, as it fell under your observation, you do not believe they *meant* to favor the escape of O'Connor? — My belief is, that they *wished* him to escape; but from anything I saw of their conduct upon that occasion, I am not justified in saying so.

I will ask you, whether it was not previously intended that he should escape if possible? — Certainly the contrary.

Nor had you any intimation that it was intended to be attempted? — Certainly the contrary. There was a loose rumor of another warrant, and that it was meant that he should be arrested again, which was afterwards contradicted. Then the question was mooted, whether the writ could be issued before he was dismissed from custody? Certainly there was no idea of a rescue. There was no friend of Mr. O'Connor's, I believe, but saw with regret any attempt on his part to leave the Court.

From whom did you learn that there was such a warrant? — It was a general rumor.

From whom had you heard this rumor? — I believe from sir Francis Burdett; but I cannot tell.

At what time was that? — About four or five o'clock.

Have you ever said that the defendants were very blamable; lord Thanet, Mr. Fergusson, or any of them? — Certainly not.

At no time since? — Certainly never.

Mr. *Erskine*. — You were asked by Mr. Law, whether you believed that the defendants wished, or meant to favor the escape of Mr. O'Connor: I ask you, after what you have sworn,

*whether you believe these gentlemen did any act to rescue Mr. O'Connor? — Certainly not; and I have stated upon my oath, that every man in the narrow gateway endeavored to stop him: I remarked it particularly; because, there being a common feeling amongst Englishmen, and he being acquitted, I thought they might form a plan to let him escape.*

You have stated that you saw no one act done or committed by any one of the defendants, indicative of an intention to aid O'Connor's escape? — Certainly.

I ASK YOU THEN, WHETHER YOU BELIEVE THEY DID TAKE ANY PART IN RESCUING MR. O'CONNOR? — CERTAINLY NOT.

[End of the evidence for the Defendants.]

#### REPLY

Mr. *Attorney-General*. — Gentlemen of the Jury: At this late hour of the day, I do not think that the duty which I owe the public can require me to detain you any considerable time in reply to the observations of my learned friend. . . .

Now, with respect to the case of my lord Thanet and the case of Mr. Fergusson, gentlemen, I declare to you most solemnly, that I respect the high situation of the one, as I respect the professional situation of the other; but in this case, gentlemen, the question, and the only question, is, "Did they make a riot?" I desire that the question may be put upon its true merits. . . . My learned friend says, "What motive could lord Thanet have?" Mr. O'Connor, who has been represented as an extremely judicious man upon some occasions, was certainly so foolish, as to think such a project as this might have been practicable; but is it in fact imputed to these persons, that they meant to turn Mr. O'Connor loose, in order to subvert the constitution of this country (for so my learned friend states it)?

and to do all this mischief which he is pleased to represent to you, must have been the consequence of Mr. O'Connor's escape? He seems to have forgot, that all I meant to impute (for aught I know, there may be men in the country who know more of it than I do), that all I am charging upon these defendants is, that they meant to rescue Mr. O'Connor from any farther demand that justice might have upon him. Whether Mr. O'Connor was immediately to take himself out of this country, into a situation in which he could do no mischief, or whether he was to remain in this country to do mischief, is a question with which I have no business. . . .

Gentlemen, that there was a riot, is clear beyond all doubt. Now let us see how it is occasioned: Mr. O'Brien knew of this rumor, at the time the application was made to the Court, by Rivett and Fugion. He was aware, that Mr. O'Connor was not discharged. He learned, and lord Thanet learned, and I believe nobody doubts the fact that everybody learned this circumstance, not only that he was not then to be discharged, . . . but it was publicly taught to everybody in court, what was the reason and what the cause for which his discharge was to be withheld from him. . . . Gentlemen, if you please, I will put it so, not to give Rivett any credit, if, upon any other part of the case, he is contradicted; but I should do that with great reluctance, till I am satisfied that he is not worthy of credit. But I will say this, that you may reject the whole of the evidence of Rivett, with respect to lord Thanet and Mr. Fergusson, out of the case, and say, whether out of the negative evidence given on the other side, you can get rid of the facts sworn and deposed to by persons whose characters are out of the reach of the breath of suspicion. . . .

Gentlemen, I will not go into a detail of the evidence, which you will

hear from his lordship; but with reference to lord Thanet and Mr. Fergusson, I cannot part with the evidence given by Mr. Solicitor-General; but I shall first make this observation upon the evidence of Mr. Sergeant Shepherd, to whose credit, honor, and accuracy, we all do justice, that where that evidence presses upon Mr. O'Brien, he says, that "Mr. O'Brien having turned round and looked up at Mr. O'Connor, it made an impression upon his mind;" and also that, as far as he observed, "lord Thanet was defending himself." He judges, therefore, of appearances, both with reference to lord Thanet and with reference to Mr. O'Brien; and what he says of the appearances with reference to Mr. O'Brien certainly throws a great degree of credit upon his accuracy when he speaks with respect to lord Thanet. The same credit is due, I take it, to Mr. Solicitor-General; and you will have the goodness also to attend to the evidence of Mr. Hussey; for if you believe what he states, that when the man was pressing forward to execute the warrant, lord Thanet inclined towards the bar, and put his person in the way; if that fact is proved to your satisfaction, lord Thanet is guilty upon this record. And if other facts are proved against lord Thanet, and similar facts are proved against Mr. Fergusson, you must decide upon all the evidence, and not from what other men did *not* see or observe; you are not to decide upon the eloquence of my learned friend, but upon the oaths of persons who depose positively to facts.

Then my learned friend made an observation upon the evidence of Mr. Solicitor-General. . . . He states upon his oath, that he did most distinctly and cautiously attend to the conduct of Mr. Fergusson and Mr. O'Connor; and then he says this: "I fixed my eye upon O'Connor, and I observed Mr. Fergusson, and other persons whom I did not know, encouraging Mr.

O'Connor to go over the bar." Encouraging is a general word undoubtedly; but it is a word which expresses the impression which facts falling under his eye had made upon his mind; and when he was asked what he meant by encouragement? he describes it to have been by his actions. But he not only gives his evidence in this way as to that particular fact, but he gives it also with a caution, which entitles it to the same degree of credit which Mr. Sergeant Shepherd's evidence derives from its accuracy; for when he comes to speak of a circumstance, with reference to which he is not certain, he tells you, "Mr. O'Connor jumped over the bar, and Mr. Fergusson turned himself round and appeared to me to follow Mr. O'Connor; but I cannot say that he did." He qualifies that apprehension in his mind, by telling you that he may be mistaken, and then he gives you the reason why he doubts whether that apprehension was or was not justly founded; and he finally states in his evidence a circumstance respecting lord Thanet, which I think will deserve a great deal of your consideration. . . .

Whether this noble peer struck Rivett first, which I do not find Rivett say that he did, is of no importance. These men have a certain temper and degree of spirit about them, which might, perhaps, induce them to thrash a peer more than anybody else, if they felt themselves ill-treated; but Mr. Rivett may take this advice of me — I hope, in future, he will not use such treatment if he can avoid it. But what presses upon my mind is, that if lord Thanet, treated in the manner he was by Rivett, had no connection with this project of rescue; if he had not, either from the circumstances that fell under Mr. Sheridan's observation, or from other circumstances, manifested that he meant there should be a rescue, is it the conduct of a man of considerable situation — is it the con-

duct of a man of common sense, instead of making a serious complaint upon the subject? . . . He is perfectly neutral; no complaint is made upon the subject. It appears to me, that if I had been struck two or three times by that officer, the manner in which I would have acted upon that occasion would certainly not have been to have immediately stated that "it was fair the prisoner should have a run for it," but to have made some application to have those punished of whose conduct I had a right to complain. . . .

Then when you have heard this evidence on the part of the prosecution, I mean the evidence that goes to positive facts, it will be for you to decide whether they are not all reconcilable with the negative evidence given on the part of the defendants. . . .

Gentlemen, having said this much, and having endeavored to discharge myself of my duty, you will be good enough to say what is due as between the public and the defendants.

#### SUMMING UP

Lord Kenyon.—Gentlemen of the Jury: . . . I have the authority of lord Hale, one of the greatest and best men that ever lived, for saying, that juries are not to overlook the evidence—that they are not to forget the truth, and to give way to false mercy; but, without looking to the right hand or the left, they are to weigh the evidence on both sides, and then, according to the best of their judgment and understanding, to do justice to the public, as well as to the defendants.

Before I proceed to sum up the evidence, I shall only make one other observation, which was made by Mr. Whitbread in giving his evidence, the tone of whose voice I never heard before. Having gone through his evidence, he gave us this *legacy*, as a clew to direct us in

the decision of this case—"that, in a scene of so much confusion, there are many things which must escape the observation of every individual." Having stated thus much to you, I will now proceed to sum up the evidence; and when I have done that, I shall make some few observations on it.

*[His lordship here summed up the evidence on both sides, and then proceeded as follows:]* . . .

I have stated the evidence on the one side and the other; and although there is strong contradictory evidence, yet I think there is a great deal of evidence which goes in support of the charge. There were some observations made by the learned counsel for the defendants, which, perhaps, were not altogether warranted. Counsel are frequently induced, and they are justified in taking the most favorable view of their clients' case; and it is not unfair to pass over any piece of evidence they find difficult to deal with, provided they cite, fairly and correctly, those parts of the evidence they comment upon. The learned counsel for the defendants, in his remarks on the evidence, totally forgot the evidence of Mr. Parker. If his evidence is to be believed, and I know no reason why it is not, he certainly gave important evidence in support of this charge—that the defendants evidently appeared to be attempting to stop the officers, and assisting the escape of Mr. O'Connor. The learned counsel for the defendants did not choose to deal with this evidence, though he conducted the cause with all possible discretion, abilities, and eloquence. As I have before observed, there is apparently a great deal of contradiction in this cause. I must again state the observation of Mr. Whitbread, and which was obvious if he had not made it, that, "in such a scene of tumult and confusion, many things must pass which escape the observation of every individual." But there is no

doubt of one thing — one thing is clear: if Rivett had not the scuffle which he swears he had with Mr. Fergusson and my lord Thanet, and if he did not wrench a stick out of Mr. Fergusson's hand, he is palpably forsworn, and grossly perjured. For him there is no excuse in the world. What motive he might have, I do not know; he has no interest; and in weighing the testimony of witnesses, I cannot consider the rank of a person, nor his station. It is clear, if he has not told the truth, he is guilty of perjury. In this scene of tumult, men's minds must have been greatly distracted. It is for you to say what degree of credit you will give to all the witnesses. These are the observations I have to make; and I should retire from my duty if I had not made them to you. . . .

At eleven o'clock at night the jury retired; and after being out about an hour, they returned with the following verdict:

The earl of Thanet, *Robert Fergusson*, esq., Guilty; *Dennis O'Brien*, esq., Not Guilty.

*Friday, May 3d*

Mr. *Attorney-General*. — In this case of the King against Sackville, earl of Thanet, and Robert Fergusson, esq., I have to pray of your lordships the judgment of the Court.

Lord *Kenyon* (to Mr. *Erskine*). — Have you anything to say for the two persons convicted?

Mr. *Erskine*. — The cause having been tried at bar, your lordships are already apprized of everything I could have to offer. I believe lord Thanet and Mr. Fergusson wish to say something to your lordships.

Lord *Thanet*. — My lords, before the sentence is pronounced, I beg leave to address a few words to the Court; not for the purpose of impeaching the veracity of the witnesses for the prosecution, or of arraigning the propriety of the verdict: on those points I shall say nothing.

What I mean to submit to the Court is, a short, distinct narrative of the facts, as far as I was concerned in them.

I attended the trial at Maidstone in consequence of a subpoena. When I had given my evidence, I retired from the court, without any intention of returning, until I was particularly requested to be present at the defense made by Mr. Dallas, the prisoners' counsel. At that time I had never heard of the existence of a warrant against Mr. O'Connor, nor of any design to secure his person if he should be acquitted. The place I sat in was that which Mr. Dallas had quitted, when he removed to one more convenient for addressing the jury. While sitting there, I heard, for the first time, from Mr. Plumer, that he had reason to believe there was a warrant to detain Mr. O'Connor. When the verdict was pronounced, I went into the solicitors' box, to shake hands with Mr. O'Connor, which I did without even speaking to him. Many others pressed forwards, apparently for the same purpose. Upon a call for silence and order from the bench, or from one of the officers of the court, I immediately sat down on the seat under that part of the dock where Mr. O'Connor stood. At that period some confusion arose, from several persons attempting to get towards him, one of whom said he had a warrant to apprehend him, for which he appeared to me to be reprimanded by Mr. Justice Buller, in some few words, which I did not distinctly hear. The moment the judge had passed sentence on O'Coigly, a most violent pushing began from the farther end of the seat on which I sat. From the situation I was in, I did not perceive that Mr. O'Connor was attempting to escape. He was a good deal above me, and I sat with my back to him. I continued sitting in my place, until several persons on the same seat were struck, among whom, I imagine Mr. Gunter Browne was



one, from the complaint he afterwards made of ill-treatment, but whom I never saw before or since to my knowledge. I then began to feel the danger I was in; but the tumult increased about me so rapidly, that I was unable to get over the railing before me. I stood up, however, and used all the efforts in my power to go towards the judges, as to a place of safety; but at that moment, by some person or other, I was borne down on the table, where a man (who as I afterwards found was Rivett) struck at me several times with a stick, which I warded off, as well as I was able, with a small walking-stick. Rivett, as he struck me, charged me with striking him first, which I denied, and called out to him, as loud as I could, that I had not struck him.

I have now detailed, as clearly as I am able, my situation and conduct during the disturbance; and I do most solemnly declare on my word of honor, which I have been always taught to consider as equally sacred with the obligation of an oath, and am ready to confirm by my oath if I am permitted to do so, that I never did any one act but what was strictly in defense of my person. It is not at all unlikely, that, in such a scene of confusion, I might have pushed others, who pressed against me, to save myself from being thrown down; but I most solemnly deny that I lifted my hand or stick offensively, or used any kind of violence to any person. I declare upon my word of honor, that I knew nothing of the existence of a warrant to detain Mr. O'Connor, until I heard it from Mr. Plumer; and that, even then, it never entered into my mind that it was to be served upon him in the court, until some person called out that he had a warrant. I declare upon my word of honor, that the obstruction which the officers met with on the seat where I sat, was perfectly unintentional on my part, and was solely owing to the situation I was in: that I did nothing of-

fensively, but, on the contrary, was violently attacked and assaulted; and that I retired from the scene of confusion as soon as I was able. And, finally, I do most solemnly declare upon my word of honor, that I did not concert with any person the rescue of Mr. O'Connor, by violence, or by any other means whatsoever; that I had no idea of doing it alone; and that I was not privy to any consultation of other persons, either for the purpose of rescuing Mr. O'Connor out of the custody of the Court, or of preventing the execution of the warrant.

As I hold myself bound to state fairly, not only what I did, but what I said, as far as it is in my power to recollect what passed, with the agitation of such a tumult on my mind, I acknowledge that some words may have escaped me, which I ought not to have spoken. I am charged with having said, "that I thought it fair that he should have a run for it." I will not dispute about the exact words. I confess they were extremely inconsiderate. Some allowance, however, I think, may be made for the instant feelings of a man so ill treated as I had been.

My lords, I am not sanguine enough to expect any immediate advantage from these declarations. I know they will not avail me against the verdict: but the truth of them will not be suspected by those who know me; and hereafter, when all the circumstances of this transaction shall be coolly reconsidered, I am confident they will have weight with the public. . . .

Mr. *Fergusson*.—My lords, I have nothing to offer to your lordships, either with respect to the charge itself, the manner in which it was proved, or with respect to my own peculiar situation. . . .

I appear, however, before your lordships, to receive that judgment which your duty calls upon you to pronounce, in consequence of the verdict of a jury. That verdict I do not mean to arraign: it was

given on contradictory evidence, the value and balance of which it was the peculiar province of the jury to weigh and to decide.

But if your lordships' long practice in courts of justice shall have shown you the fallibility of human testimony, — if it shall have shown you, still more, the fallibility of human judgment founded upon human testimony, I hope I may meet with your indulgence, if I here make a solemn declaration of that, with respect to which I alone *cannot* be mistaken.

My lords, upon the occasion which has given rise to these proceedings I was of counsel for one of the prisoners who was tried at Maidstone. I was seated in the place which was allotted for the counsel for the prisoners; and being wholly engaged in the discharge of my duty, I solemnly aver, that whatever might be the previous consultations or conversations of others, with respect to the practicability or impracticability of a rescue, I never had even heard the rumor that a fresh warrant was in existence, until after the jury had retired to consider of their verdict. It was not till after they had so retired, and very shortly before they returned into court, that I learned that circumstance. I was in my place, seated where I had been during the greater part of the day, at the moment when the verdict was delivered: and I do most solemnly aver, that from that moment, until I was pressed upon by the crowd, I did not stir from that seat. I do farther declare, that when I was forced upon the table, I used no violence to any one; that the whole of my endeavors went to allay the ferment, and to remove those of my friends whom I loved and regarded, from the scene of disturbance, in order that they might not be implicated in any charge that might afterwards be brought against those who were the authors of it.

I can, therefore, say, in the presence of this court, and under the eyes of my countrymen — that

which, in the name of my God, I have already sworn — that I am innocent of this charge. . . .

*Mr. Attorney-General.* — My lords, in this stage of the business, I have very few observations to offer to your lordships' attention. . . .

*Lord Kenyon.* — You have not alluded to any particular punishment that you supposed to be annexed to the offense. . . . We wish, on a future day, to have it argued, whether the Court have any discretion in the sentence they are to pronounce? If there is a specific sentence, our discretion is taken away. . . .

*Monday, June 10th*

*Mr. Attorney-General.* — My lords, I have the honor of addressing your lordships, on the part of the prosecution, in the case of lord Thanet and Mr. Fergusson, and to inform you, that since my last address to the Court on this subject, I have received, and have now in my hand, his majesty's royal command to cause to be entered a *nolle prosequi* on such parts of this information as have in fact raised any doubt whether the judgment of the court is discretionary. My lords, in obedience to his majesty's royal will and pleasure, I have accordingly caused to be entered a *nolle prosequi* on the first, second, and third counts of the information. . . .

My duty at present, in obedience to his majesty's commands, is, to pray judgment on the fourth and fifth counts of this information. . . .

*Mr. Justice Grose.* — Sackville earl of Thanet and Robert Fergusson, you, and each of you, have been found guilty of a misdemeanor, by a verdict of a jury of your country, on an information filed against you by his majesty's attorney-general, charging you with a riot, and an endeavor, in open court, before his majesty's justices of Oyer and Terminer, to rescue Arthur O'Connor out of the custody of the sheriff.

in which he had been detained during and after the trial for high treason, and thereby to enable him to go at large. There are some counts, stating it to have been accompanied with violence; but of those I have no occasion to take notice. Other counts charge you with having made a riot and disturbance in one of his majesty's courts of justice, and interrupting and obstructing his justices in the lawful and peaceable holding of that court. . . .

To the nature of your case the Court has paid great attention; and upon the most mature deliberation on the offenses contained in the two last counts of this information, this Court doth order and adjudge:

That you, SACKVILLE EARL OF THANET, pay to the king a fine of One Thousand pounds; that you be imprisoned in the Tower of Lon-

don for the term of one year, and that you give security for your good behavior for the space of seven years, to be computed from the expiration of that period, yourself in the sum of ten thousand pounds and two sureties in five thousand pounds each; and that you be farther imprisoned till such security be given.

The sentence on you, ROBERT FERGUSSON, is, that you pay a fine to the king of One Hundred pounds; that you be imprisoned in his majesty's jail of the King's bench for the term of one year; and that you give security for your good behavior for seven years, to be computed from the expiration of that period, yourself in five hundred pounds and two sureties in two hundred and fifty pounds each; and that you be farther imprisoned till such security be given.

233. **KNAPP'S TRIAL.** W. & S. B. Ives' edition. Salem, 1890, of the first trial and the arguments. Dutton & Wentworth's edition. Boston, 1890, for the added testimony at the second trial.<sup>1</sup>

At the Supreme Judicial Court for the Commonwealth of Massachusetts, holden at Salem on the second Tuesday in July, A.D. 1890, pursuant to an Act of the Legislature, passed June 5, 1890.

Present.

HON. ISAAC PARKER, LL.D., Chief Justice.

HON. SAMUEL PUTNAM, LL.D.,

HON. SAMUEL S. WILDE, LL.D.,

HON. MARCUS MORTON, Justices.

The Grand Jury being impaneled and sworn . . .

#### Friday Morning

The Grand Jury came into Court with the bills which they had found.

The prisoners, John Francis Knapp, George Crowninshield, and Joseph Jenkins Knapp, junior, were then placed at the bar and the following indictment was read by the Clerk . . .

To this indictment they severally pleaded *Not Guilty*. And at the request of John Francis Knapp, and Joseph Jenkins Knapp, *Franklin Dexter* and *William H. Gardner*, Esquires, of Boston, were assigned to them as Counsel; and *Samuel Hoar*, Esq. of Concord, and *Ebenezer Shillaber*, Esq. of Salem, were assigned to George Crowninshield as Counsel at his request.

Tuesday, July 27, was assigned for the trial. The prisoners desired separate trials.

#### Tuesday Morning, August 3

Present, PUTNAM, WILDE, and MORTON, Justices.

The Attorney-General, *Perez Morton*, entered a nolle prosequi upon the Indictment which had been found against the prisoners, upon which they had been arraigned; and the following Indictment was returned by the Grand Jury: . . .

John Francis Knapp pleaded *Not Guilty*.

Before the others pleaded, *Mr. Dexter* suggested that they were indicted only as accessories, and therefore were not obliged to plead to the commission of a principal.

THE COURT said they need not now plead.

The Attorney-General then moved that Mr. *Wentworth* might be permitted by the Court to take part in the cause on behalf of the government, stating briefly the reasons.

THE COURT said there could be no objection at all. . . .

Counsel for the Commonwealth — Hon. *Perez Morton*, Attorney-General; Hon. *David Dana*, Solicitor-General; Hon. *Daniel Webster*.

Joseph J. Knapp, jr. and George Crowninshield were then re-arraigned. . . .

SOLOMON NELSON, Esq. was appointed by the Court, Foreman of the Jury.

The Clerk then read the Indictment.

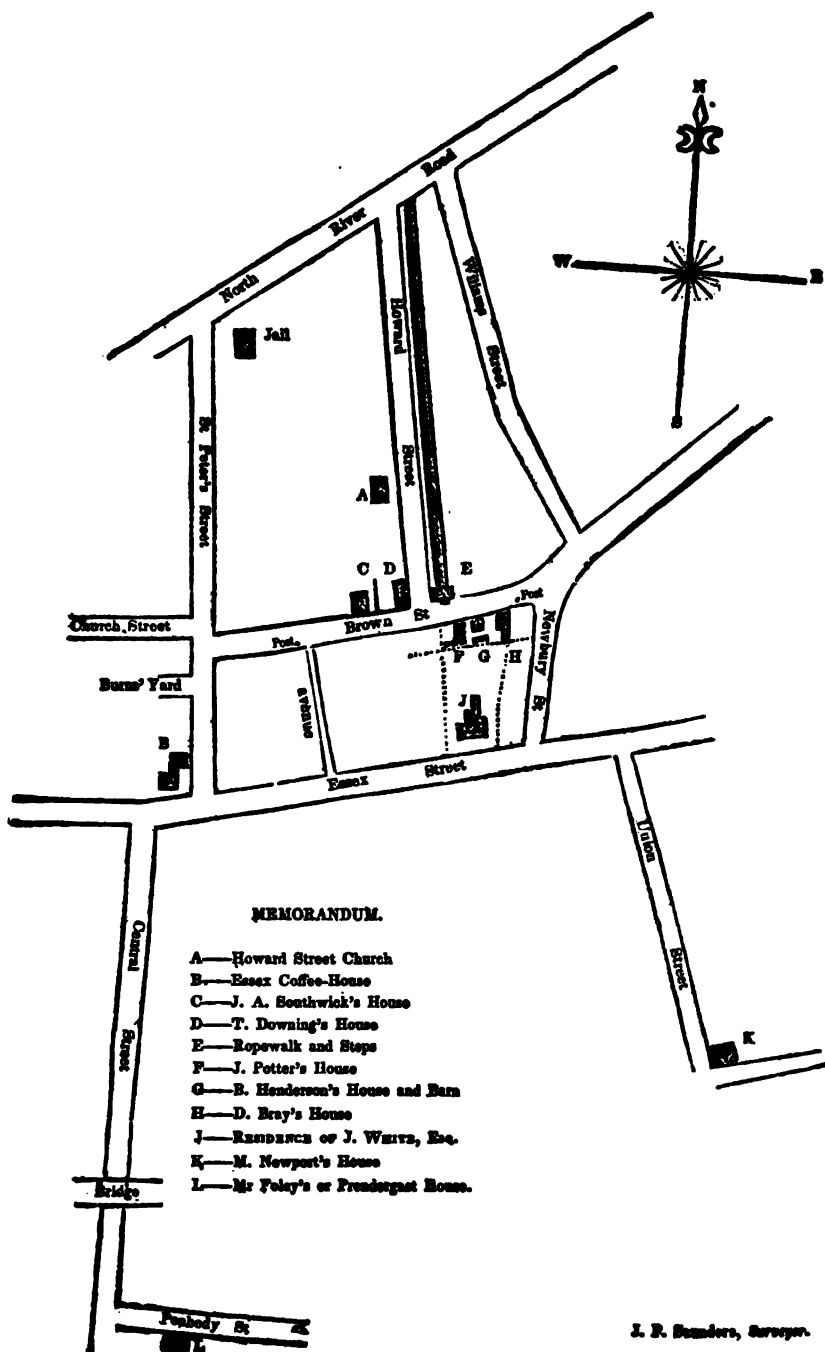
The Attorney-General then addressed the Jury, as follows: *Gentlemen of the Jury,*

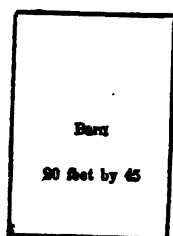
The charge against the prisoner at the Bar, is for the murder of the late Mr. Joseph White. . . .

It is not to be wondered at that such a crime should have produced an uncommon excitement among the citizens of the place of its atrocity, for who of them could have felt himself safe in retiring to his rest, unless the authors of this abominable murder were detected and punished? And it affords me satisfaction to say, that much credit is due to the Committee of Vigilance, chosen on the occasion, for their unwearied exertions to obtain that end. . . .

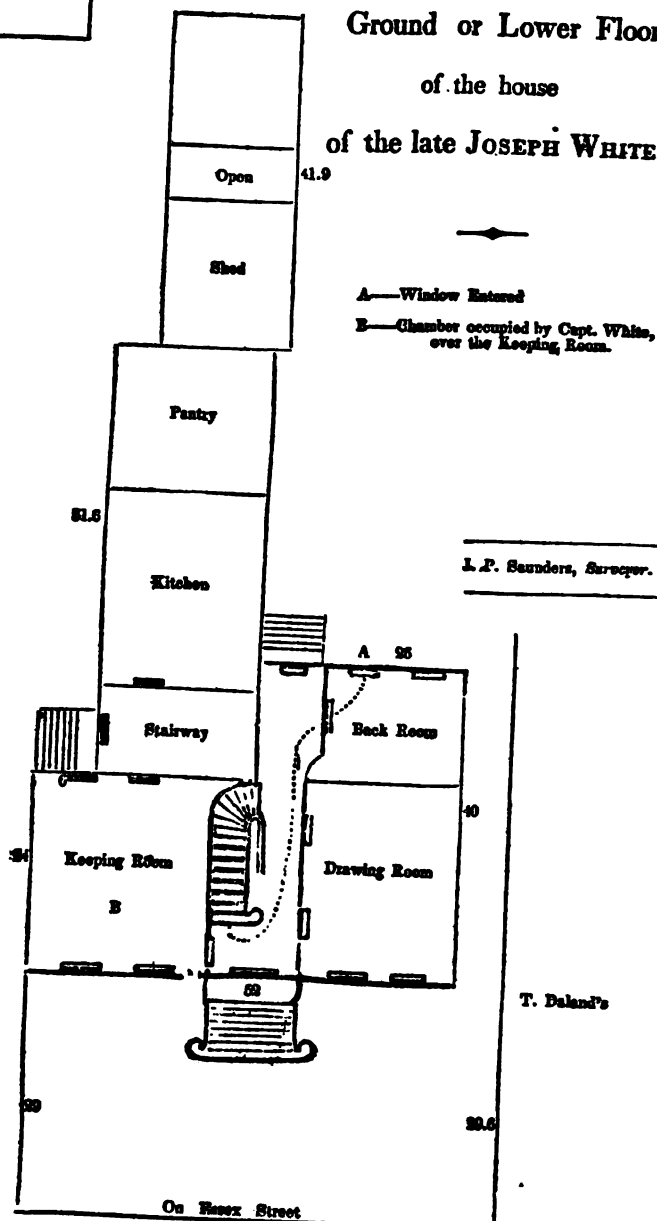
The perpetrators of this atrocious murder remained, for a long time,

<sup>1</sup> [For the loan of the Dutton & Wentworth pamphlet, the Compiler is indebted to the courtesy of the Social Law Library of Boston.]





Ground or Lower Floor  
of the house  
of the late JOSEPH WHITE.



L. P. Saunders, Surveyor.

T. Daland's

veiled in darkness and mystery, notwithstanding the efforts to detect them. The circumstances under which it appeared to have been committed were such as naturally created suspicions against the inmates of the family; for it was found that nothing had been taken away, that no actual violence had been committed in entering the house, that the iron bar, with which the window where the assassin entered was usually fastened, was taken down and carefully placed against the side of the window. . . .

The first suspicion fell upon the son of Mrs. Beckford, who was the niece and housekeeper of the deceased; but on inquiry it was found that he could have no concern in it, not having been in a situation to render it possible.

The breath of scandal, spread, no doubt, as since appears to have been his intention, by the prime instigator of the murder, to cover his own atrocity, imputed this deed of death to the favorite nephew and principal heir of the deceased, Mr. White; but the filial and parental-like affection which was known to subsist between this uncle and nephew . . . soon dissipated this ephemeral slander, leaving, however, on this honorable mind an embittered regret, that any one for a moment, could suppose him capable of so dark and horrid a crime. . . .

But not a conjecture was whispered, that I ever heard, against the real authors of the murder, until a letter was handed to the Committee, under the signature of one GRANT, but really written by Palmer, whom you will have as a witness upon the stand, dated at Belfast, May 12th, postmarked May 13th, directed to J. J. Knapp, not having the addition of junior to it; and, by that means, it was handed to the Committee by the father, for whom it was not intended. We are not now about to give any account of the contents of this letter, but only to say, that in consequence of it, and by some ad-

dress of management by the Committee, *Palmer* was arrested at Belfast, as having some concern in the murder, or as having knowledge of the persons who were the perpetrators, and the two Knapps were arrested, charged with being deeply implicated in the fact. . . .

After the two Knapps were arrested, at the request of several respectable citizens of Salem, I authorized in writing the Rev. Mr. Colman to receive the free and voluntary disclosures of any one of the individuals charged, without naming any one; and giving him authority to say that on condition of his disclosing the whole truth and nothing but the truth respecting the murder, I would call him as a witness on the trial, and that being a witness, he would have the implied pledge of the Government, not to be prosecuted for that offense. In consequence of this authority, Mr. Colman received the voluntary disclosure of J. J. Knapp, jr., in writing: accordingly, to redeem the pledge on the part of the Government, I have called him before the Grand Jury, at this term, as a witness, to give evidence as he has disclosed: but, by the advice of his Counsel, he refused to testify there, saying he was not bound to criminate himself. . . .

It is, however, altogether immaterial, whether the prisoner at the Bar, actually gave the mortal blows, provided he was present, aiding and abetting the person, who inflicted them. He is charged both ways. . . . After proving the murder, I shall move that J. J. Knapp, jr., be brought into Court as a witness. . . .

*Benjamin White* was then sworn, and testified: He was a servant of Capt. White. On Wednesday morning, 7th of April, about 6 o'clock I came down into the kitchen, and on opening the shutters of the eastern window, saw the back window of the northeastern room open, and a plank put up to the

window. I went into the front room, but saw no appearance of any one having been there. I then went to Miss Kimball's (the maidservant's) room, and told her, and then went into Mr. White's chamber at the back door, and saw that his door, opening into the front entry, was open, and that he was murdered. I then went down, and told Miss Kimball that Mr. White was gone. His face, when I first saw him, was very pale—the bedclothes were turned down. I think I saw some blood upon the side of the bed, or on his flannel. I then went to Mr. Mansfield's door, who lived opposite, and knocked—then to Mr. Deland's, then to Dr. Johnson's, and then to Mr. Stephen White's. . . .

On the afternoon before the murder, I was at the farm, in Beverly, with Mr. White—we were there several hours; came home a little before night, about 5 o'clock. The window which I found open, was up 21 or 22 inches—the shutter, which opened very hard, was open some way, and it was sometimes left open two or three days together—the window was fastened by a screw, and the shutter by a bar. I found this bar standing by the right side of the window. Mrs. Beckford is a niece of Capt. White, and lived with him. She is a middle-aged lady. Miss Kimball, a domestic, and myself, were all who lived in the house with Mr. White—his chamber was over the southwest parlor (the keeping room)—the house faces south, on Essex street, is three stories high—Mr. White's chamber has two doors, one opening from the end entry, and the other from the front entry—it has also four windows, two southern, one western, and one northern, looking into the yard.

Mr. Webster then called *J. P. Saunders, Esq.*, the Surveyor, who swore that the plans of the house and premises were correct. Mr. Webster then explained these to the Jury.

(Witness continued.)—I was at

the kitchen window when I saw the back parlor window up—that room was very little used. The rooms commonly used were the S. W. parlor—Mr. W.'s chamber over that—the maid's over Mr. W.'s. Mrs. Beckford's chamber over the kitchen, and mine over Mrs. B.'s. The chambers on the eastern side were unoccupied, except when strangers were at the house. Mrs. B. was at Wenham on the night of the murder—she went away about 12 o'clock that day. The window which was opened, and at which the plank was put, was the one nearest the back door. Mr. W. went to bed that night rather later than usual, about 20 minutes before 10—his usual hour was about 9. He was 82 years old and in some measure deaf—the left ear was deafer than the right. . . .

The head of his bed was against the eastern wall of the chamber, near the door which opened into the front entry, so that any one entering that door would come behind Mr. W. if he was lying upon his right side. Mrs. Beckford's furniture was in the back parlor, which was entered. In Capt. W.'s chamber there are shutters to all, and blinds to the front and western windows—I did not notice the state of the windows that morning, but the blinds were open and the room was light enough to see when I entered. I knew that Mrs. B. was going to Wenham, for she had spoken of it two or three days before. I went to bed the night of the murder immediately after Capt. White went. It was about a quarter before 10 o'clock. I went without a light. I left Miss Kimball raking up the fire, and as I went up I looked into the keeping parlor at the clock. There is an avenue and two doors on the west end of the house, and to get at the opened window, one must pass along that end, through the avenue, through a garden gate, round the buildings, and up the garden to it. There are no blinds



to my chamber — there is a shutter at my east window, but none at the west.

*Cross-examination.* — Mr. White went from the kitchen to his sitting room, and through his room to bed. After he had retired I knew what o'clock it was, because I looked at the clock. No one called at the house on the evening previous to the murder — do not know that Mr. W. sat up late expecting any one. The street door was usually kept fastened all the evening, except the latter part of it, for when Mr. W. came in he used to leave it unfastened till he went to bed. The relatives, Mr. S. White's family and Mrs. Beckford's friends, passed in and out without knocking — I saw Joseph Knapp there once or twice within two months before the murder. Frank Knapp very seldom came there. Mr. W. never kept his lamp burning all night. It was not Capt. White's habit to keep a light or fire in his room during the night — there were shutters to all his windows, and to the north window shutter there is a bar, and this is the only one which has a bar. The weather, when I went to bed, was overcast. The shovel and tongs had been removed from the chamber and there was no poker there — there was one in the room below. There is nothing between my chamber and Capt. W.'s but an entry and staircase — I heard no noise during the night — I don't recollect telling any person that some gentlemen were there or that any one was expected on the day of the murder — I don't know who had been there during the day — did not hear or see Mr. W. after he went upstairs — Miss Kimball had nearly raked up the fire when I went up — I did not hear her go to bed nor see a light in her room when I went up — I saw Frank Knapp a day or two after the murder — he sat up with the body and was in the house some time every day — I sat up with him one night

and don't remember, who else ever sat up with him — he assisted at the funeral. There was nothing missing from the house after the murder, and there was money in Mr. W.'s chamber, about a week before the murder. I found the window which was entered fastened — knew that it was so by putting my finger over and feeling the screw — it had not been unbarred, to my knowledge, before the murder.

*Re-examined by Government.* — I had seen Jos. Knapp there within two or three weeks previous to the murder — he usually came when Mr. White was not at home, about four in the afternoon — he married a daughter of Mrs. Beckford — he had free access to all the rooms when the family were out — we usually kept fastened both front and back doors — Joseph came into both. . . .

*Lydia Kimball* (a domestic) was then sworn. I did not hear any noise during the night — the man came to my door and told me that some one had been into the house, for that the back window was up; I went down into the front room to see if anything had been stolen; told him to go up and tell Mr. White — he came down and told me to be calm — that Mr. W. had gone to the eternal world — he then went to call the neighbors — I did not see Mr. W. till I was called before the Jury of Inquest. Mrs. Beckford left the house on Tuesday, the day previous to the murder, about half past 11 o'clock — she told me, a day or two before, that she was going to Wenham — Mrs. Knapp came down for her. I went to bed that night rather before 10. There are blinds and shutters to my room; the blind on the west side was shut, but all the others, and all the shutters, were open. — In Capt. W.'s room all the shutters were open except one half of the one nearest his bed, which was a front window — that day when I made the bed all the blinds were open, except the

western ones, and I have not seen them since. It was Mr. W.'s usual habit to have all the shutters open but the half one I have mentioned. He usually went to bed about 9.30. I lived with him more than sixteen years. I could generally tell when he was awake, if I myself was so, by a kind of cough or *hem* which he had when awake, which was usually in the latter part of the night—I don't recollect hearing him ever early in the night—I had nothing to do with the room which was entered—it was Mrs. B.'s, and not much used—the chambers over that side of the house were unoccupied. Capt. W. was deaf in his left ear.

*Cross-examined.*—I think Capt. White went to bed a little before ten, on the night of the murder—the northern window of his chamber was shut and barred in the winter and opened in the spring—I can't say exactly what time it was unbarred this spring—my room is over Mr. White's and has the same number of doors and windows—no one called at the house that day after one o'clock—the gentleman who called then did not say he should call again. Capt. W. did not lock his door usually, but there was a key in it—I generally heard him shut it—I did that night—he usually put his candle on the table between the windows.

Dr. Samuel Johnson called and sworn.

I was called about 6 o'clock, to Capt. White's—was told that he was murdered. I went, and entered with Mr. Stephen White. I went to Capt. White's chamber, and found him lying on his right side, or nearly so, and nearly diagonally to the bed. There was a mark of considerable violence on his left temple. I noticed that the bedclothes were laid slantwise, square across the body, and diagonally to the bed. He lay with his feet towards the left lower post of the bed, and his head towards

the right head post. His head was towards the closet, and on the right side, on the pillow; on throwing off the bedclothes, I saw that the back of his left hand was under his left hip, and there was considerable blood on the bed; he also had bled a little from the nose. Nothing further was then done. I told Mr. Stephen White that an inquest should be called. In presence of the Coroner's Jury, the shirt was stripped off, and the body exposed. We found five stabs in the region of the heart, three in front of the left pap, and five others, still farther back, as though the arm had been lifted up, and the instrument struck underneath it. I examined a number of the stabs with a probe, and found that it would penetrate from one to three inches. It was my belief at the time, that either the wound on the head, or the stabs, would have caused death. The wound on the forehead was not very perceptible, except to touch. Upon feeling I could perceive that the bone was fractured. I was convinced at the time, that it was sufficient to cause death. Afterwards, a more minute examination was made; the scalp was removed, and we found a fracture of an oval shape, in the temple, three and three fourth inches long, and two and one half inches broad. A portion of the temple was broken in, some fractures extending upwards, towards the back of the head, and another down, towards the face. Upon opening the chest, it was found that two of the wounds had penetrated the walls of the heart, without reaching the cavity—I have no doubt that either would have produced death. The instrument which gave the blow on the head was probably some smooth instrument, like a loaded cane, that would give a heavy blow, without breaking the skin, and the instrument used in giving the wounds in the side was probably a dirk. On the second examination, we found thirteen stabs, six in front.

and seven farther back, about three inches from the others, near to the spine. We found three of the ribs fractured, most probably done by the hilt of the dirk. There was no appearance of a struggle, it appeared a case of instant death. I was desired by Mr. Stephen White, to look on and see the iron chest and trunk examined, and also the footprint and window. The window was open. I saw two footprints, both directed towards the wall of the house. There was a plank set up, diagonally, the bottom of it about two feet from the sill. There were no marks of wet feet, but a little dampness on the floor, where it had rained in.

*Cross-examined.* — The inquest was holden about an hour after I went to the house. The second examination took place thirty-six hours after death. The stabs were grouped; one group of five was within the compass of three inches. On the first examination, the wound on the head was not very perceptible, except to the touch. On the second examination, it was more prominent; there then appeared to be more air in the *cellular membrane*.

The footprints, I believed at the time, were made by the person when he put up the plank; they were not near together, and were those of a right and left foot. There was no appearance of more than one weapon having been used in giving the stabs. The front wounds gaped more than the others, and were three fourths of an inch wide. The first examination (that before the Jury of Inquest was held) was hasty. The head was then lying on its right side, partially, but not fully, and a little back. I suppose the arm was drawn back when the stabs were given, because it covered them when I first saw him. The body was nearly, but not quite, cold, and there was no pulse. The human body retains its heat for some time, if covered up. Mr. White was an old man, but he was rather fleshy.

The blow on the head, by checking the circulation, probably prevented the loss of blood. From all the circumstances, my first opinion was, that it had been done three or four hours. There was, however, nothing to prevent its having been done six or eight hours. My first impression was that he had lost more blood than we afterwards found he had.

The *Attorney-General* then called Joseph J. Knapp, jr., as a witness, and inquired of him, if he was willing to be sworn. He answered in the negative, and the *Attorney-General* was proceeding to inquire the reason, which was objected to by Mr. Dexter.

THE COURT said he was not obliged to state his reasons for refusing. It is only necessary that this should be understood, so that there may be no difficulty hereafter. The Government say they have pledged themselves not to proceed against him if he would testify; he does not testify, and now that pledge is recalled. . . .

*Benjamin Leighton* sworn.

I have lived with Mr. Davis, at Wenham, at the house where Mrs. Beckford and Joseph J. Knapp jr.'s family live, since the 6th of October last. Knapp's family came there to live a few days after I went. About a week before Capt. White was murdered, I went down to the lower end of the avenue, got over the wall, and sat down by the side of the gate, that is across the avenue. I sat a few minutes, and then heard men talking the other side of the wall. I looked round through the slats of the gate, and saw the two Knapps coming down the avenue. When they came near the gate, Joseph said, "When did you see Dick?" Frank said, "I saw him this morning." Joseph said, "When is he going to kill the old man?" Frank answered, "I don't know." Joseph said, "If he does not kill him soon, I will not pay him;" — then they turned back, and I did not

hear anything more. This was about two o'clock in the afternoon; I had been to dinner. It was the Friday before Capt. White was murdered, I think; it was within the week previous to the murder. They did not know that I was there; I was waiting for Mr. Davis, to go to work. I shall be eighteen years old the 30th of next December. I am under no mistake about the conversation; I am sure of the persons. Jos. J. Knapp, jr., has lived in the house where I lived. John Francis Knapp came to the house frequently. Frank came up to Wenham one evening, after the murder, in a chaise, about nine o'clock; this was about a fortnight or three weeks after the murder. I believe Mrs. Beckford was living there then. There was a gentleman in the chaise at the door; I did not know him, but he was a slim man, not so thick as Frank Knapp. I went to the door when the chaise drove up — Frank got out and went in, and asked if his brother Joseph was at home. Joseph Beckford said he was. Joseph Knapp met Frank at the inner door, and they went into the room together, and shut the door. They were together, I should think, an hour; nobody was in the room with them. Frank Knapp knocked; I went to see who was at the door. The other person sat in the chaise all the time; they did not give the horse anything; they both drove away together, down the avenue; I could not tell which way they went.

*Cross-examined.*

The house is about fifty rods from the road; I heard the conversation near the gate to the pasture, at the lower end of the avenue. I had just come from dinner; Mr. Davis was in the house at the time. Joseph and Frank were standing by the gate, near the house, as I passed down the avenue — when I got down the avenue, they came down. I was sitting under the wall, to wait for Mr. Davis, and to take a little nooning, I mean a little

rest. I passed them and went down the avenue, went through the gate, and hasped it, and sat down behind the wall. I did not say anything to Mr. Davis about the conversation I had heard. I have been called upon to tell what I knew about it, by Mr. Waters and another gentleman I did not know; they sent for me to come to Mr. Waters's office; I told them I could not recollect, at that time, that I had ever told anything about it. I did not tell them I knew nothing about it. I was in his office in the forenoon and afternoon, and stayed at the Lafayette Coffeehouse at noon.

The gate, where I left the Knapps standing, is in front of the house, and opens into the avenue. I went down the avenue towards the pastures, not towards the road, went out of the avenue over the wall, by the gate. This gate could not be seen from the place where the Knapps stood. The house makes one side of the avenue, which is narrower at that place. The gate, at which the Knapps were standing, is about forty feet from the house. The gate, where I got over, is fifty rods from the house. They could not see me when I got over the wall; the house hides the place, and stands out into the avenue, or the fence retreats. I know they could not see me get over the wall, because I have tried since. I tried, because if they did see me, and knew I heard them, I was afraid they would kill me.

I first saw Mr. Waters a week ago last Thursday: I was summoned by a man from Lynn, and carried to Mr. Waters's office. They asked me if I recollected telling Mr. Starrett anything. I told them I did not. I believe I did not tell them I did not know anything about it. I went to Mr. Waters's office about 11 o'clock, and stayed till 2. Mr. Starrett was there, and they talked with him. They asked me if I knew anything about Frank

Knapp. I told them I did not. I was asked if Richard Crowninshield had been at the farm, and I said I did not know him. They asked me if I had told Starrett anything about it, and I told them I did not recollect telling him anything. I did not then remember that I had told Starrett anything about it, and I told them so. They bothered and frightened me talking to me, and I could not remember. Mr. Starrett told Mr. Waters that I had told him something, but I could not recollect it, and told them so. They said Mr. Starrett and Dr. Kilham were in the shop when I said so. I told Mr. Waters I did not recollect it, but if he would come up the next day, I would tell him all that I knew. I then remembered what I have testified, but did not calculate to tell anything about it. I went to Mr. Waters's office again in the afternoon, about 5 o'clock. From 2 to 5 I was at the Tavern. Mr. Starrett and Mr. Waters were at the office in the afternoon. Mr. Starrett asked me if I could not recollect what I said in his shop. I told him I could not. They said Dr. Kilham and Mr. Starrett were in the shop, and heard what I said. They did not question me any further. I stayed there till sun about an hour high; I was there an hour or more. They did not tell me anything would be done to me, if I did not tell what I knew, but said I must come to Court.

I told Starrett, because I spoke before I thought. I saw Mr. Waters again last Saturday, at Lummus's tavern, in Wenham. He came there with Mr. Choate and Mr. Treadwell. They wanted me to tell what I knew. I told them I had been down to Salem, but could not recollect then; I was in a strange place, and frightened. They talked to me so, that I could not recollect. Then I recollected what I had told Starrett, and told them the same story I have told to-day. I believe they asked me but once. I told them at once

what I knew. They did not tell me they had a warrant against me. Mr. Davis afterwards told me they would carry me off, if I did not tell all I knew; they did not threaten me.

The day I heard the conversation between the Knapps, I was going to splitting rocks. They were on one side of the wall and I on the other. I looked round beyond the wall, and through the slats of the gate. I did not wish they should not see me. They were halfway between the house and the gate when I heard their voices, and looked round to see who they were. They walked down to within three or four feet of the wall. I heard nothing else, that I could understand. They stood by the wall two or three minutes, and then went back. It was after they stopped that I heard what I have testified. I did not tell the conversation to anybody before the murder. I could not think, till after the murder, what it was about. I stayed by the wall till the Knapps had passed out of sight. Mr. Davis came down after I had gone to work.

On the evening when Frank came to Wenham, with another person, it was dark, and the chaise top was up. I could see that the man, who sat in the chaise, was a slim man.

*Reëxamined.* — On the day after the murder, I went into Starrett's shop, and he said, "What is the news about the murder?" I said, they think I don't know anything about it, but I know a little more than they think I do. I spoke before I thought. I was unwilling to say anything more because if they got hold of this, I was afraid they would kill me. Frank used to be round me, with his dirk, and pricking me with it — he did this more than once, and other persons saw it. Thomas Hart saw it. The first time I told the conversation to anybody, it was to Hart, and it was not long ago. I next told it to Mr. Waters. I told Starrett I overheard something, but did not tell him what.

This was when going home from Salem; before this, I had told Hart, down in the field. No threat has been used to make me testify. I was frightened when I was carried to Mr. Waters's office, for I was taken suddenly, and from the field — they carried me by the Court-house, but the Grand Jury had been dismissed. The officer read the summons to me when he took me.

*Cross-examined again.* — The first time I saw Francis Knapp have a dirk was after he was attacked at Wenham Pond, after the murder. Starrett did not ask me what I knew, did not ask me what I had overheard. I am afraid now, if the Knapps get clear, they will kill me. I heard there was a reward offered. I told Mr. Starrett before I heard of the reward, but did not tell the conversation till afterwards. I did not know what the reward was.

*Rev. Henry Colman, sworn.*

I had no personal acquaintance with the prisoner until the 28th of May, when he was examined before Justice Savage. On the afternoon of that day, I went to his cell with his brother, Phippen Knapp, at his (Phippen's) request. When we went in, Phippen said, "Well, Frank, Joseph has determined to make a confession, and we want your consent." I am not able to give the reply of the prisoner, in his precise words, but the effect was, that he thought it hard, or not fair, that Joseph should have the advantage of making a confession, since the thing was done for his benefit, or advantage. I now give his words, as nearly as I can recollect them. He said, "I told Joseph, when he proposed it, that it was a silly business, and would only get us into difficulty." Phippen, as I supposed, to reconcile Frank to Joseph's confession, told him, that if Joseph was convicted, there would be no chance for him (that is for Joseph), but if he (Frank) was convicted, he might have some chance for pro-

curing a pardon. He then appealed to me, and asked me if I did not think so? I told him "I did not know, I was unwilling to hold out any improper encouragement."

*Dexter.* — We object to any continuation of this confession. It is now in evidence, that Phippen, with a view to reconcile Frank to Joseph's confession, told him, that if he were convicted, he might have a chance of pardon. This was a direct inducement to a confession.

THE COURT said they would hear the Counsel for the Government....

PUTNAM, J. — . . . It is the opinion of the Court that anything said by the prisoner, after what Phippen said to him, is not admissible.

*Mr. Colman resumes.*

It was just at the close of the interview, that Phippen appealed to me. He had told Frank, more than once, in the course of the conversation, that there might be a hope of pardon.

THE COURT direct the witness to state all that was said in relation to encouragement.

Early in the interview, Phippen said that Joseph had decided to make a confession, etc. (as above), and afterwards repeated this, and appealed to me. Frank then asked me to use my influence, or interest, for him. I told him that I could promise nothing, but that I thought his youth would be in his favor.

I have stated all the encouragement that was given. There was not the least encouragement given to him, either by me or in my hearing, to relate facts within his own knowledge. Soon after this interview, I found the club under the north steps of the church, in Howard Street. I went there on the 20th of May, about 1 o'clock, with Dr. Barstow and Mr. Fettyplace. The steps are of wood — under the lower one there is a Rathole — in it I found this club.

*Webster.* — Who told you it was there?

*Dexter.* — I object to this question.

The finding of the club is all that can be given in evidence. . . .

*Court.* — We are very clear that it is competent for the Government to prove that this club was found in consequence of information from the prisoner.

(Mr. Colman resumes.) — Frank Knapp gave me precise directions where to find the club, and I found it as nearly as possible, in the place pointed out by him.

*John C. R. Palmer* called. . . .

*Palmer.* — I have seen the prisoner at Crowninshield's, in Danvers. The first time, he came on the afternoon of the 2d of April, about 2 o'clock, with a young man named Allen — they came on two white horses. I saw the prisoner in company with George Crowninshield. Did not see them in the house; I saw them from the window of the chamber; they walked away together. I did not see them again till after 4. Richard was with Allen. All four returned about 4. Allen and Frank then went away on horseback. George and Richard immediately came into the chamber where I was.

*Dexter* objects to asking what agreement the Crowninshields said they had made with Frank Knapp.

*Court.* — The Government intend to prove a conspiracy — they may begin at either end.

There was then a conversation between us about the proposed murder of Captain White — both George and Richard spoke of it. — George, in the presence of Richard, proposed to me to take a part in this murder. The object of the murder was something that Frank Knapp had told them. The motive held out to me was one third of the \$1000 they were to receive from Joseph Knapp. Richard said it would be easy to meet him that night, and overset Mr. White's carriage, for George said he had gone out to his farm. Joseph Knapp's object in the murder was to have a Will destroyed. George said to me that

I was poor, and in want, and had no funds, and that this would be a good time to supply that want. George said that the housekeeper *would be* away at the time of the murder. Frank came again on that day, about 7 o'clock in the evening, in a chaise, and alone. He stayed then over half an hour. Richard went away with him in the same chaise. I did not see Frank afterwards, till this time, but Richard came home about 12 o'clock that night. I do not know by what conveyance. I left Danvers the next day, which was Saturday. The Will was to be destroyed by Joseph Knapp, who could get the keys from the housekeeper, and have access to the trunk in which it was kept. I understood that the Will was to be destroyed at the time of the murder. This Will Joseph wished to have destroyed, because it gave all Mr. White's estate to a Mr. White, then living at the Tremont House, in Boston. I next saw the Crowninshields at their house, in Danvers, on the night of 9th of April. When Richard went away with Frank in the chaise, as above stated, he said he was going to the Lynn Mineral Spring Hotel. On the 9th of April, I went about 12 o'clock to the Crowninshields' house, and spoke under the chamber window to George, who opened it, and asked who was there. I told him, and asked him to come down. He came down, and asked if any one was with me. I told him no. He then let me in, and asked me if I had heard the news in Salem.

I stayed there a short time, and then went that night to Lynnfield Hotel, where I put up. Next day I went to Providence, and stayed two days. On the evening of the 27th I saw the Crowninshields again at their house, about 10 o'clock. I stayed till 29th. Richard gave me four 5-franc pieces; I asked him to let me have it, and promised to return it. I then went to Lowell, then to Boston, then to Roxbury,

then to Belfast by water, with Capt. John Boyle. While at Belfast, I wrote a letter to Joseph J. Knapp.

"BELFAST, May 12, 1830.

"DEAR SIR—I have taken the pen at this time to address an utter stranger, and strange as it may seem to you, it is for the purpose of requesting the loan of three hundred and fifty dollars, for which I can give you no security but my word, and in this case consider this to be sufficient. My call for money at this time is pressing or I would not trouble you; but with that sum, I have the prospect of turning it to so much advantage, as to be able to refund it with interest in the course of six months. At all events I think that it will be for your interest to comply with my request, and that immediately—that is, not to put off any longer than you receive this. Then set down and inclose me the money with as much dispatch as possible, for your own interest. This, sir, is my advice, and if you do not comply with it, the short period between now and November will convince you that you have denied a request, the granting of which will never injure you, the refusal of which will ruin you. Are you surprised at this assertion—rest assured that I make it, reserving to myself the reasons and a series of facts, which are founded on such a bottom as will bid defiance to property or quality. It is useless for me to enter into a discussion of facts which must inevitably harrow up your soul—no—I will merely tell you that I am acquainted with your brother Franklin, and also the business that he was transacting for you on the 2d of April last; and that I think that you was very extravagant in giving one thousand dollars to the person that would execute the business for you—but you know best about that, you see that such things will leak out. To conclude, sir, I will inform you, that there is a gentleman of my

acquaintance in Salem, that will observe that you do not leave town before the 1st of June, giving you sufficient time between now and then to comply with my request; and if I do not receive a line from you, together with the above sum, before the 22d of this month, I shall wait upon you with an assistant. I have said enough to convince you of my knowledge, and merely inform you that you can, when you answer, be as brief as possible. Direct yours to CHARLES GRANT, jun., of Prospect, Maine."

*Dexter.*—I object to reading the letter.

*PUTNAM, J.*—Its bearing upon the prisoner should appear.

*Webster.*—It was received by his father, and the prisoner, to divert suspicion, caused two other letters to be written.

*Court.*—Let these first be proved.

*Wm. H. Allen* sworn.

I put these letters into the Salem Post Office, on Sunday afternoon, May 16th, between 5 and 6, at the request of J. J. Knapp, jr. He gave them to me, and said that his brother Phippen and his father came up to Wenham the day before, and brought an anonymous letter from a fellow down East, and which contained a devilish lot of trash, such as "I know your plans, and your brother's, and will expose you if you don't send me money." He said that they had a good laugh upon it, that he requested his father to give it to the Committee of Vigilance. "What I want to see you now for, is to have you put these letters into the Post Office, in order to nip this silly affair in the bud." He said several other things, but I don't remember all. He said that his mother Beckford was getting old.

*Webster* reads the letters.

MAY 13, 1830.

"Gentlemen of the Committee of Vigilance:

"Hearing that you have taken up four young men on suspicion of being concerned in the murder of Mr.



White I think it time to inform you that Steven White came to me one night and told me if I would *remove* the old gentleman, he would give me \$5000; he said he was afraid he would alter his will if he lived any longer. I told him I would do it, but I was afeared to go into the house, so he said he'd go with me, that he would try to get into the house in the evening and open the window, would then go home and go to bed and meet me again about 11. I found him and we both went into his chamber. I struck him on the head with a heavy piece of lead and then stabbed him with a dirk, he made the finishing strokes with another. He promised to send me the money next evening, and has not sent it yet, which is the reason that I mention this.

Yours &c.

GRANT.

[This letter was directed on the outside to the "Hon. Gideon Bars-tow, Salem," and put into the Post Office, on Sunday evening, May 16, 1830.]

LYNN, MAY 12, 1830.

Mr. White will send the \$5000 or a part of it before to-morrow night, or suffer the painful consequences.

N. CLAXTON 4th.

[This letter was directed on the outside to the "Hon. Stephen White, Salem, Mass.," and put into the Post Office in Salem, on Sunday evening, May 16th.]

(Allen resumes).—I went to Danvers, with Frank, on the 2d of April, on horseback — on white horses.

Palmer recalled and cross-examined.

On the night of the murder I was at Babb's, the Halfway House in Lynn. I was there from 7 in the evening, till 9 in the morning, and then went to Lynnfield, to meet John Dearborn, of Chester, New Hampshire. We had appointed a meeting there. I expected to go to New York with him to go into business — I had no particular business in view. I first came to Salem three years ago, and from there went to Danvers to

see the C.'s. I had an invitation from George at New York. I came back to Salem last March. I can't tell every place I have lived in between my visits to Salem — at New York part of the time and at home in Belfast. I lived at Thomastown two years. I was there occupied in *cutting stone for the State*. I don't know who employed me in behalf of the State. While in Salem, at the Lafayette Coffeehouse, I bore the name of Carr — *preferred that name at the time* — stayed at the Coffeehouse two weeks. — While at Danvers I lived with the C.'s in their room, apart from the rest of the family. I came from jail to-day. I have been there since June last, and have been visited by Mr. Colman, Mr. Stephen White, my father, etc. I was brought up from Belfast in irons. I made the disclosure from my own wish, and was not compelled to do it. I knew the flannels were stolen in Danvers — saw it in the paper — (he declined answering any more about the flannels). I told Mr. Waters that I did not want *Counsel*. While at Babb's I bore the name of George Crowninshield. I have been told that I should not get the reward and have no expectation of it — perhaps I expected part of the reward when I wrote the letter which I wrote to see if Joseph Knapp was connected with the murder. I was told by the C.'s that it was only a joke when they proposed it, and did not think them serious until after the murder.

*Reexamined by Government.* — I have never complained of the officers of Government, and have refused a pardon from them in this case.

Wm. H. Allen recalled.

Frank proposed the visit to the C.'s. We first met Dick — he invited us in, and in a few minutes George came in. Dick went to show me the factory and we separated from George and Frank at the house. After going through the factory George and Frank rejoined us, and after talking a few minutes

Frank and I left them and came home. We visited them also once last winter.

One evening, about three weeks after the murder, Frank and I met Dick in Bath Street. I thought they might have something private and was walking away, when F. said "Stop a minute and I'll join you."

*Cross-examined.* — Dick and I were in the factory fifteen or twenty minutes. Frank did not request to be left alone with George. We were separated one half or three quarters of an hour.

*Re-examined.* — Frank's usual dress was a dark frock coat, and a glazed cap with a large glazed star on the top, and a camblet cloak.

*Cross-examined.* — Glazed caps and camblet cloaks were a common dress. I wore such a one. Wm. Peirce also had a glazed cap, and a Scotch-plaid cloak.

*William Osborne sworn.*

I keep a livery stable in Salem. Francis Knapp has been accustomed to hire horses of me. The charges on my book against him from April 1, are as follow:

April 1. Horse and Gig to Lynn Mineral Spring. April 2. Saddle horse to Dustin's, in Danvers. William H. Allen had a saddle horse same afternoon. Francis Knapp had a chaise same day, in the evening. I find the charge of horse and gig to Spring altered, the word Spring erased, and ride substituted, I think the alteration was made by Francis Knapp, it is in his handwriting. April 3. Saddle horse to Wheeler's, which is about half a mile from Dustin's, and the same distance from Crowninshield's. Do not recollect the time of day. The last charge on that day is a saddle horse to Francis Knapp, to Wheeler's. April 5. Saddle horse to Wenham. April 6. Horse and Gig to —. This is in my own handwriting. Do not know where he went. No price is put down. Have never ascertained where he went. April 19. Horse and Gig to Wenham.

April 21. Horse and Gig to Wenham, and over that I find the name of Joseph J. Knapp. April 23. Horse and Gig to Wenham. April 24. Horse and Gig to Wenham. This is the last charge on the book that day — there are eleven previous charges. April 25. One half Horse and Gig. April 27. Horse and Gig to Wenham.

*Cross-examined.* — I make charges when horses are given out. Don't know when Francis Knapp came from sea. He rides considerable. Don't know where they go. I leave a blank till I ascertain. Always trusted him. March 30. Horse and Gig to Wenham. March 29. Half of the charge of Horse and Gig to Spring. March 28. Quarter of charge of Carryall. He hired horses and chaises frequently. Not often hired horses in the evening, but did afternoons. Can't tell much about the time of day by my method of charging. The father of the prisoner failed on the 6th of April. No charge to prisoner from that time to April 19. There are on my book ten charges before his on April 5. I have four white saddle horses, and others used occasionally. I have one horse, called Nip-Cat, of sorrel color, slim, and a smart trotter — rather remarkable.

*Thomas Hart sworn.*

I live with Mrs. Beckford, at Wenham, and am hired to work on the farm. I went there on the 9th of last April, and was hired by Capt. Joseph Knapp. Mrs. Beckford came there to live about the 15th of April, and Frank Knapp about the 28th.

One Saturday evening, about 25th of April, Frank came there. Mr. Davis and Joseph Knapp had been to Salem, and had returned about half an hour. Frank came about 7 o'clock, knocked, and Joseph Beckford went to the door, and asked him how he came there at that time of night. Joseph Knapp went out with him to the chaise, and remained a quarter of an hour. I think I

heard the voice of a third person in the chaise. They then came into the house, and went into a room by themselves, and stayed about ten minutes. The chaise came a little after 7, and stayed a little more than half an hour. Mr. Davis and Benjamin Leighton were there. It was dark, dull, cloudy weather. Frank had on a camblet cloak, and leather cap. Frank went in where Joseph was, and no one went with him. I was in Mr. Davis's kitchen. Joseph, on the Tuesday after this Saturday, gave me some 5-franc pieces to buy meal with. It had been dark half an hour, I should think, when Frank came. Joseph and Frank were pretty near the chaise, while talking together, and near the N. W. corner of the house. I heard three voices, which all came from where the chaise was. They did not move from that place while talking. F. Knapp has worn a dagger, and I have seen him several times prick Benjamin Leighton with it, while out in the field. And one night after we had gone to bed, Frank came up and pricked Ben through the bedclothes. Ben asked him not to, and he said "lay still, you will not feel it after a little time." . . .

*Josiah Dewing* sworn.

I came home from sea last spring, and brought from three to four thousand 5-franc pieces. About five hundred were for Joseph Knapp, jr., and were brought from Point Petre, Guadeloupe, and paid to him. So far as I know, all but his went into the bank, as a deposit. The distribution of them was about the 21st of April last, and I have the receipt of Joseph for his portion.

*Cross-examined.* — I have been a ship master several years. It is nothing unusual to bring home 5-franc pieces. Don't recollect bringing home any lately, on any other occasion.

*Daniel Marston* sworn.

I know George Crowninshield, and in the course of last spring I re-

ceived from him two 5-franc pieces. This was on Saturday, the day before his arrest.

*Cross-examined.* — I keep a victualing cellar. Five-franc pieces are not a common currency. I do not often take them — not so often as I do hard dollars.

*George Smith* sworn.

I attend Mr. Chandler's grocery store. On the evening before the Crowninshields' arrest, I received from some person, and in the presence of George Felton, a 5-franc piece.

*Cross-examined.* — I have frequently received them from other persons.

*George Felton* sworn.

I know George Smith — I went into Mr. Chandler's store with George Crowninshield, when he paid Smith a piece of silver. . . .

*Nehemiah Brown* sworn.

I am the Keeper of the Salem Jail. On the 15th of June, a little before 2 o'clock in the afternoon, I had occasion to go into George and Richard's room, to carry notes. Called at Richard's room, but had no answer. After calling for him a second time, I looked over the top of his door, and saw him hanging at the grate. Called turnkey and went in. He was hanging by two handkerchiefs. Took him down. Called in physicians. They attempted to restore life, but without success. I then sent for a Coroner.

The Attorney-General then read the inquisition on the body of Richard Crowninshield, jr. The verdict of the jury was *felo de se*.

*Mr. Brown cross-examined.* — The Rev. Mr. Colman visited the cells of the two Knapps. Which first do not know — but both on the same day. Richard Crowninshield's Counsel had constant access to him, when they chose. Richard Crowninshield was usually supplied with newspapers.

*Mr. Palfray* called again. — I published a number of the *Essex Register* on twenty-first May, containing the disclosure of Joseph J. Knapp, jr.

*Cross-examined.* — I published an article respecting the finding of the flannels in Danvers. Should think it was three or four days before Richard Crowninshield's death.

*Richard Burnham, sworn.*

On the evening of the murder saw George Crowninshield, with two others, in Essex Street, near Franklin Building, about sixty rods from Capt. White's house — near Newbury Street. They were going towards the eastward. One of the persons with him was Chase. Did not know the other. It was about eight o'clock.

*John McGlue sworn.*

On the night before the murder, saw Richard Crowninshield, jr., standing opposite Capt. White's house. Found him standing there. He was not doing anything. I was going up along, on the south side of Essex Street, and when I came up to the brick house next to Dr. Barstow's, I found him standing near a post, he had his head turned up, so as to look up towards Coffeehouse, or that way, so that I could see side of his face. Think that where he was standing was a little higher up than the house of Capt. W. It was about half past eight in the evening. Crowninshield walked up with me, as far as the Post Office. Asked me, if I was going further. I told him no, and he continued on.

*Cross-examined.* — Lafayette Coffeehouse is west of Capt. White's house, a short distance. Richard Crowninshield, jr., was opposite upper end of the house. He might have been there an hour, for all I know — did not see him till I came up. Do not know whether there was a party of girls opposite. This was Monday night. Richard Crowninshield, jr., was by brick building next to Dr. Barstow's.

*Benjamin S. Newhall sworn.*

I saw George Crowninshield on the evening of the murder, April 6th, passing down Williams Street. It was a little before 10 o'clock.

There was a person with him, whom I did not know. He had on a glazed cap. Do not know particularly other parts of his dress. He was a little shorter than George.

*Cross-examined.* — It was between half past 9 and 10 o'clock.

*Thomas W. Taylor sworn.*

I saw George Crowninshield on the evening of the murder, at from fifteen to twenty minutes after 9, passing by door of my store in Newbury Street which runs down by the Common. A man was with him, whom I did not know. Store in northwest corner of Franklin Building. He was on the east side of Newbury Street. Some person spoke to him at corner of Newbury and Essex streets, and asked him, where he was going. George said, "You know, all the way down town."

*Cross-examined.* — He was going down towards Williams street, from Capt. White's house. When I first saw him, he was in Newbury Street going towards Williams Street. Do not know whether he came up or down Essex Street.

*Joseph Anthony sworn.*

On the evening of murder, I saw George Crowninshield going from Essex Street into Central Street. Two other persons were with him. One was Chase; the other I did not know. George had on a short jacket and fur cap. They were talking, as they passed.

*Benjamin Horton sworn.*

A year ago last spring, I saw Richard and George Crowninshield at Lynn Mineral Spring Hotel. Chase was sitting near Richard Crowninshield. Saw dirk in Richard Crowninshield's bosom. Dick told me it was his nurse child.

Prisoner's Counsel objected to the statement of what Richard Crowninshield said. The Court observed, that they could not see but that it might tend to prove that Richard Crowninshield usually wore a dirk, that instrument being alleged to have been used in the murder, and they therefore thought the evidence admissible.

*The Witness* proceeded. — Richard Crowninshield commonly carried it with him. I examined it, and should think the blade was from *five* to *six* inches long. The handle was bone or ivory. Had a cross hilt about three quarters of an inch long. Called on them about a fortnight after murder, to see if they would say anything about murder. Saw Richard Crowninshield near workshop. He went into the house, when he saw me. Afterwards came out, and we bid each other "Good morning." George came out soon after, and asked, when I came from Portland, and if any kind of gaming could be carried on down there, as he and Dick thought about going down there — said they intended to go down, but meant first to make a *raise* at *Election*. Inquired of me about steamboat. Showed me some false props, they had been making. I agreed to meet them on the next Thursday evening, at Salem Hotel. They were arrested on the following Sunday. I had received information in Boston, that I was suspected of the murder of Capt. White. I immediately wrote a letter to Dr. Barstow about it, but received no answer. Went to Hotel, saw there the two Crowninshields and Chase. They were whispering among themselves. Everybody seemed to look at me with suspicion. I wanted to see if they (the Crowninshields) knew anything, and made them think I would go with them. Said they had good game all winter at their room in South Salem.

*Cross-examined.* — Mr. White suggested to me the expediency of going out to Danvers, to see the Crowninshields. Went to see if they would tell me who murdered Capt. White, but did not tell them so. Went partly on my own account. Told Mr. White, in Boston, that I thought of going out to Danvers, to see the Crowninshields. I wanted to see if they would say anything about murder. It was after conversation with Mr. Stephen White, but don't

know whether he or I proposed it first.

Don't know how I came to be suspected. Know no cause — heard a check was drawn by Mr. White for \$1000 on a Bank in Boston. I had asked Mr. Stephen White to loan me \$50, which he did. Having occasion to pay Mr. Leavitt \$1.37, I asked him to change this check. He could not, and went into the Bank, at the back door, as the front was shut. I borrowed money of Mr. Stephen White two or three months before the murder. Mr. Theophilus Sanborn said, I had a check of Mr. White for \$1000. On the night of the murder I was at Windham, fourteen miles from Portland.

*Cross-examined.* — When in Portland saw that a reward was offered. It was Thursday morning, at about 10 o'clock. I was not to have anything, if I obtained information from Crowninshields.

*Stephen Mirick.*

I live directly opposite to the corner of Mrs. Andrew's yard, on north side of Brown Street. About fifteen minutes before 9, on the evening of the 6th of April, I saw a man standing at a post, directly opposite my shop, on the opposite side of the street. He stood with his arms on the post, and facing the common. I had a fair view of him. I did not know him. He remained there apparently waiting for some one — this led me to be more particular, in noticing him. He stood thus, till the bell rang for 9, changing his situation a little. After the bell rang, I went out as usual and shut my shutters, but did not put up the slide to my door, so that I might see if any one came to meet him. He walked back and forth twice, certainly, if not more. When any one came down Brown Street, he went into Newbury Street, and then turned so as to meet him at the corner; and if any one came down Newbury Street, he went into Brown Street, and turned

to meet him in the same manner. From this post he could see up Newbury and Brown Street, about as far up one street as the other. I stood to see if any one should come to meet him. He remained there till twenty or thirty minutes after 9. I did not see him go away, and he was there when I shut up and went home. He had on a frock coat which came round him very tight, was very full at top and bottom; it was of a dark color. I can't say what he had on his head. I did not observe his face at all. I never saw the prisoner till he was brought before the *Grand Jury*. It is my belief that he was the man at the post. . . .

*Webster*. — Have you, as you know, or believe, seen that person since?

*Ans.* — I think I have seen him since.

*Webster*. — Where have you seen him, and what name did he bear?

*Ans.* — I think I saw him when he was brought up before the *Grand Jury*, and when he was brought up, once or twice since. I think it was Francis Knapp. Can't swear positively, but I believe it was he.

*Court*. — Was this belief derived from personal observation, or from what you have heard from others?

*Ans.* — From both — that is, from my observation at the time, and from the description of the person seen that evening.

*Court*. — From your own observation alone, do you say, it was Frank Knapp?

*Ans.* — No, I should not. Can't say positively, from my own observation. But the size and height of the man I saw, correspond very nearly to prisoner. His dress is different now.

*Webster*. — I suppose, we may ask, what description of dress has been given to him.

*Court*. — His belief arises from two sources. What he had from others, is not evidence.

*Cross-examined*. — I saw the pris-

oner when he was brought up to be arraigned, week before last, on Tuesday I think. Don't know what part of the day. The first time, I saw him, was one day, when he was brought in to hear indictment. I was in County Street — the prisoner was in a chaise. There were three chaises; he was in one of them, do not know which. Saw him get out of the chaise at the door. Did not see him, in this room.

He had on a light coat — they were all pointed out to me, as they rode up. Don't know who pointed them out.

*Re-examined*. — Prisoner at the Bar is the same person who got out from the chaise, and was pointed out to me, as Francis Knapp.

*Cross-examined*. — I can't say whether I asked which was Frank Knapp. I heard some person, who stood by, say this is such an one, and this is such an one. Believe I did not inquire which was Frank Knapp, or speak to any one.

*Peter E. Webster* sworn.

I live in Bridge Street, corner of Pleasant Street. My place of business is in Essex Street, nearly opposite Newbury Street. I have occupied for purposes of trade several buildings. Always have more or less property about Branch Meeting-house. Occupy the cellar of it. I went home about half past 9 in the evening of April 6th; from half past 9 to 10. I generally go to Post Office first. I went through Howard Street on my way home. About a quarter of the way down Howard Street, saw two persons — overtook them, at the bottom of street, near new road. They were walking about the middle of the street. This is a narrow street. They were walking down towards river. Passed them at the lower end, where it goes out. I took one of them to be Frank Knapp, and mentioned it once or twice. Did not think anything about it, more than if I had seen anybody else. Have always known Frank Knapp

for a dozen years. When at home generally see him every day or two. He is sometimes at sea. I passed nearest to him, and I supposed him to be Frank Knapp. I then took him to be Frank, and I have never altered my mind. The other person I did not notice. They were walking slowly. I turned to the right. They were going same way. They followed me. When I last saw them, they were about a dozen or twenty rods from the bottom of the street. They did not pass my house. Did not see them, after they got to the rise of the hill. Capt. Knapp, the father, lives in Essex Street, near my store. The prisoner stays at his father's, when at home.

*Cross-examined.* — I did not see the face of the man. Knew him by his air and walk. Passed within six or eight feet. Did not speak to him, nor he to me. I sometimes speak, and sometimes do not speak to him when I meet him. Both men had dark wrappers, and glazed caps. Night was cloudy, and a little damp. Don't know Richard or George Crowninshield. I know it was 6th April. Took notice of the men, because unusual to see men in that street. Don't know that it is a street where assignments are made. I mentioned it to Mr. Foster, Cashier of Asiatic Bank. Do not recollect how soon. Do not know, whether before the Knapps were taken up, or afterwards. I thought it was Frank, whom I saw there, before they were taken up. Told Mr. Foster one of them was Frank Knapp. The Post Office generally opens at *half past 9*. My usual hour of going to Post Office was a little after 9.

Could not say positively who the person was, without seeing his face. Thought they were waiting for somebody because they walked so slow. I know that night—recollect the appearance of the night on account of the weather. I sometimes go home other way. I did not go that way the night before.

Do not recollect what the weather was the night before. Heard of murder next morning. Sometimes take 5-franc pieces — not very common — take more or less every week.

*John A. Southwick sworn.*

I live in Brown Street, next house but two to the westward above ropewalk. Mr. Downing's house makes the corner of Howard Street. On the evening of the murder, I left my father's house in Essex Street, about half past 10 to go home; as I passed up by ropewalk, I saw a young man sitting there; as I passed him, he dropped his head. I stopped at Downing's door, then walked back, I think that time, then returned to Downing's house, and then to my own. Dropped his head every time I passed him. I felt very sure it was Mr. Knapp. Passed him three times, when on the steps; he had a brown camblet cloak, and glazed cap. I then took that person to be Mr. Knapp. I was brought up alongside of him, within a few houses of him, from his boyhood. When I passed the third time, I went into my house — my wife was up. One time, when I went in, I spoke to her. The same person was in my mind, all the evening, after I saw him. I came out of my house, and walked to the corner of Downing's house, looking for this person, down Howard Street, when Capt. Bray came up. He asked, what I was out there so late for. Told him I had seen a person on ropewalk steps, and about there, that looked suspicious, or whom I thought suspicious. He said he had seen one also, and pointed up to old Mrs. Shepherd's house, and said, there he is now, on the opposite side of the street, further up. Looked and saw a person standing there. He came down by us, and went to the post nearly opposite Capt. Bray's door, and leaned over the post. When he passed us, we were near Downing's house, on that side. This man passed down on the opposite side. We

walked down some ways, perhaps as far as Dr. Johnson's house. While he was at the post, we went in, at the west end of Bray's house, and went into the house, at the end door. Front door is on the north side of the house, the side nearest post. Went into his chamber. When we went in, only half of one shutter open. I stood back. Mr. Bray watched. In a short time he said, another one has come up. Now they have passed along to the west corner of the house, and that induced him to go to the window to look out. Saw one of the persons running across the street. (Here the witness referred to the plan which had been exhibited to the Court.) He run round ropewalk corner. The other went down towards Common. Thought he went round corner. Then Mr. Bray and I came out, went down Howard Street, round up Williams Street, and back home. We parted in front of Bray's house. Mentioned to my wife, what I had seen. Told her, I had seen a person, that I supposed was Frank Knapp, without making any further observation. Do not recollect dress of person leaning on post.

*Cross-examined.*—The time, when I first saw this person, was about half past 10. I know, because I knew at what time I left my father's house. It is two or three minutes' walk. My impression is, that I looked at my watch when I was at my father's, and thought it was time to be walking up. It was about half past 10.

The man upon the steps was two or three feet off, when I was nearest to him. I did not speak to him because I had nothing to say to him, and he hid his face. Perhaps I should not speak to him three quarters of the time, when I met him, owing more to his manner than mine; he rather evaded speaking; I don't know that I saw his face; his dress was a camblet cloak, I can swear to it.

I judge it was Frank Knapp, from the general appearance of the man. He was not wrapped up, for I could see that he sat cross-legged. It was a cloudy night, but moon was at the full. I don't recollect its raining; it did not rain then; it was misty at times.

I did not see the man on the steps get up and go away; but it is on my mind that it was the same man I saw at the post. I did not think it important to go out, though it looked suspicious in the man to drop his head when I passed and to be sitting on the steps at that time.

I have no doubt he had on a glazed cap; did not see any fur about the cap. I went out the second time from suspicions expressed in the house, when I told what I had seen. They said in the house, they should like to have me go out, though I had said who I thought the man was. I have not known that Howard Street is a place of assignations for the last six months. I cannot say that I suspected the man was there for that purpose. I cannot say what I suspected him of. When I met Capt. Bray, I told him my suspicions. He said there was a suspicious-looking person on the other side the street by the post. Don't recollect seeing the man by the post till Capt. Bray pointed him out to me. He did this when we were standing by Downing's house. We saw him pass down the street. Can't say whether the man Capt. Bray pointed out to me had a cloak and cap. I thought it was the same I had seen on the steps, because I had seen no other in the street. I had the same suspicions about the man who walked down the street that I had of the man on the steps. Don't recollect stating before the magistrate that I took the person on the steps for Frank K. from nothing but his dress.

I cannot describe the dress of the person who came up and joined the man standing at the post, when we were in Capt. Bray's chamber.



The post might be six or eight feet from the window. I can't swear to the dress of either. My impression is that one of them had on a light coat. Can't recollect the other's dress.

I don't recollect that I have told any person that I could not tell who the person was on the steps. Have no recollection of telling any person that I could not distinguish. I never said the man on the steps was Wm. Peirce, but compared him to Wm. Peirce in size and appearance. I don't recollect telling Capt. Bray that he looked like Wm. Peirce; never told him I thought the man was Wm. Peirce.

I cannot tell how the man running across the street was dressed; I knew it was one of the same persons, because they appeared to be watching, and engaged in the same business.

We were looking out of the window four, five, or six minutes. I can't say the dress spoken of is a common dress, but many young men wear glazed caps and camblet cloaks.

I cannot tell when I was first examined before the Committee of Vigilance, or that I ever was particularly. I have been sent for and questioned about this matter; cannot say whether before or after the Knapps were arrested.

The observation of Capt. Bray, that the man had gone to the west end of the house, was made before I looked. I did not continue to look, but looked away. When I was looking out of the W. window, and saw one of the men running to the eastward, I did not know where he went to.

I never said either of these persons was Crowninshield or Selman or Chase.

I was at Ipswich before the Grand Jury; did not state to them, that I supposed the person, that I saw on the steps, was Frank K. I was sworn to tell the whole truth. I did not say that it was Selman or that it was not. I said I thought that it looked some like Selman.

When I passed the man on the steps, I went halfway to the Common; the first time I passed him I went as far as Downing's corner, then turned and went back halfway to the Common, then repassed him and went home. I was watching the man twenty minutes before I went into the house; stayed in the house a few minutes; Capt. Bray and I watched him five or six minutes; we were in Bray's house six or eight minutes; in going down Howard Street, we went pretty quick the first part of the way; looked over into the burying ground by the Branch Meetinghouse, to see if the person was there; we stayed together perhaps two minutes after we came back, then went home. I did not hear the clock strike after I got home; It was about ten minutes past 11 by the timepiece, when I got home. I have not said that I heard the clock strike 11 that night.

*Daniel Bray, jr., sworn.*

I live in Brown Street, and in the lowest house on the S. side.

On the evening of the 6th of April I was passing down Brown St. from St. Peter's St. and when I passed the 4th house, I saw a man dressed in a dark full frock coat, dark pantaloons, and shining cap standing at a post. The frock was very full at bottom.

I was on the north side of the street and he on the S. As I passed on I saw another man looking or peeping down Howard Street, who I found was Mr. John Southwick. I think I asked him what he was about there so late. He said that when he went into his house a man was sitting on the ropewalk steps. I turned round and observed, "there stands the man now." (I could see him very plainly up towards Shepard's house — it was so light.) Mr. Southwick then said that he did not like the looks of the man when he went in. I walked on with him close to the ropewalk, and stood so as to get out of the wind, when the man passed along on the south side

and took his station at the post next the bounds between my house and that of Mrs. Andrew. I asked Southwick to go with me into my house, to see what he was about. We passed about twenty feet from him and entered my west door, and went up into my chamber, because the sliding shutters in the room below were closed, and we could not uncloseth them without noise. I looked out of the window and by pressing my face against the glass, I could see the man at the post, and never lost sight of him while he stood there, which was five or six minutes, when another man came from eastward — in the middle of the road and not on the sidewalk. I saw him when he was 150 or 200 feet off. From my window, I could see down Brown Street, and the Common, so the man must have come through Newbury Street, or we could have seen him sooner. He came up to the post close to the other without bowing, as near as he could get, and stopped. They then went together into the street ten or eleven feet toward the N. W. and stood there not more than a foot apart, and not more than a minute. I could then see them better from the western window. The man that came from the E. had on light clothes — he then run as hard as he could down Howard Street. The other at the same time started off in the opposite direction, and was out of sight towards the E. I know he did not go up Brown Street, for he turned round and went to the east. When we got into the street we could see no one. We then went down Howard Street immediately, and as soon as we came to the Graveyard, we looked over the fence several times, but saw nothing; we looked over the fence repeatedly. Before we got down to the New Road we saw a light open wagon with a man in it passing along that Road towards Beverly. We went on round through Williams Street and came home. I don't know the prisoner now — but did

know him four years ago. I have seen him since in prison, and at the bar. I can't tell whether he was one of those I saw that night; the size and general appearance agree very well. I had heard the clock strike ten, and should think that it was thirty or forty minutes after when I met Southwick. After the murder I went up on Downing's steps, and could see all the north and west windows of Capt. White's house, and a light in the chamber where he slept — the windows of the room over that, those of the room on the same floor over the kitchen, and those of the room over this. These cannot now be seen because of leaves on the trees.

*Cross-examined.* — The steps of Downing's house is the only place where I looked from. The windows could not be seen from the ropewalk steps, or from Shepard's post, or from the post near my house, or while walking down under the fence on the S. side. I saw the man before I came to Southwick and it appeared singular that one should be standing there. He did not then tell me that it was Frank Knapp, but he has since told me — I believe after the arrest. I did not then hear Southwick say that the man looked like William Peirce, and believe I did not hear him say so when examined by Justice Savage.

*Mrs. Southwick sworn.*

On the night of the murder Mr. S. came home after 10, went out again and returned just before or just after 11. I had looked at the timepiece just before.

*Capt. Bray* recalled by Counsel for Prisoner.

My dress was a dark frock coat, dark pantaloons. Southwick's was reddish pantaloons, and we both wore hats.

*Miss Elizabeth Potter sworn.*

I live in Brown Street. The evening of the night of the murder, about half past 10, I saw a person standing at the corner of Howard Street, looking down Howard Street. He

turned and looked towards the house, when I opened the door. The house is nearly opposite the rope walk. His dress was light pantaloons, cinnamon drab, I thought, and dark coat; I don't recollect what he had on his head. I know Mr. Southwick and do not think it was he.

*Isaac H. Frothingham* sworn.

I was in Brown Street on the evening of the 6th of April. I was at Mr. James Potter's, nearly opposite the rope walk. It was about half past 10 o'clock, when I came away; I looked at the clock. When I opened the door, I saw a person walking up the street slowly. He had passed the door when I opened it. He turned and looked over, and remained there after I walked up the south side of the street. He was on the opposite sidewalk, within a few paces of the ropewalk, when he first stopped. He then advanced a little farther, and that brought him to the corner of the ropewalk on Howard Street. I went on the same side of the street, and looking back, thought he was joined by another person. One of them was dressed in a dark coat and light pantaloons and hat. The person who joined him must have come up Howard Street or Brown Street, or I should have seen him. They were standing there the last I saw of them.

*Cross-examined.* — My first impression was, that it was Mr. Southwick; but afterwards came to a different conclusion, because I thought he was too tall, and if it had been Southwick, I thought he would have spoken to me. I thought his pantaloons were of a cinnamon drab color.

*Joseph Burns* sworn.

I was born in old Spain; have lived here about twenty-five years. My place of business is in St. Peter Street. I keep horses to let — my stable is near the head of Brown Street. I know Francis Knapp. Had a conversation with him in the stable, after the murder, and after the Committee of Vigilance was

appointed. It was just after the Wenham robbery. He came into the stable, and asked if anybody was in the stable besides me. I told him no. He asked me whether I had any loft, or place upstairs; I told him yes. He said "the best way is for us to go up, as I want to say something particular to you." We went up — then, he asked me if I knew anything about Capt. White's murder. I told him "no — I wished to the Lord I should, because I would make it known pretty quick." He said the Committee had heard I was out on the night of the murder, till about 10 o'clock; and, said he, "if you saw any one, any friend, out that night in the street, don't you let the Committee know it, for they will try to pump something out of you." He said his brother Joseph was a friend of mine, and he himself too was a friend to me. He said the Committee wanted to pump me, to see if they could catch me, in one thing or another. I then said that I knew all the members of the Committee, and if they wanted me any time, I was ready to answer them to anything. Then I asked Knapp what he thought of the Crowninshields, who were in jail. Mr. Knapp said they were as innocent of that as he and I. I asked him who did it, then? He said Capt. Stephen White must be the one. I said, "Don't you tell me such a thing as that. I know Capt. Stephen White, and have known him ever since he was eighteen or nineteen years old." Then he put his hand under his waistcoat, where he had a dirk, and showed the handle. I said, "D—n you, I don't care for you, nor twenty dirks." Then he said that he was a friend to me, and had come to give me this information, that I need not get into difficulty. I know Joseph J. Knapp, jr., — he used to come to my stable to hire, and to put up horses. He was there on the week before the murder. He sometimes wore a cap, and sometimes a hat.

He usually left one of them there. He wore also a cloak, or surtout, and likewise left one or the other of these. His clothes were sometimes left in the entry, and sometimes in the chaise, and I put them into the entry.

*Nathaniel Kinsman* called again.

I reside in Brown Street. A few days after the murder, I went out to see from what part of that street I could distinguish the window in the chamber of Capt. White. I could see the window from the southeast corner of Mr. Downing's house, at the corner of Howard and Brown streets. I could see the north window of Capt. White's sleeping chamber, and that of the chamber above. I have no doubt that I might have seen the windows in the chamber of Mrs. Beckford, but my object then was to ascertain whether I could see the window in Capt. White's chamber. There is no building to interfere with the range of the second story. As far west as the next house to Mr. Downing's, which is the one in which I reside, and is eighteen or twenty paces farther up, I could still see the window, and also in all the intermediate space. East of the southeast corner of Mr. Downing's house, could not see it. — There is one passageway from Essex Street to Brown Street. It is not public—it comes through to where the Sun Tavern used to stand, and is nearly as far west as the church. There are two passageways, with a gate to each, which you must open. It would be nearer to go from the ropewalk steps to Capt. White's house by Newbury Street, than through either of these.

*Cross-examined.* — I could see the windows very plain, without getting upon the steps of Downing's house.

*Philip Chase* affirmed.

Early after the murder of Capt. White, I heard of a suspicious man's having been seen on ropewalk steps. Thought he might be watching. I went to see if anything could be seen from steps. A little to the

west from the opening of Howard Street, I could see Capt. White's chamber window. I think it was rather more than halfway across Howard Street, that I first saw the window. But on Downing's steps could see it very plain. Don't know how far west of the steps I might have seen it. — Could see range of windows.

*Cross-examined.* — I don't know which was Mrs. Beckford's chamber, don't know that I examined that. I had no suspicion, of any particular person having been concerned in murder, when I went to look at this window. It was before the Knapps were arrested. I had no suspicions of the Knapps, before I heard of the Wenham robbery.

*Mary Jane Weller* sworn.

I know George Crowninshield. About three weeks before the murder, he was at my house. It was in the morning. I went into his room where he slept. Mary Bassett and I found a dagger under the pillow of Mary's bed. He had been sleeping with Mary that night. I asked George why he carried a dirk. He said it was because it had once saved his life, and some Salem fellows were going to flog some Danvers fellows. On the evening of April 6, between 10 and 11 o'clock, he came to my house. I heard the clock strike 11 after he came in. Saw him there next morning. I went out and heard of the murder. Then went into George's room and told him. He appeared to be alarmed, and Mary was alarmed. I wanted to go down to Capt. White's to see the body, and asked Mary to go. George was unwilling to have her go. He told me that morning not to say anything about that dirk; he said every scrape was laid to the Crowninshields. He stayed there all day, and did not go away until the evening. The hour he came at, was between 10 and 11. He had been accustomed to come there at dark, and to go away again and come back between 12 and

1. He had stayed there once all day, a very cold day. This time, he said he had a bad headache, and laid abed nearly all day. He asked, if we went down, not to say anything about his being there, and not to say anything about the dirk. Went away about dark, day after the murder. The dirk was about as long as a case knife — it had an ivory or bone handle.

*Cross-examined.* — *Counsel for prisoner.* — What sort of weather was it the next day?

*Witness.* — You know, as well as I do. I am not going to answer any such silly questions. I've told my story and I don't want to be made fun of. . . .

Miss *Catharine Kimball* sworn.

I was at Capt. White's house, on the next day after the murder. I found the key of his chamber door under the sofa covering. It is a common door key. Mrs. Stanley was with me, don't recollect what she did with it. I think, though I am not positive, that Mr. Deland was present.

*Benjamin White* called again.

The last time Joseph J. Knapp, jr., was at Capt. White's house, before the murder, was Sunday before. Mrs. Knapp was with him. Took tea there. Capt. W. not at home. He took tea at Mrs. Stone's, Chestnut Street. Mr. Knapp did not come, till towards night. Mrs. Knapp came first.

*Cross-examined.* — The plank, found under the window, came from before the garden gate. It is just beyond the shed. It opens into the yard fronting Essex Street. You go along the yard to garden gate.

*Re-examined.* — Plank so near doorstep that one might step on it from the door.

*Cross-examined.* — The small gate was not usually fastened, but generally shut. I was examined by Committee of Vigilance, as if suspected.

*Henry R. Deland* sworn.

I was at the house of Capt. White on the day after the murder,

after the body was laid out. I saw the key of the chamber on the sofa. We looked for it to fasten the door. Miss Kimball was there. I called at Capt. White's house, on the day before the murder, between half past 12 and 1. Lydia Kimball came to the door.

*Hon. Gideon Barstow* sworn.

I went with Mr. Colman, on the 29th May, at his request, to the meetinghouse, in Howard Street. Mr. Colman went to the further steps of the house, put his hand under the step, and drew out the bludgeon, and said this killed Capt. White. . . .

*Jedediah H. Lathrop* sworn.

I live in Beverly on the farm owned by Capt. White. He was there on the day before he was murdered. His young man came with him. It was after dinner. He returned home, about 5 o'clock. The next time before that, he was there on Friday, April 2. He came up in his wagon. He then came up after dinner. Usual hour for dining 1 o'clock. He started to come home about sunset. Generally went through Danvers. Would go across North Bridge. But whether he went that way, on that day, do not know.

*Jonathan Very* sworn.

I live with Mr. Osborn, and have the care of his stable. I know Francis Knapp very well. One time Francis came to me, and asked me, if I would bring him a horse and chaise behind, or near the Courthouse. He gave no reason for it. I brought the horse and chaise, between the Courthouse and Mr. Chase's. Nobody got in with him. Do not know which way he went. It was between 1 and 2 o'clock. I had just come from dinner. Some grain was brought up from wharf same day. Had been drawing grain. This was the last day of our drawing it. It was on the Friday afternoon before, that we began to draw it. I never carried a chaise to him before.

*Cross-examined.* — He asked me

to harness Nip Cat, in the chaise, and bring him as soon as I could.

*William Osborn* called again.

I have with me a bill of the grain, bought of Mr. Hacker. It is dated 2d of the fourth month. We began to remove the grain on the same day, and finished drawing it on Tuesday.

*Cross-examined.* — Am positive, that the day we finished drawing the grain was Tuesday.

*William E. Hacker* affirmed.

I made an agreement with Mr. Wm. Osborn for the sale of a quantity of oats to him on the 2d of April last, and he commenced taking them away immediately. He took away the last of them on Tuesday, April 6th.

*Cross-examined.* — I know that the agreement was made on the 2d of April and that they were several days in measuring the oats.

*John W. Treadwell, Esq.,* sworn.

I am cashier of the Merchants' Bank. . . . Mrs. Beckford was a niece of Capt. White, an only sister's daughter, and housekeeper in his family. She had two daughters, one married to Joseph J. Knapp, jr., the other to Mr. Davis of Wenham. Capt. W. had nephews and nieces, children of his late brother Henry. Mr. Stephen W. and family were at Boston last winter at Tremont House.

*Cross-examined.* — I am one of the Committee of Vigilance. The committee consulted Mr. Choate as Counsel. They did not retain any other Counsel, to my knowledge. They did think proper to take an oath not to divulge their proceedings. I do not know how the expenses of the committee were paid. A letter was received from Mr. Stephen W. offering them \$1000 — to pay expenses, if their investigations should not lead to the detection of the murderers.

*William Osborn* called again.

I commenced removing the oats, bought of Mr. Hacker on the day I

made the agreement, and finished the Tuesday following.

*Cross-examined.* — It was on that day that ostler mentioned to me that he carried a chaise to the Court-house for Frank Knapp, and I thought strange of it. The horse he had was Nip-cat.

*J. C. R. Palmer* called again. And inquired of more particularly as to prisoner's visit to the Crowninshields on 9th of April.

George asked me at that time if I had heard of the murder, and said, they had no hand in it. Richard afterwards asked me if I had heard of the "music" in Salem? He said, people supposed they had some hand in it — they said they should leave home. I told him I thought it a bad plan if they were suspected. George told me he took his dirk down to the machine shop and melted it down; for a committee was appointed to examine houses, and it would be a bad sign to have it found. Richard agreed to meet me at Lowell on the 1st of May. He said he had to finish some cloths and could dispose of them and get some money and go to New York. He gave me \$5 — bill on Newburyport Bank.

*Cross-examined.* — I never have stated that the murder was committed with a hatchet — I said I found a hatchet in the machine shop and threw it into one of two places, did not recollect which. I told Jones I had seen a hatchet and suspected it had been used, because I saw an account in the newspapers that the murder was probably committed with a hatchet — I put it away so that it might be found if called for. It had the handle newly sawed off and had clay on the head of it, but was just like any other hatchet. George said he had melted the dirk because a committee was appointed. I am positive that this was on the 9th of April.

*David Starrett* sworn.

. . . I heard of the robbery of the Knapps, last spring. There was nothing done to detect the robbers.

I saw the prisoner at my store on the afternoon before the murder, about 4 o'clock. My store is about one quarter of a mile from Joseph Knapp's house.

*Abraham True* sworn.

I live in Williams Street, pass through Brown Street several times every day. I took particular notice, soon after the murder, of Capt. White's house, and the back windows of the two upper stories are perfectly visible from Brown Street when the trees are not covered with leaves. I am a retail grocer, do not take a dozen 5-franc pieces in a year.

*Cross-examined.* — The windows are not visible from all parts of Brown Street, but they may be seen from Howard Street and several rods above, westerly. They cannot be seen from the ropewalk steps, but can be seen from a point six or eight feet west of the steps, I should think. The western windows of the front chamber may also be seen.

A majority of THE COURT having decided that the confession of the prisoner could not be given to the jury, Mr. Webster submitted to the Court an application on behalf of the Government for reargument of the question. . . .

After this decision, Mr. *Webster* stated to the Court — that the question appeared to be not fully settled, and proposed to call the witness and ask him certain questions of a different character from those already proposed to him. He proposed to ask the witness whether the prisoner did *assent* to J.'s confession, suggesting that it would probably appear that he never did assent.

WILDE, J. — That would materially vary the case.

MORTON, J. — It would be most important evidence. My opinion was founded on the supposition that he assented. . . .

Mr. *Colman* called again.

WILDE, J. — It becomes necessary to ask one question which was not

proposed to you before. The fact the Court wish to ascertain is, whether, before the confession, there was any assent to the proposition made to the prisoner by his brother Phippen Knapp?

*Ans.* — There was neither assent nor refusal.

MORTON, J. — The fact, upon which my whole opinion turned, that is, the prisoner's assent to his brother's confession, is varied. It is now said that there was no assent. The burden of proof is upon the prisoner to show that the case is within the exception to the general rule. As the evidence now stands, it does not appear that there was any improper influence. There is no evidence of assent.

Mr. *Colman* goes on.

I had been informed that the murder was committed at a very early hour in the evening — I thought it incredible, and asked the prisoner at what time it was done. He told me between 10 and 11. I had been incredulous about there having been but one person in the house. He told me, that Richard Crowninshield alone was in the house. I asked him if he was at home that night. He said he went home afterwards. I asked him, in regard to the weapon — the place where it was concealed. He told me under the steps [as before], and said that if I went there, I should find it. I asked what became of the dagger or daggers — I am not certain which. He replied that it or they had been worked up, at the factory.

*Cross-examined.* — The principal part of the conversation was between Phippen and Frank. I went into the cell a little before 7 o'clock and suppose that I came out at half after 7. This was Friday afternoon, 28th of May, I first visited him — I had never spoken to him before. I had some conversation with him at another time at his window. I went immediately from the cell of Joseph to that of Frank. Phippen was not in Joseph's cell

with me. While I was in the latter, some one knocked at the door. — I looked out at the scuttle of the door and saw Phippen—he asked to come in. I told him “not yet.” I had not finished my business with his brother. I went to Boston to see the Attorney-General. I started for Boston about 10 P.M. and arrived at the Attorney-General’s between 12 and 1 o’clock.

I was at Joseph’s cell three times on that day, and again on the day following—once with Dr. Barstow, and Stephen C. Phillips, Esq. I recollect beyond a doubt, which time I went from Joseph’s to Frank’s cell—it was after the third visit to Joseph’s, and the same evening, on which I visited the Attorney-General. Frank was told that Joseph had decided etc. [as before], and nothing more. I did not hear it stated, that Joseph had made a full confession. I never said that I would not mention what Joseph had told me unless Frank consented to the disclosure. I never stated to Frank that there was no chance, if both refused to confess. I never told him that there was evidence enough to hang both. He never stated, that he had no confession to make. I already knew that the club was under the church steps, but *which* steps I did not know, until Frank told me. I don’t recollect telling the prisoner that Palmer was arrested, or that application was made for his pardon. I don’t recollect that it was stated to Frank that Palmer would receive a pardon, though I think it not improbable, that it was stated. The jailer had called and told us that it was time to go, and repeated his call; then Phippen appealed to me, and Frank said, “I suppose you will use your influence,” etc.

I said, this is your deliberate assent (to Joseph’s disclosure), he said, “I don’t see that it is left for me to choose. I *must* consent.” I have stated all that I so well recollect, as to be willing to state under oath. I

think I stated to Mr. Stepleton in Boston, at the Tremont, and also at the office of Phippen Knapp, when Mr. Dexter was present, that Frank had confessed.

Phippen Knapp was present during the whole interview and I have heard it. I didn’t tell Stephen White that Frank was where the club was. I have no recollection of telling any one else it was, till I had found out that I spoke of it to Phippen Knapp, as we came up from the jail. I told him that I should rely on his honor that he should not reveal the club.

On Saturday, 29th March, before 1 o’clock, I found out that I went to Frank’s cell at the jail of Phippen Knapp—his conduct was an example of filial affection. At the request of his father and brother Phippen to go to him. Frank did not say that he knew where the club was of his own knowledge, or that one told him it was there. He answered the question directly.

Here the testimony on the part of the Government closed.

#### DEFENSE

was opened by Mr. Gardiner, Counsel for the prisoner.

Mr. Gardiner, in introducing the grounds of defense, which he expected to establish for the prisoner, referred to his situation as being peculiarly embarrassing.

He called the attention of the Jury to the state into which the public mind had been thrown by the publication of the confession of the persons implicated in the crime. He terminated seemed to be desirous to establish the guilt of the persons accused, that he might say, it was hazardous for them to appear in the defense. That the people is for blood. He considered it truly an alarm of things, if to be accused



be convicted, if rumors, generated by suspicion, were to be the evidence upon which the life of the prisoner was to be put in jeopardy. But he had no fear on this account. He did not despair of a fair trial, even in this case. . . .

The whole evidence of the conspiracy rests on two conversations. One, overheard by Leighton, between the prisoner and his brother, at Wenham, the other heard by Palmer, between the Crowninshields. So far as these conversations tend to anything, it is to disprove the charge. As to the weight of this testimony, he intended to show that these witnesses were not entitled to credit. . . .

The only question is, was John Francis Knapp constructively present? Even if he were in Brown Street, he was not present, except by a mere fiction of law. To make a man liable as constructively present, he must be in a capacity to render assistance, and must be there for that purpose, and must actually assist. . . .

Mr. Gardiner went on to state that they proposed to introduce evidence to show that the man seen in Brown Street was not the prisoner at the bar, but some other person; that the prisoner was in a different place during the evening; and that Brown Street was not a situation in which aid and assistance could be given to the murderer. . . .

The witnesses for the prisoner were then called.

*Jona. P. Saunders, Esq.*

The distance from Brown Street to Essex Street, through the garden of Capt. White, is about 295 feet.

I have no affidavit, made by J. C. R. Palmer, before me. I saw it last in the possession of Palmer. He had it when I left his cell. It was sworn to before me. I cannot tell in whose handwriting it was; don't know how much it contained. I received it folded, with Palmer's signature, and did not see its contents, but merely administered the oath. I

have never seen it since. I don't know in whose possession it is now.

*Daniel Bray, Jr.*

I have stated that when I first saw the second man, he was in the middle of the street. I have not examined to see which way he could have come. If he had come from the north side of the arched gate of the Common, I could have seen where he came from, but not if he came from the south side. I could have seen him fifteen feet farther south than I did. There are several paths across the Common, leading to both sides of the arch. I first saw this man 100 or 150 feet off. I could not tell whether he came round the corner or across the Common.

*Cross-examined.* — From where I was I could see any one come out either side the arched gate. If the man had come round the corner, on the sidewalk, I could not have seen him until he was within four or five feet of the other man at the post. I don't think I saw him when he first came in sight. The post is ten or fifteen feet from the N. W. corner of the house. When the men were standing at the post, the one most westerly was perfectly in sight, the other could be seen by pressing my face hard against the glass. . . .

*Joseph Burns.*

Frank Knapp's dirk had a plated handle, which looked like silver. I am not certain whether or not it had a guard. It had a crosspiece on the handle. It was not drawn. I don't know how long the handle was.

*Wm. H. Allen.*

I have known Frank Knapp from childhood, and have been intimate with him. I can't say whether he had a dirk before the Wenham robbery. The first time I saw it was about the time that dirks were selling in Salem. I have no dirk, myself, but I have known a few young men who have had them — this was sometime after the murder. [He identifies the dirk shown him.]

This was Frank's. Mr. Newhall made it for him.

*Benjamin Leighton.*

Frank's dirk had a gilt handle, with a little jog to prevent its going into the scabbard. The one produced looks like it.

*Dudley S. Newhall* sworn, and dirk shown him.

I was making this when prisoner came into my shop and wished to purchase it, and I sold it to him on the day before the Wenham robbery. I was making it for my own amusement. It was several days before it was delivered, that he said he should like to buy it. This is not my regular business — I am a jeweler. There was a particular demand for dirks at that time.

*William Peirce* sworn.

My usual dress at the time of the murder was similar to prisoner's. It was a plaid cloak and a black glazed cap. This was a common dress — almost all the young men wore glazed caps. Before the murder, it was not usual to wear dirks. Since that time many use sword canes, but I don't know as to dirks.

The appearance of my cloak was very different from a camblet one — it was a dark-green color and shaded.

*Cross-examined.* — I was not on the ropewalk steps on the night of the murder, but I was in Brown Street, for I live there. I don't know what time — I did not stand leaning over a post.

*Asa Wiggin* sworn.

I am a tailor. Camblet cloaks were the most common last winter. — From the 1st of September to April, I made twenty-four. I did not make any plaid cloaks last winter. I made as many mandarins as I did cloaks.

*Israel Ward, jr.,* sworn.

I am a tailor, and made about fifty cloaks last winter. Two thirds of this number of blue and brown imitation camblet — the other third principally of German camblet. I made also a few of cloth, and two or three of plaid.

*Cross-examined.* — I had clothes for the prisoner, and the 20th and last of January I gave him a frock coat, of olive brown color, single breasted about the body, and quite short skirts.

*Reexamined.* — I have similar garments for other prisoners, probably from the same piece. I did not make so many last year as I did the year before, then I made about this prisoner's frock was made in the fashion of the day.

*Stephen Osborne* sworn.

I am a hatter, and live within the last year I made 1600 or 1700 head covering more than 500 caps, of all kinds the year ending about this time since; and of glazed and black caps, 200 in all. I know the prisoner, as much as the two articles can be. I have of the same general appearance this, men's and boys'. Other hatters in this town have a common article of dress like this.

*Cross-examined.* — Of the same kind I sold last winter one to three dozen — not the same kind to boys.

*Reexamined.* — I have one to three dozen of this without fur, and the rest were of glazed leather, but a star like this, on the top.

The counsel for the prisoner read copies of two warrants. J. C. R. Palmer — one of the 8th of June, by which he was arrested and committed for examination, upon the same as that against the prisoner, one of July 10, by which he was committed by the magistrate to the same charge for the present term of this court.

They then read a copy of the Court of Common Pleas, Maine, of a conviction of the prisoner for breaking a shop, with stealing — the judgment and

which was confinement to hard labor for two years, in Thomastown State Prison.

*William Babb* sworn.

I keep a house of Entertainment, called the "Halfway House," between Boston and Salem. I know Palmer, but from the time he was at my house until last Friday I have not seen him. I am not certain when he was at my house; my impression is, that he came there on the 9th of April, and went away on the morning of the 10th. I heard of the murder on the 7th, in the after part of the day, I think. He never slept there at any other time, unless he got into the house unknown to me. My impression is, that it was after the murder, that he slept there. I am not positive that I had heard of the murder before. I know that it was the 9th, because I had a man (George Green) who "took too much," and I turned him away, and he signed a receipt the next morning. Palmer came out while he was signing and asked for his bill, and said he had no money. It was at this time, I think, and the receipt is dated the 10th.

Green was paid for four days' labor. He worked on the 10th, and left the house on Sunday, the 11th. I am not certain that Green was present. He is now covered up in the earth.

Palmer called himself George Crowninshield, and left with me a plaid silk handkerchief marked with that name, and offered me a note for the amount of his bill, signed George Crowninshield, and said that he should be along in a day or two, and would pay the bill. I asked him if his name was George Crowninshield — he kept his head down very much, and I said, "You don't resemble the family; I know Richard very well — but you may be a younger brother" — he said, "It might be the case." I carried back the note and threw it on the desk, because my wife said that it was good for nothing. I went out,

came back and never saw the note afterwards. I don't know what became of it.

*Cross-examined.* — The receipt I left at my house. I saw it last Friday. I can't swear that the receipt was dated the 10th, and if it were, I can't swear that this was right. But I am positive that it reads 10th. The time of day was 7 or 8 P.M. when he came there, and it was after 7 in the morning, after the usual time of going to work, that he went away. I can't fix the time any nearer. I don't know which way he came. He went to the east. . . .

*James W. Webster* sworn.

I live in Belfast (Me.). I have known Palmer these eight years. As to his general reputation for truth I don't know that he has any at all. I have always heard a bad character of him. I have heard perhaps an hundred people say, that he would not be believed at all, in any case in which he was interested. His general character is not good.

*William F. Angier* sworn.

I live at Belfast and was admitted to the practice of the law about a week ago. I have known Palmer eight or nine years. I have never heard his general character for truth and veracity questioned. . . .

*Alfred Welles* sworn.

I reside in Boston, and import hardware and fancy goods. I sell arms. I have sold small arms, such as pocket pistols and small dirks, in greater quantities within two months than usual. I have had orders from Salem for quantities — from Mr. Johnson. After the murder I received orders for short dirks from respectable persons here and in Boston, as long as I had any left. My drawers were emptied of these instruments once or twice within two months.

*Major Petty* sworn.

I live in Danvers, about a quarter of a mile from Crowninshield's. I remember being at work for George Crowninshield, trimming a couple

of trees. I can't tell whether before or after the murder. While at work, Richard and two young men, whom I didn't know, came up to us, I heard the name of one called Allen. I can't say whether the prisoner at the bar was one of them — one was a man about his size, and one of them had a whip, but I don't know how they came. The trees which I was trimming were within eight or ten rods of the house. These young men went towards the house, and George went with them. I can't tell whether they went into the house. The front door was open. I am pretty sure that I saw two on the steps, but I am not sure who went in. They were gone but a short time, and came back to within one and a half, or two rods, of the place where I was at work — all four together. I heard talking, but couldn't hear what was said. I could if I had attended. I think that George and one of the others went a little before the rest, when going to the house, but I should say not a rod ahead — all four came back together. They stayed perhaps ten or twenty minutes, and then started to go to the factory together. The time of day was, as nearly as I can recollect, after dinner. I can't say whether Mr. Allen was the man.

*William H. Allen* recalled.

The first time I went, I saw a man at work — it was six or eight weeks before the murder.

*Petty* resumes.

I was not trimming trees in February, merely cutting them away, so that the meetinghouse might be seen. I should say that this was in April. I can fix the time by the work I was then employed on. I did not see the young man any more on that day. There was frost in the ground at this time.

*Cross-examined.* — This was not in March — I should think that it was in the fore part of April. I don't know whether it was just before or just after the 6th of April. I think I heard George call one of them Allen.

*Ebenezer Shillaber, Esq.*

I have had a conversation with Mr. Southwick respecting the men he saw in Brown Street. I inquired after the arrest of the Knapp, the men he saw in Brown Street. He told me he recollected a young man there. That he went into Bray's house with him after having got there the first. Mr. Southwick said that he could not tell, as well as Bray could, he said he thought that the man was from Newbury Street, and that he was taller than the man who was in Brown Street. . . .

*Gardiner.* — We proposed to the witness, generally, what was the position of Mr. Southwick given to him as a witness, of the persons who were in Brown Street. . . .

*Witness.* — I don't know whether Mr. Southwick gave any description of the persons he saw in Brown Street. I asked him whether, for aught he knew, the person who came from Brown Street might not have been George Knapp, and the person in Brown Street Richard Crowninshield. He said he could not tell, but that he knew, it might be so. I asked him whether, in his conversation with him about the steps, he had said anything to satisfy myself, that he had been Richard Crowninshield in Brown Street.

*Cross-examined.* — I was asked for Richard and George Knapp, when I made the inquest.

*Mrs. Burns* sworn.

On the night of the murder, Mr. White, I saw Selman at my house. It was about nine o'clock. They came in, and they tied their horse in the stable and went away. Mr. Brown was not at home. Chase came again about half past 9 — about five minutes for Selman took his chaise and went. Selman came back about five minutes after Chase had gone, and asked for him. A young

with Selman, at the bottom of the yard. I did not know who it was.

Selman said he expected Chase to call for him there. He then went away, and returned in about a quarter of an hour, to see if Chase had called for him. The last time they were there, the young man that was with him left a message to tell Chase, when he should come, that he should be at Pendergrass's. . . .

*Cross-examined.* — I know George Crowninshield. I did not know the voice of the one who spoke to Selman — he did not speak loud, but in a tone of moderate conversation.

*John Needham sworn.*

I saw George Crowninshield, on the night of the murder, in South Fields, the first time about 7 o'clock, at the news room, at Pendergrass's. Richard Crowninshield paid the rent for that room. Chase and a young man, introduced to me as Col. Selman, came in, and George a few minutes after. They stayed there about half or three quarters of an hour, and then went away, all together. I saw them again there between 9 and 10 o'clock. Chase then came alone in a chaise, and George Crowninshield and Selman came on foot afterwards. George was there all the time, except about ten minutes, that I was out. Joseph Burns, Austin, and Osborn were also there, and stayed some time. Chase and Selman went off together, in the chaise, and afterward George, Austin, Osborn, and myself came away together. I said that I was going home the nearest way and George said, "I'm going to Mary's, and will go with you." We went by Malloon's Mills. When I got to the gate of our house, at the corner of High and Summer streets, we parted. This was before 11, because I went to bed immediately, and soon after heard the clock strike 11. Mother asked me whom I spoke to at the gate, and I told her George Crowninshield.

*Cross-examined.* — At this read-

ing room we took many papers, and its general use was for reading. Richard Crowninshield paid for the papers. We had some from Alabama, and the "Truth Teller," from New York. Sometimes we had gambling of all kinds. . . .

There is a game called props. I have never seen any other played. Ours was not a gambling house — a gambling house is a cheating house. — There was some liquor kept there sometimes.

*Matthew Newport sworn.*

I keep a victualing cellar at the corner of Union and Derby streets. George Crowninshield and Benjamin Selman came there on the night of the murder, between 9 and 10 o'clock and stopped about ten or fifteen minutes. They inquired if John McGlue had been there.

*Joseph Fairfield sworn.*

I live in Danvers and keep a public house. I saw George on the evening of the 6th of April about 9 o'clock with Chase and Selman at my house. They stopped there about ten or fifteen minutes, came in and took something to drink, two glasses of brandy and one glass of gin. They came and went in a chaise towards Salem.

*William Austin sworn.*

I saw George Crowninshield on the night of the murder at Pendergrass's about half past 9. I am a tanner and currier. George Crowninshield came about half past 8. He stopped in Pendergrass's shop a little while, then went into his room. I was there with him — when he went away he went towards Marblehead. He came out with me and John Needham. I and Osborn came over the south bridge. Joseph Burns and two others were there that night besides. I did not know who they were. The clock struck 11 just as I got home. I live in Boston Street. I did not know Selman and Chase at that time. It takes me about nineteen minutes to walk home from the "reading room." I have walked it since about

as fast as I did that evening. Chase and Selman went away five or ten minutes before I did. After they went away, Osborn and I proposed to go. George Crowninshield and John Needham came out when we did. They came immediately behind us—as we turned towards the south bridge, they turned up the hill.

*Benjamin Selman sworn.*

I saw George Crowninshield on the night of the murder. I came over to Salem from Marblehead with Mr. Chase. We went up to the factory and saw George Crowninshield. Chase wanted to see him, and I wanted to see Clark Read in Salem. We went into the factory and saw George between 5 and 6 o'clock. George wanted to go to Salem to see John McGlue, to get some money. He went with us in the chaise. We stopped at the tavern opposite to Dustin's in Danvers, and then came to Salem. George got out at the post office. Chase and I went into Burns's with the chaise. After leaving the horse at Burns's shed, I then came out and met George opposite the post office. George proposed taking a walk. We went to Pendergrass's and stopped near an hour. We got there about half past 7, and stayed till after 8. We then came over into Salem, and went down to the Franklin building on the Common, and Chase found a friend there—a female—and went away with her, and said that he would join me in fifteen minutes at Burns's stable. I then went with George down to Newport's cellar, and stayed there near an hour. George said that he wanted to see Mr. McGlue who owed him some money—'twas 9 o'clock, when we came away, and then came up to Franklin building again. I wanted to see Read, and he said he would go with me. Read's is in Williams Street, he stopped at the gate and waited for me there near half an hour. We then went through Brown Street to

Burns's stable, without stopping. We went through Brown Street. We went to the shed and found the chaise. I knocked at the door and told Mrs. Burns if Mr. Chase was there, she said he had been there fifteen minutes. She did not know where. I went up into Esplanade in front of the Coffeehouse and waited a few minutes, and then went over to Central Street, where the clock struck 10. George came over the bridge, while I was waiting. I told Mrs. Burns that I was over the bridge; if Chase would tell him George was with me.

When I got there, Chase was waiting with a chaise, and said he was waiting half an hour for me. He said he had agreed to be there, and took a cigar and stayed till after 10. We then took the chaise and went home to Marblehead. I left George Crowninshield at the yard and got home five or six minutes before the clock struck 11. It is four and a half miles from Salem to Marblehead. I have been in jail eighty-five days on suspicion of having been concerned in the murder. I had on a hat and a coat and a glazed leather cap.

*Clark Read sworn.*

I live in Williams Street. Selman came to my house about 9 o'clock on the evening of the 6th. I was just going to bed and was nearly undressed. I went down there ten or twenty minutes before I got down to the door with him. I saw a person there who spoke to me. I thought who I thought was Chase. He said he was Chase. He said he was for him, but did not say that he was at the gate.

*Nathaniel Phippen Known as Ans.*

Do you know what has happened in this case.

*Ans.*—I have been told that point, as to finding the chaise.

I have heard something of Colman has testified—casually in the street, and confirmed by Mr. Dexter. A person who told me in

was, I believe, Mr. Miller. I can't remember that any other person has told me. Mr. Dexter has told me that Mr. Colman had stated that it was by the prisoner's direction that the club was found. . . .

Mrs. Sally Needham sworn.

John Needham is my son, he came home on the night of the murder about fifteen minutes before 11. I heard him speak to some person at the gate. I asked him who he was talking with. He had come into my chamber to light his lamp.

*Cross-examined.*—I knew the time because I have a watch in my chamber, and heard the clock strike, and I looked at the watch when I went to bed.

(*N. P. Knapp resumes.*)—I was present at a conversation between Mr. Colman and the prisoner, at his cell. I went to the prison with Mr. Colman, and went to my brother Jo's cell. When we came out from there, I went to my brother Frank's (the prisoner's) cell. As I was going in, I observed that Mr. Colman looked anxious to be admitted, and I asked him if he would go in. He said yes, and came in. There was a conversation at the door of Joseph's cell. He said, Mr. Knapp, I wish that you would not disturb the club. I will get a witness, and go and get it myself, for my own security. After we went into my brother Frank's cell, I addressed him in this way—"Mr. Colman says that the committee have evidence enough to convict you and your brother, that the only chance of salvation is for you to confess; that Palmer has applied for a pardon, on condition of being a witness, and that a promise of pardon has been dispatched to him from the officers of Government; that the messenger would pass through town that evening in the mail stage, and that if they did not confess before the mail stage passed through, it would be too late; that if either of them would confess, the committee would stop that message,

and apply for a pardon in favor of him, whichever it might be." I told him, also, that the subcommittee had severally assured my father that Palmer knew every circumstance relating to that transaction, and that the only chance to save his sons was to induce them to confess. I then asked Mr. Colman if what I had related as coming from him was not true? He said yes, and then went on to state, "I have seen your brother (addressing prisoner). I have made him these assurances, and offered him a pardon in case he would be willing to confess. I also assured him that if he committed anything to me in confidence, it never should be revealed, unless he should choose to become a witness. I am authorized by the committee to offer this pardon to either of you." I then said, "Mr. Colman thinks Jos. had better confess, for if you should be convicted after his confession, you would have a greater chance of pardon than he would." I applied to Mr. Colman, and asked him if he did not think so. He said, "yes, undoubtedly—your youth will be very much in your favor—your case will excite great sympathy, especially if it shall appear that you were persuaded to do what you did by your elder brother." He then said, "but I don't insist on the preference, I leave that for you to settle between you." My brother hesitated, and said nothing. Mr. Colman then said, "you know the condition, if you stand a trial, you will both be inevitably convicted—if either of you chooses to confess, he will save himself. If Jos. confesses, and you should be convicted, you will have a good chance of pardon, but if Jos. should be convicted on your confession, his chance would not be so good. At all events, your chance will be much greater than if you stood a trial, and were convicted on Palmer's testimony." He then reminded him that he had but a few moments to choose. My brother then said,

"I have nothing to confess. It is a hard case; but if it is as you say, Jos. may confess if he pleases. I shall stand trial." I recollect nothing more than that. Nothing was said about the club in Frank's cell in my presence and hearing. This conversation in the prisoner's cell was on Friday evening after the arrest on the 28th of May. Mr. Colman stated to me that he had been at Jo's cell that day two or three times. Nothing was said in my presence or hearing about the time when the murder was committed. . . .

My father failed 7th of April. The instrument is dated 7th of April. I was occupied in preparing it on the evening of the 6th. My brother, the prisoner, rode less after the failure. I had cautioned him about it in consequence of the failure. This was after the 7th of April. He was in the habit of riding much. My brother wore a glazed cap, like this in every particular. I remember the dirk—I never saw my brother have any before this.

I was up all night of the 6th of April, preparing, with Mr. Waters, my father's assignment. I went home at half past 1 o'clock. I left my office at some time after 9, with my father. I went to Mr. Waters's house, stayed there till a few minutes before 10, then went with Mr. Waters to his office, in Washington Street. My father went home. A few minutes before 10, went to Mr. Waters's office. We were at his office ten minutes, perhaps. We did nothing but strike a light and get a book. From there we came directly down Essex Street, to go to Mr. Waters's house again; on the way, we stopped at my own house to get my umbrella. It rained when we left Mr. Waters's office, and when I got to the house. When I came out, it had ceased raining. I went to Mr. Waters's house, and stayed there till 1 o'clock. I got from the house, also, a key of one

of the doors, that I might get from Mr. Waters's house directly home. When I found my father in the morning he had just come in himself. My father he had better not. I sat up all night, and finished writing. I saw nothing of the prisoner during the night. I saw him the next morning at 10 o'clock.

Frank's usual hour of going to bed was 10 o'clock. He was the most regular person in the family in this respect. My father's house is in Essex Street, a few minutes from Newbury Street. I passed by White's house at a quarter of 10, and saw a light in his chamber. I heard the clock strike ten minutes before we arrived at Mr. Waters's office—stayed there a few minutes. I believe I called Mr. Waters's attention to it, but I am not certain. It was in Derby Street or the street leading to it when the clock struck 10.

*Cross-examined.*—When I went to the prisoner's cell with Mr. Colman, I went from Mr. Joseph's cell. We went to the prisoner's cell together, to make arrangements to Joseph, that the committee had made to Mr. Joseph to see whether he would go. This was on Friday evening between 6 and 7 o'clock. I had been to the cell of either of them before. We both went into the cell, and a conversation took place about confessing. I do not know whether Joseph agreed to be a witness for the State.

It was not positively agreed that he was to become a witness for the State; it was agreed on certain conditions. The condition was that he should have the preference, unless he chose that he should. I understood that Joseph's becoming a witness depended upon Mr. Colman's consent. Mr. Colman said that he would go to Joseph's cell at this



I asked him to let me go with him, to which he agreed.

I went into the prison with him. I cannot recollect from what place. When I left Joseph's cell, it was my purpose to go to Frank's cell. I presumed Mr. Colman intended to go out of the prison, but as I entered the door of Frank's cell, I thought he wished to come in, and I asked him to come in. . . .

During this time, we had the conversation concerning the club. I had been in Joseph's cell all the time that Mr. Colman had been there — heard all the conversation between Joseph and Mr. Colman. I was there ten or fifteen minutes; at this time, I presume, I heard all that was said, because nothing was said in a whisper. There was an understanding that Joseph should turn State's evidence, but if Frank did not assent, it should be offered to him. Joseph would not accept that offer unless Frank would assent. I understood he was determined not to assent to Mr. Colman's proposition, unless Frank were willing — don't recollect how it was arranged that Mr. Colman should find that out.

When Mr. Colman told me not to get the club, I was in front of the door of Joseph's cell. I heard nothing said about the daggers, in Frank's cell — do not recollect hearing anything said about its being a hard thing that Joseph should "have the privilege to confess, since the thing was done for his benefit." Frank said it was a hard case — a hard alternative. I will not swear that he did or did not say this. I don't recollect that it was said that it was a hard case, since the thing was undertaken on Joseph's account. I will not swear that it was not said — I will swear that I did not hear anything said about melting up the daggers. There was no secret conversation between Mr. Colman and Frank. I have no doubt that if it had been said "the thing was done on Joseph's account," I should

have heard it. I can swear I did not hear anything said about its being done on Joseph's account. I heard nothing said about its being "a silly business," nor that it would bring him into difficulty. . . .

I will not undertake to swear that he did not say "I told Jo it was silly business, and would only get us into difficulty." I will swear that he did not say that he went home after the murder, — or "afterwards." I can swear that there was no conversation about the time of the murder — that Mr. Colman did not ask him about the time of the murder — that nothing was said about the dirk, and nothing about the club. . . .

My brother, the prisoner, had been an acquaintance of the two Crowninshields three or four years back. He had been to New York with them. . . .

*Solomon Giddings* sworn.

I reside in Beverly and was in Salem on the night of the murder. I passed Mr. White's house about 11 o'clock and saw and heard nothing which attracted my attention. I was going from the wharves to Beverly, and the clock struck 11 while I was in Essex Street.

*William F. Gardner* sworn.

I live in the next house to Capt. White's. I passed there twenty-five or thirty minutes after 10 in coming from Mr. Deland's, which is the next house to Capt. White's on the other side and on the corner of Essex and Newbury streets — there was a party there that night, which was just breaking up at that time. I heard no noise, nor anything which attracted my attention. Mr. Deland's windows look into Capt. White's front yard. There were three persons with me.

*Stephen D. Fuller*, Surveyor, sworn.

The plan made by me is correct. I have been a surveyor fourteen years, live in the city of Boston. The distance from Essex Street to Brown Street through Capt. White's

garden, is about 300 feet. [*Explains upon the plan the various obstructions between Brown Street and Mr. White's garden, and the difference between his plan and that made by Mr. Saunders.*]

Nothing could be seen of Mr. White's house from the ropewalk steps; nor from the post by Mrs. Shepard's house; nor from the post by Capt. Bray's house; nor from any part of the space between the two posts on the south side of Brown Street, except that through a small opening between Mr. Potter's and Mr. Henderson's houses, a part of the rear of Capt. White's house, but not the part in which he slept. Between the avenue from Brown Street to Essex Street, and Capt. White's house there are houses and other buildings; but from some parts of the avenue the upper western windows may be seen.

*Charles G. Page* sworn.

I saw the prisoner on the 6th of April, about 7 o'clock, P.M., in Essex Street, near the Salem Hotel — Forrester, Burchmore, Balch, and I were together, and he asked us into the Hotel to take some refreshment. We stayed there about five minutes, then came out, and I left them. I am a student of Harvard University. Glazed caps were at that time worn by almost all the students who belong here. Our caps were mostly bought in Boston. Sixteen of my Salem classmates have them. Camblet cloaks are also very common among students.

*Cross-examined.* — I recollect the night, for on the morning after the murder I was accounting for myself, as was natural, and thinking what company I had been in. I had some doubt as to what evening this was, when I was first called upon. I then did not recollect the circumstances by which I could fix the time, but have recalled them since. I have never said that I did not recollect, but when first called upon I wished time for consideration.

*Moses Balch* sworn.

I live in Lynde Street. On the

evening of the murder, I am not positive. I was prisoner, and Burchmore, and Forrester. I first saw him in Essex Street, between 8 o'clock. I was with him about a quarter of an hour. I came again between 8 and 9 o'clock, and came into Remond's, near Church Square. Burchmore, Forrester, and Page, were with him when he came in. We were in that place about 9 o'clock, and then he went to walk in Essex Street. I saw the prisoner at the corner of the Church streets, about 9 o'clock, to go home. My impression is that he went down Church Street. I was with him all the evening, until 10. Forrester was at the corner of the Franklin Street.

I know that dirks were common after the murder. I saw two young men who had them before. I wore a glazed cap at that time.

*Cross-examined.* — I am not positive that this was the evening of the murder. It was Monday or Tuesday evening, but I cannot tell any nearer.

The Court overruled the objection, and witness resumed.

The evening on which the murder was committed, walking was dark and cloudy. We were at Remond's, smoking. Frank came in. Remond was an oyster house. We were in the Salem Hotel the first part of the evening. When I got home, the folks had gone to bed; but I have been 10 when I saw the prisoner.

*Zachariah Burchmore, jr.* sworn. On the evening preceding the murder, I went with the prisoner, and Page, and Forrester, to the Salem Hotel, about 7 o'clock. I was there about a quarter of 8, and the prisoner left us. I was with him an hour after, Forrester, Balch, and I were sitting and smoking in Remond's when he came in — about 8. We all went out together before 9. I don't remember

Forrester went out with us, or before. We walked in Essex Street about half an hour, and I left him about half past 9, at Franklin Building, or opposite.

*Cross-examined.* — To the best of my belief, this was on the night of the murder.

*Re-examined.* — I am not sure whether it was before or after the murder; but my belief is that it was the same night.

I generally wear a hat.

*Cross-examined.* — I can only recollect that it was on the evening that we were in the Hotel that I saw the prisoner. I don't remember what the weather was.

*John Forrester, jun., sworn.*

I took a walk with the prisoner, I think, on the evening of the murder. I met him in company with Balch, Burchmore, and Page, and was introduced to him — this was about 7 o'clock. I was with him about twenty or thirty minutes. We went to the Salem Hotel. He left us, and I saw him again in about an hour at Remond's.

*Cross-examined.* — It was on the night of the murder, or the night before, or the night after, that I walked with the prisoner and the others. I never walked with them all but once.

*Judson Murdock sworn.*

I live in Brighton, and keep a public house, and saw a man whose name I have since understood was Palmer, but he then wrote his name J. C. Hall. He came there on Monday, 3d of April, at 9 in the morning, I do not know from where, and stayed till the next day at 3 or 4 P.M. and then went towards Boston on foot. It is five miles from Brighton to Boston — from there to Charlestown five miles — and about thirteen miles to the half-way house.

*Joseph J. Knapp sworn.*

I am the father of the prisoner, and made an assignment of my property on the 6th of April. I was at home that night a little before ten.

I came from Mr. Waters's house in Derby Street. I saw the prisoner just after 10. He entered my front northern parlor about five minutes after 10, and asked me if he should bolt the door. I told him no, for Phippen was out, and I should wait for him. I told him that I was very glad that he was at home in good season. He asked me if I wanted any assistance. I told him no. I asked how the weather was, and he said that it blew fresh from the east. I asked him if he knew the time, and he told me that it was just 10. He then retired to his chamber, and left me in the parlor. I did not go to bed till after 2 o'clock. His chamber was in the west end of the third story. There is only one staircase up to the third story. My door opens into the entry. To come out of Frank's chamber, one must pass my door. He usually keeps his cap, when in the house, upon the window of the keeping room. I saw it there that night; he threw it there when he came in. No person moved in the house that night, except Phippen, when he came in. I saw Frank again the next morning, between 7 and 8 o'clock, when he came from his chamber. He usually put his boots in the kitchen; I don't know where he put them that night. His usual hour of coming home was about 10; he was very regular. He will be twenty years old next month. My son Phippen was with me until near 10. I left him at Mr. Waters's house. I again saw him about twenty or twenty-five minutes after 10, when he came in to take the key, that he might enter after he had finished his business. He was assisting Mr. Waters in making an assignment of my property, and he rejoined me just after 1 o'clock. He went to bed before I did, and at about 2, immediately after he came in. I did not see either of my sons in the chamber that night.

*Cross-examined.* — I saw Mr. Michael Shepard that night, at my

son's office, about a quarter after 9 o'clock. I did not see him after that time. When I went home I had come from Mr. Waters's house, about ten minutes before 10 o'clock, and left my son with Mr. Waters. I saw Mr. Shepard again the next day; I am not certain where, whether at his house or in the street. I believe that it was at his dwelling house after breakfast. I had no conversation with him about Frank's being at home on the evening previous. I next saw him the same day, at the Mercantile Insurance Office, but had no conversation with him about it then. I saw him also again in the evening of the same day, abreast of the Asiatic Bank. I then had a conversation with him, and told him that my son was at home before half-past 10 o'clock. We had then no particular conversation, excepting he asked me if he could credit what was in circulation — the arrest that had been made. Joseph and Frank had been arrested then. The Crowninshields had been arrested before. I remembered so as to tell Mr. S. all that happened the night before.

I have mistaken the questions — that conversation took place after the arrest.

I saw Mr. Shepard on the evening of that day at the Asiatic Bank. Nothing was then said about the time that Frank was at home. The first conversation on that subject with Shepard might have been the day of the arrest, or the day after the arrest of Joseph and Frank. I am sure that they had been arrested when I had this conversation with Mr. Shepard, abreast the Oriental Insurance Office. It was on the evening of the arrest, and no other person was present. This was the only conversation I had with Mr. Shepard on the subject. Mr. Shepard introduced it. I told Mr. Shepard that my son was at home in bed before half past 10 o'clock, and that I was at home so as to know when he came in. I told him I

knew that the clock had 10 when I left Waters's that he was at home and before twenty minutes at told him that Frank can asked whether he should door. I did not tell him collected seeing Frank cap upon the window seat.

I don't recollect any conversation with Mr. J. W. Treadwell the time that Frank came the night of the murder, no knowledge of ever having with Mr. Treadwell on the or of having said to him not know what time Frank home; or of having said "they said he came home at 10." I did nothing of an assignment till Mr. Shepard away; he was to be my We talked about business street.

I was sitting up late to schedule of property. I did the assignment till the when I signed it. I was memorandums and papers for the assignment. . . .

*James Savary sworn.*

I board at the Lafayette house. I work for the Boston Stage Company in the street on the morning of 7th of April. I went about minutes before 4 o'clock the Lafayette Coffee-house stable in Union Street. I person turn out of Cap yard and come up street to He came as far as Mr. yard and then turned and was then between the two houses. I saw him running as far as Walnut Street. I can judge he was a man size. It was dark and night had on a dark dress.

*Nathaniel Kinsman called.*

I have testified to an observation I made of the windows on or third day after the could then see the whole White's chamber window

paces W. of the S. E. corner  
ning's house. I paced off  
ance to ascertain.

*Walcutt* sworn.

d with Caleb M. Ames in  
nd of Daniel Street, on the  
April. It leads into Derby  
I was out on the morning  
7th between 3 and 4. I  
ng to call Mr. Ames, who  
Palfray's Court, because one  
orses was cast in the stable.  
was going up the Court, I  
man nearly opposite Mr.  
house in Derby Street. He  
king easterly when he saw  
then turned round and  
back westerly *seven* or *eight*

The last I saw of him was  
was just above Mr. Prince's  
He was a middling-sized  
The morning was pleasant  
rather foggy.

*McGlue* called again.

e time of the murder, I owed  
Crowninshield, jr., some  
I do not know how much.  
it was \$30 or \$40. It was  
he had done at the factory  
It was for caps and turned  
s. He asked me for the  
before, and after the murder.  
ed fifteen or twenty dollars.  
t then pay him any part of  
the Friday night before he  
en up, I paid him \$7. He  
e out, and I went down to  
nklín building, and he told  
would pay him, he would let  
e it back, if I wanted it —  
im I would pay him on the  
k. After the murder he came  
ort's to find me and I gave  
order for \$10. He told me  
as going to give him money  
d not. This was Friday  
he was arrested. Then  
came for some money and  
r me.

*Richard Palfrey, jr.*, called again.  
lished in my paper of Mon-  
ccount of the finding of some  
in Danvers, which was on  
aturday previous to the publi-  
Richard Crowninshield, jr.,

hung himself, I believe, on the next  
Wednesday.

*Nathaniel P. Knapp* called again.

When my brother started for  
Wenham, at the time of the robbery,  
I was not at home. I don't recollect  
hearing them speak of arming them-  
selves before they went. I never  
heard a syllable of their saying  
jocosely, they might be robbed. I  
never said I did. I never gave a  
different account of Mr. Colman's  
conversation. I never gave a dif-  
ferent account of the light in Mr.  
White's chamber.

#### FOR THE GOVERNMENT

*George Wheatland* sworn.

On the day before the arrest of the  
Crowninshields, 10 o'clock, A.M.,  
Phippen came to my office. . . .

A few days after the murder, he  
said that on the night of the murder  
he saw a light in Capt. White's  
chamber. He stayed in his office till  
near 10 then went down to consult  
Mr. Waters, at his house. He went  
up with Mr. Waters to his office, and  
stayed there till near 11 o'clock.  
He could not tell when it was he  
saw the light, as he passed Capt.  
White's house four times. He spoke  
of the interview between himself,  
Mr. Colman, and Prisoner. I asked  
Phippen why Mr. Colman went to  
Frank's cell. He stated that Mr.  
Colman was a very intimate friend of  
the family, and married Joseph. . . .

*Michael Shepard* sworn.

I had a conversation with Capt.  
Knapp, senior, soon after the mur-  
der, while passing from the offices to  
my store, and I asked if Frank  
associated much with two young  
men that I suspected. He said  
that he did not, but had kept very  
good hours of late, and that on the  
night of the murder Frank came  
home and went to bed at half  
past 10 o'clock — "so Phippen  
told me," said he. Capt. Knapp  
did not tell me as from his own  
knowledge at what time Frank came  
home. This was before the arrest  
of his sons, and I think before the

arrest of the Crowninshields, and while we were walking from the site of the old Sun Tavern to the head of Union Street.

He did not tell me that he was at home that evening and knew at what time Frank came in. I don't recollect that he told me that he came in at five minutes after 10 o'clock. He did not tell me of the conversation between Frank and him about bolting the door, nor that he heard the clock strike 10 before he left Waters's house.

*Cross-examined.* — I did not ask him as to his own knowledge concerning what time Frank came in, and don't think that I put any question to him except as to his son's associating with these two young men.

*John W. Treadwell* called again.

On Friday morning, the 28th of May, I had a conversation with Capt. Knapp, senior. I took him into the private room at the Bank, and told him that I was entirely satisfied of the guilt of his sons, and advised him to go to the jail, and get a confession from one of them if he wished to save either. He said he would go. I then asked him if he knew where Frank was that night. He said no. I then put the question, "At what time did he come home?" He said, "I don't know, but I believe about the usual time," and added that he himself was up that night till very late, arranging his papers.

*Mr. Shepard* again.

Capt. Knapp was at that time probably a good deal agitated. He had found it necessary to assign his property. I, however, saw nothing unusual. He was a little disturbed and perhaps mortified.

*George W. Teal* sworn.

I live in Danvers, and attend the Bar at Dustin's. I saw the man now called Palmer there at about 6 o'clock, P.M., on the 9th of April. He stayed there near an hour and a half. It was the day after Capt. White's funeral. I was told to

watch him as a suspicious person. He left there about 7 o'clock.

*Stephen Brown* sworn.

I lived at the Hotel on Wednesday before last April. I saw Frank on Wednesday before. He came there about 8 o'clock in the morning, and stayed until 8 o'clock on Saturday afternoon, except that he was away in the afternoon.

*Cross-examined.* — I saw Frank in the barroom on Saturday afternoon, and he talked as if he had been at a public meeting in Salem the night before.

FOR THE PRISONER.

*Elizabeth Benjamin* sworn.

I am a domestic at Capt. Knapp's senior. On the night of the murder, Frank must have slept at the house of the Knapps, who make the bed, should have marked it. I saw him in the morning as usual. He went to bed about 9 o'clock. I did not go to bed. I found him in the morning in the keeping parlor. He was there about 5 o'clock in the morning.

*N. Phippen Knapp* recalled.

I remember conversing with Capt. Knapp, senior, at Wheatland a few days after the confession. I told him about Counsel for the defense, and he made some suggestions.

After I came from Wheatland the night of the murder, I spent some time with father, and went into the cellar to get some food to eat, and while I was gone, Frank went to bed. I then wrote a letter, copying the assignment of the jury.

I never gave any other information to the light in Mr. White's case than I have already given. I did not tell Mr. White what took place in the cellar, as he stated. . . .

After the conclusion of the trial, the cause was argued by Mr. Dexter, a prisoner by Mr. Dexter, and the government by Mr. Webster.

The Jury were charged by Judge Putnam.

deliberating twenty-four  
the Jury returned into  
able to agree upon a ver-  
were discharged from fur-  
deration of the cause.  
dictor-General, on behalf  
ernment, then moved that  
be impaneled to try the  
again upon the same in-  
...

Saturday, Aug. 14, 1830, the  
as again put on trial. The  
adduced was substantially  
as before, with the follow-  
ons:]

#### THE GOVERNMENT

*Jaquith sworn.*

day evening, the 2d of  
ut 10 o'clock, I was pass-  
Brown Street, from a  
which I had been attend-  
Vestry of the first Baptist  
in Marlborough Street.  
got to Capt. Kinsman's  
aw a group of men stand-  
ropewalk steps, and one  
as pointing towards Capt.  
house. As I passed by Mr.  
gate, I saw that there  
persons, one sitting down,  
standing each side of him.  
who stood on the eastern  
something in his hand; I  
tell what it was, but at  
nt thought it an instru-  
music, or something of that  
I passed, the one that  
g took it out of the hand  
er, and put it behind his  
I passed on. The two  
anding had on cloaks, or  
with capes, and the one  
d on a hat, and a surtout  
cape. I could not tell  
instrument was.

*Examined.* — I saw no other  
the street than those three  
s. I walked fast by them,  
n. I told of it the next  
e mentioned it something  
dred times. I was not  
to attend on the former  
his cause. When I first

saw them pointing, I was by Capt.  
Kinsman's house; when I saw them  
concealing the instrument, I was by  
Mr. Downing's house. I know it  
was Friday evening. I mentioned  
it the next day. I thought what  
I saw was an instrument of music.  
There is a meeting every Friday  
evening through the year. I always  
attend.

*Lewis Endicott sworn.*

I had a conversation with Joseph  
J. Knapp, jr., in January last, about  
the time that Capt. White had  
an ill turn. He said if he had been  
in town, Mrs. Beckford would not  
have sent to Boston for Mr. Stephen  
White, for he could destroy all his  
own notes. He said that Capt.  
White had made a will, and that  
Mr. Stephen White was not executor,  
but Mr. John W. Treadwell alone;  
that black and white would not lie;  
that Mr. Lambert was the only  
witness. I asked him if he had seen  
the will; he said he had. I asked  
him if Capt. White did not keep  
his will locked up? he said yes;  
but there was such a thing as having  
two keys to a lock.

*Cross-examined.* — He said there  
was only one witness to the will.

Miss Sanborn and Miss Kimball,  
on this trial stated that, on the  
morning after the murder, a cloak  
was left at Capt. White's house  
by a young man, whom they did not  
know, who said, "This is my  
brother's cloak." It was afterwards  
proved that this cloak was left by  
Stephen Stratton, a servant of Mr.  
White.

*Mr. Phillip Chase's testimony.* —  
He had been through Brown Street  
for the purpose of ascertaining  
whether Capt. White's window  
could be seen from the neighborhood  
of Howard Street, and found that  
it could be seen distinctly. Witness  
visited Palmer in prison, in the room  
directly under Richard Crownin-  
shield. While there a string was  
let down through the ceiling with  
a lead pencil — soon after a piece of  
paper with two lines of poetry,



and a request that if he was acquainted with the poetry, he would complete the verse and send it back. Witness pulled the string, and it was drawn back. Then he heard a shrill whistle, after that, the person above called, in a hard whisper — "Palmer," "Palmer." Thinks Palmer knew who was above him. . . .

#### FOR THE PRISONER

*Daniel Potter sworn.*

I have conversed twice with Leighton about the murder, once last Friday afternoon while the jury were out. He then said that Frank Knapp came to Wenham soon after breakfast, on the day that he overheard the conversation that he had testified to. As I questioned him, some one told him to stop. I saw him again two hours afterward. He said Frank was viewing the farm that morning; he said nothing of the conversation that he had heard.

*Cross-examined.* — I live in Salem; — am a blacksmith. My meeting with Leighton was accidental. I had a bet on the last trial, — on the verdict while the jury was out the first time. I have none now.

*Stephen Field, jun., sworn.*

I overheard the conversation between Leighton and Potter, as he has testified to it. I had no conversation with Leighton myself. . . .

*Stephen P. Webb sworn.*

I left Mr. Deland's house, which is next to Capt. White's, on the evening of the murder, at half past 10 o'clock; did not see or hear anything unusual. From the appearance of the pavement, it had rained a little, though it did not rain at that time.

*James Savary sworn.*

In addition to his former testimony, this witness stated, that he thought the person who came out of Mr. White's yard, was the prisoner; he said, "I mentioned it to a person, that I was carrying to overtake the Boston stage a few days afterward. I also mentioned it to

Mr. E. Maxon, at the Court the morning after the murder."  
*John Chapman sworn.*

The weather on Monday before the murder was very pleasant. It was a clear, moonlight night. There was a public meeting at the South Meetinghouse. It was a full meeting.

Affidavits were read, stating that Samuel H. Knapp, a brother of the prisoner, would testify, that on the night of the murder the prisoner came home about midnight and opened the door of the room where he was, and spoke to him ten minutes after 10, and then spoke to the prisoner, and then heard the prisoner go into his room to his own room and as he went to bed. . . .

*Dr. Abel L. Peirson sworn.*

On Thursday, 8th of April, I was requested to examine the body of Capt. White. Doctor White, some of my pupils, and several spectators were present. It was the first time that I had seen the body after the murder. The wounds on the head have been described by the other physicians. At the examination, we found two wounds on the body. The first was six stabs, three inches from the neck, and near together, which measured exactly one inch in length, and gaped one quarter of an inch, and somewhat the figure of a parenthesis [ ( ) ]. About four inches further down, there was a series of wounds, seven in number. These wounds were all near together, having the edges together, and gaping at all. One of them was three quarters of an inch long, and the other varied from half an inch to three quarters. Four or five wounds penetrated the substance of the body, though none of them reached the cavity. The second series of wounds had a downward direction, nearly at right angles with the first. (The diaphragm was perforated by them.) The fifth, sixth, and



ribs were broken, by the blows which formed the first group of wounds. These two series of wounds differed in so many particulars, that I inferred that they were made by different instruments. The instrument by which the ribs were broken must have been about five inches in length, as the ribs were probably broken by the guard or hilt, and it did not appear to have been long enough to reach so far as the instrument that passed through the diaphragm.

*Cross-examined.* — I cannot explain satisfactorily the different appearance of the wounds, without supposing two instruments. . . .

Dr. Johnson called again by prisoner's counsel.

I did not observe such a difference in the appearance of the wounds as to lead me to believe that more than one instrument had been used.

Mr. Dexter then addressed the Jury as follows:

GENTLEMEN OF THE JURY:

You have now heard all the evidence on which you are to form your judgment of life or death to the prisoner. He stands before you for that judgment under terrible disadvantages. I will not repeat to you what has already been stated on that subject. I have neither time nor strength to expend on anything but the law and the evidence. You see around you proofs of the power against which the accused has to struggle in his defense. . . .

What, then, is the crime of which the prisoner stands indicted? It is, that he was present, aiding and abetting in the murder. Not that he is guilty of the murderous intent, or that he procured the murder to be committed, but that he was present at the perpetration of it, and gave his assistance to the murderer.

These are the facts of which you are to be satisfied by the evidence you have heard before you can return a verdict against him. But we admit the law to be well settled,

that an actual presence is not necessary to constitute the prisoner a principal. We admit that any place from which actual physical aid can be given in the commission of the murder, is presence within the meaning of the law. . . .

This, then, and this only, is the question that you are to try on the evidence you have heard, and from your own view of the scene of the murder: Was the prisoner, with such intent, under such an agreement, in such a situation, that he could render actual aid at the moment when the murder was committed? With this view of the case, I will now ask your attention to the evidence on the part of the prosecution.

Sensible of the weakness of the evidence of the prisoner's presence in Brown Street (especially as it stood on the first trial) the prosecutors have relied much on the aid of the conspiracy. . . . If, then, as the prosecutors contend, the evidence of Leighton is sufficient to indicate the object of the conspiracy — if the words he so ingeniously overheard can, as is said, mean nothing, but that the two Knapps and Richard Crowninshield had agreed that the latter should murder Capt. White, then all the remaining proof of the conspiracy is superfluous. The only object for which it could legally be used was accomplished at the first step. The Wenham robbery, the robbery of the Knapps' house, the preceding letters of Joseph Knapp to Stephen White and to the committee, and such other circumstantial stuff that has been introduced, may be used to aggravate the general appearance of the whole transaction; but they have no bearing on the case of the Prisoner. The letters may be proof that Joseph Knapp was guilty, but what is that to the Prisoner? He is not to stand or fall by the subsequent and independent acts of Joseph. Why are these evidence against him, more than Joseph's confession given to Mr. Colman?

They are but confessions made after the fact and without the knowledge of the Prisoner. As to the robbery, it may have been real or pretended. But whether real or pretended, what has it to do with the murder of Capt. White? . . . Considering these things as of no weight in the cause, I shall pass by them without further remark. Some other circumstances may be dispatched in the same manner. The conspirators wore daggers — the proof is that the Crowninshields habitually wore them before the murder — and that the Prisoner never had one until long after. And whether he then wore it for murder, or in boyish bravado, you may judge from Layton's account of the manner in which he used it upon him. Pleased with his new weapon, he "pricked me Bull Calf till he roared"; and how much of Layton's testimony is to be ascribed to that, is matter of no great consequence, so incredible is the whole.

So of the 5-franc pieces. The proof is that Joseph received five hundred on the 21st of April — and that George and Richard Crowninshield spent nine between that time and their arrest — nine 5-franc pieces! Richard was to receive, according to Palmer, one thousand dollars for the murder! and we are called upon to account for nine of these pieces, when the whole five hundred would not have been half of the price agreed to be paid. And why should not the whole five hundred have been paid? and if they were, why are not more than nine traced to the Crowninshields? The coin, besides, is no uncommon one — they carry no ear mark — the witnesses tell you they pass currently — commonly — here. They are the regular return from Point Petre; and in large quantities they go into the Bank — in small quantities they go into circulation. But suppose it otherwise, how does this prove Francis Knapp guilty of this murder? Is he shown to

have any of this pernicious All the evidence about the nine spent by the shields and that Joseph K Hart three to buy me family. . . .

One word about George shield; he has been shown government's witnesses to in Salem that evening and gone to bed at the house of Weller about 11. The proof has proved an alibi for him shall not disturb it. On the contrary we have shown your evidence, which is unnecessary to recapitulate, that he came with Selman and Chase on business, and we have shown from place to place throughout the evening. It seems to be of the government to show could not be the man in Street. We agree that he but we think it material to also that neither was he in the neighborhood of the house at the supposed time of murder. The testimony corroborated as it is at establishes that fact. Who was the man in Brown Street the only one in the vicinity of the house, and that will be a material fact when we come to purpose for which he was

Much use was made on the trial of the testimony of Osborne, the stable keeper, who appears by them, that there was in the daily habit of going often to Danvers, and that early in the month of April he went to Danvers on the 6th of April, as testified by F. Allen, and afterwards on the 10th day hired a chaise to go to Danvers. That on the 6th he went to Danvers and did not ride till the 19th. A little that can fairly be taken from all this but that the frequent intercourse between the Prisoner and the Crowninshields is a circumstance undoubted

favorable though slight, and between him and his brother Joseph's family, a matter from which nothing can be inferred. Two or three circumstances, however, attending these rides, have been selected as highly suspicious. In the first place the frequency of them just previous to the time of the murder and the interruption of them just after. If the books are examined, it will be found that these rides are as frequent in the months of February and March as in April, making due allowance for the difference of weather. The Prisoner returned from sea in January and he appears to have hired Osborne's horses almost every day from that time until the 6th of April. That evening was marked by the failure of his father, as well as by the murder of Capt. White — a circumstance quite sufficient to account for the discontinuance of his visits to the stable, and also for another fact, somewhat relied upon.

The place, it seems, for which the chaise was hired on the 6th of April, is still blank in the book. Now Mr. Osborne testified that it was the habit of the prisoner to fill out and rectify the charges against him by his own memorandum book; but this he had no opportunity of doing after the 6th until the 19th; and it does not appear that he ever was asked where he had been on the 6th; so too of the entry on the 2d. The chaise was hired for *the Springs*; but those words were afterwards struck out, and *to ride* put in their place, in the prisoner's handwriting. But the first words are not so erased as to be concealed; they are merely crossed out with a single line of the pen; and this was in conformity with the practice permitted by Mr. Osborne, who tells you he had perfect confidence in the prisoner, and suffered him to have free access to his books to make his own charges. One circumstance more, and I have done with these minor points.

It is thought very strange, that on the 6th the prisoner ordered his

chaise brought to the Courthouse, instead of getting in at the stable. A hundred innocent reasons may be imagined for that, while it is hardly possible to think of one in any way connected with the murder. He was much more likely to be noticed if seen getting into a chaise in Court Street, than at the stable, because one was a usual, the other an unusual, thing. The fact that he had a chaise was as much known at the stable; and if he wished to conceal the direction in which he rode, a much simpler expedient would have answered the purpose. Why did he not start the contrary way, and drive round the town until he could escape unnoticed? He may have had an errand in Court Street; he may not have wished to be seen leaving the stable on the day of his father's failure. It is so simple a thing that any reason is enough, and none need be sought for. But the most indifferent acts of the prisoner have been traced out with inquisitorial diligence, and magnified into proofs of crime. Is there anything in all these circumstances inconsistent with the prisoner's innocence? It is not enough that they are consistent with his guilt. Before circumstantial evidence can amount to proof, it must be impossible to explain it without supposing guilt. So far, certainly, all may be as well explained without that supposition. And yet, from the way in which these things have been heretofore insisted on, it would seem that they were looked upon as conclusive evidence. It seems to be enough if the prisoner can be found anywhere or doing anything on the day of the murder, which might, by any supposition, connect him with it. A thousand suspicions, it has been well said, do not make one proof. And what are these but possibilities? There is not one among them that deserves the name of a probability. A thousand such possibilities would hardly make one suspicion.

But one thing that has a little more show of proof, or rather of suspicion, must be disposed of, before we come to the direct evidence of the conspiracy. I mean Mr. Burns's story. Burns is a Spaniard; and although I would not discredit him on that ground alone, I cannot have the same confidence in his oath, I should in that of one of our own citizens. He hardly speaks English intelligibly, and there is some doubt whether he was finally understood as he meant. His story is intrinsically improbable, and he has discredited himself by his own contradictions. He tells you the prisoner called at his stable and asked if he were alone; being assured that no one was there, he wished to be yet more private, and asked if he could speak with him in the chamber. And all this secrecy was to tell Burns, that the Committee had heard that he [Burns] was out on the night of the murder, and that they suspected him — and that if he saw any friends that night, he had better hold his tongue about it, and that Joseph Knapp and the prisoner were his friends; and then follows an idle tale about the prisoner's accusing Stephen White of the murder, and then threatening Burns with his dagger because he would not believe it. Now what possible object could the prisoner have in all this but to bring himself into suspicion? No one had at that time whispered a suspicion against him. Burns had not pretended to have seen or heard anything of him that night, near the scene of the murder. But it may be asked, what motive could Burns have to fabricate this story? It is in vain to deny that there is a sufficient motive. We have seen the operation of it on more than one witness, and that Mr. Burns is above its influence I see no special reason to believe. You observed the manner in which he testified, — how zealously he defended Mr. Stephen White from the aspersions of the prisoner, — and how impossible it

was for the Counsel to get anything from him but impugning the mildest cross-examination of a man as Burns well understood what is the source of false testimony. He as well as other witnesses the prisoner is a helpless and less culprit, pursued by all the force and respectability of the law. Can you see in this no motive which could lead such a man to claim his share in the murder without conviction?

But be his story ever so improbable, you cannot believe it — positively on the first trial. It happened after the Weymouth robbery, and on this he was positively that it was not more than weeks earlier — he has the prisoner's dagger as evidence, like any one he ever had. He is differently at his two examinations. Let him and his story go. They are worth — I trust — nothing. The prisoner is in no danger from them.

I come now to what is the direct evidence of the conspiracy. It rests on two witnesses — Knapp and Palmer; or rather Leighton alone, for we have no testimony that of Palmer's can be admissible. Palmer's story is only to have had a conversation between the two Crowninshields in the absence of the prisoner, and to make this admissible against Knapp, a conspiracy must be established between him and the Crowninshields. For this Leighton overhears the conversation, and tells each other the whole story. He listens behind a stone wall, and it may be supposed that this is a deficiency in Palmer's story, or of its truth. Not so. The story was first told by Leighton writing to convict Richard Crowninshield, and it would stand alone for that. Richard was out of the country, and Frank became the principal connecting link was wanting to furnish this is Leighton's story.

And what is Leighton's

Of all the gross improbabilities that ever were laid at the foundation of a cause, this is the most gross. It is just the clumsiest contrivance of a play, where the audience is informed of what has taken place behind the scenes by the actors telling each other what they have been doing together. If it were told with the utmost consistency, could you believe it for a moment? Why, gentlemen, do but listen to it. He tells you that Frank Knapp came to Wenham about 10 o'clock (and Potter says he told him he came there immediately after breakfast, which would be about 7), — that he and Joseph were together all the morning in the fields, and that after dinner he left them together talking at the gate by the house, while the witness went down the avenue to his work. There was abundant opportunity, then, for them to talk in private about what most concerned them; but after the witness had passed through the gate at the end of the avenue, and taken his place behind the wall, he heard voices in the avenue; without rising, he peeped through the gate, and saw the two Knapps about twenty-five rods off, coming towards him; that they ceased talking until they arrived within three feet of the wall, and then began this dialogue: Said Joseph, "When did you see Dick?" "This morning." "When is he going to kill the old man?" "I don't know." "If he don't do it soon, I won't pay him," — and they then turned up the avenue and walked away; and this is all the witness heard.

Now is anything more than a bare statement of this story necessary to show its falsehood? For what purpose, under Heaven, could the Knapps have postponed all conversation on this most interesting subject till that very time? They had been together all the morning; they were plotting a murder; and Frank had been that very day to see the perpetrator; and yet neither

Joseph had the curiosity to ask, nor Frank the disposition to speak of the matter, until just as they reached the place of Leighton's ambuscade; and there in an abrupt dialogue of one minute's duration, they disclose the whole secret, and walk back again. Not a word more is heard by the witness. The conversation evidently began and ended with these words. Really it is too miserable a contrivance to deserve much comment. But there is a remarkable mistake about this story which stamps it with falsehood. Leighton fixes the conversation on Friday, the 2d of April. And why on that day? Because he knew, as well as every person who has read the newspapers, that on that day Frank did see Richard. But unluckily he fixes him at Wenham at the very hour in which it now appears, from the testimony of Allen and Palmer, that he was at Danvers. Leighton says that Frank came to Wenham at 10, and said he had seen Dick that morning; but it now appears that Frank did not go to Danvers until 2 o'clock, and at that very hour Leighton pretends to have heard this conversation at Wenham. Again, Palmer tells you that at that interview at Danvers, the plan was first proposed to the Crowninshields — that George spoke of it to Richard and himself as what he had just heard from Frank; and yet from this dialogue at Wenham it seems that Joseph was impatient at the long delay of Richard. "When is Dick going to kill the old man?" "If he don't soon, I won't pay him." How are these things to be reconciled? Leighton tells you too that he never mentioned this conversation until after the murder. And why not? Why, forsooth, "he did not think of it." He had heard a plain palpable plot of murder contrived by his own master, and yet he did not think of it! He did not tell it to Mr. Davis when he joined him at his work, nor to Hart who slept in the same room with him; and when he

hinted after the murder to Starrett at two different times, that he "knew something," and had "overheard something about the murder," Starrett had not the curiosity to ask him what it was! He is directly contradicted by Hart, both at the time when he told him of it and as to the circumstances of Richard's supposed visit to Wenham. Hart says he never heard of this conversation until after Leighton's examination at Salem, and that Leighton told him the Committee brought out a warrant to commit him to jail if he did not tell what he knew — facts both of which Leighton denied on the stand. Now what account does he give of the manner in which his evidence was brought out? He says he was summoned to attend court, taken out of the field where he was at work, and carried to Mr. Waters's office — he was kept there forenoon and afternoon, more than four hours, closely questioned and threatened, but he told nothing. Why did he not tell? On the first trial he swore he remembered well enough, but did not choose to tell — to be sure he swore both ways about it, but he finally said he did remember and would not tell; and on this statement a most ingenious argument was built by the counsel in his favor. "He would not betray his employer; improper as it was to deny what he knew, he had fidelity enough to refuse." But on this last trial he takes all that back; he swears positively he did not remember a word about it. Equally regardless of his own oath and the argument of the counsel, he denies the whole. He says it all came into his mind about two days after his return to Wenham — the very words. What brought it to his mind he cannot tell. Now what credit can you give to this boy and his story? But one of the most remarkable improbabilities of it is yet to come. He says he told the gentlemen at Mr. Waters's office that if they would come to Wenham the next day,

he would tell them all he could remember. That was on the 22d of July. Now do you believe if that were true, that he would not have gone? When he was in Salem was inquiring about the murder, and some of the gentlemen at Mr. Waters's office were doing nothing else for months, and when they had taken pains to extract from Leighton what he knew, do you believe they would give him such a promise they would not follow him up? And yet you say he heard nothing from them until ten days after the trial. Then they came to Wenham, and he told them all about it. Now, gentlemen, if you had been as much as we have of the day, you would not think this improbability in Leighton's testimony. Consider how important the money is. Without it, Palmer's whole evidence of the crime would be useless. It is the corner stone of the prosecution. And yet it was not thought of looking after for ten days immediately preceding the trial. Now we shall be asked, what would we expect Leighton to swear falsely for? Answer, Fear, favor, and reward. He was told at Mr. Waters's office he should be made a free man — he said he was taken with a warrant, and he knew of immense rewards that had been offered. He remembers going with the dagger, and now to you that if Knapton was hanging, he expects he will be hanged. Under all these circumstances, it is to your consciences to say you can take this boy's word as to the life of the prisoner. If you do not believe it, then you must reject Palmer's testimony, and the evidence of what was done by any one but the prisoner, or in his presence, is absolutely no other than to connect the prisoner with

or the Crowninshields in this matter.

But who is this Palmer, this mysterious stranger who has been the object of so much curiosity and speculation? He is a convicted thief. We produce to you the record of his conviction of shop-breaking in Maine. He is an unrepenting thief, for he tells you on the stand he cannot speak of the stealing of Mr. Sutton's flannels in Danvers, committed since his discharge from the State Prison, without criminating himself. Mr. Webster (the witness) tells you his character among his neighbors in Belfast is as bad as it can be. He tells you himself that he has passed in his wanderings from tavern to tavern, sometimes by the name of Palmer, sometimes that of Carr, sometimes that of Hall (the alias of the notorious Hatch), and sometimes that of George Crowninshield. The latter name he gave at Babb's house when he was called on to settle his bill; and whether he settled by a note he cannot remember; but Mr. Babb remembers that he did, and signed that note *George Crowninshield!* And how came Mr. Palmer a witness before you? He was arrested as an accomplice in the murder at Prospect; committed to Belfast jail; brought up by land from Belfast in chains; put into a condemned cell in Salem — remained in jail two months, neither committed for trial, nor ordered to recognize as a witness; but kept for further examination at his own request, until he is brought out and made a free man on the stand. Now what is this man's credibility? If his conviction had been in Massachusetts, he would have been incompetent; he could not have opened his mouth in court. But the crime is the same — the law violated is the same — and the infamy and the punishment are the same in Maine as in Massachusetts — and his credibility is the same. Add to that conviction, his subsequent theft, falsehood, and forgery, and you have

left in him but a bare possibility that he may speak the truth. As to his temptation to testify against the prisoner, you see how he was brought here, under what liabilities he stands, and what is the price of his discharge. He tells you himself that, though a disinterested love of public justice first moved him to inquire into the matter, he thinks he deserves some little pecuniary reward for his exertions; and doubtless he thinks that reward will depend something on the success of them. But what is his story? It is that being himself concealed at the house of the Crowninshields in Danvers, he saw Frank Knapp and Allen come there on Friday, April 2, about 2 o'clock; that Frank and George walked away together, and after their return Frank and Allen rode off — that the Crowninshields then came into the chamber where he was, and George detailed to him and Richard the whole design and motive of the murder as a matter then for the first time communicated. Now perhaps there is nothing intrinsically very incredible about this story, except its too great particularity. If it be false, it is so artfully ingrafted on the truth, that Frank Knapp was there at that time, and had an interview with George alone, that it would be almost impossible to detect it. Palmer too must be allowed the credit of ingenuity, whether his story be true or false. It is impossible for any one in his situation to have testified with a more artful simplicity. And I admit, too, that he has had the good sense to tell no unnecessary falsehood. The only instance in which he has tripped, is his saying that George Crowninshield told him on the 9th of April that he had melted the daggers the day after the murder for fear of the Committee of Vigilance; whereas, that committee was not appointed until late in the evening of the 9th. How that little impossibility is to be disposed of is not very material.

But this conversation is too particular. Like Leighton's it goes too much into all that the case requires. Why should the Crowninshields tell all this to Palmer without first sounding him? He says he rejected their offer immediately. Would they risk detailing the whole plan to him before securing any indication on his part of assent? Nay, after having communicated it to him and after he had refused to have any part in it, would Richard have gone on to execute it? He was not a man to trust his life to the keeping of such a witness as Palmer, who had refused to become an accomplice.

There is one circumstance in which the story is a little too ingenious. George speaks to Richard and Palmer of Stephen White as a certain Mr. White that lived at Tremont House in Boston; and then witnesses are brought in to prove that Mr. Stephen White actually lived there at that time. This is too shallow. Did not the Crowninshields, with their Salem connections, know Stephen White by name? There is not a man in the county that does not know him. This is meant to look like corroboration; but it looks much more like contrivance. Now such a story from such a man deserves no manner of credit unless corroborated by other testimony. Is Palmer corroborated? In the immaterial circumstances of his story in which he had the sense to tell the truth, and no temptation to lie, he is confirmed by other witnesses. But on the only important point he stands alone and unconfirmed. The conversation between him and the Crowninshields rests, and must of necessity rest, on his single statement. But it has been said that his letter corroborates his story. How can that be? Would he be such a fool as to swear now to anything inconsistent with his letter of which we had a copy? The mere fact that his testimony is consistent with his own letter amounts to nothing.

But does that letter corroborate anything which he might have known whether true or false, and which is confirmed by any other witness? It states that he knew J. Knapp's brother was with him on the 2d of April, and that he was extravagant to give a thousand dollars for such a business; but that is all. The rest is but a unmeaning menace. Now it is undoubtedly true that Frank was at Danvers on the 2d of April, and had a private conversation with George; and that Palmer was at Danvers and saw him. This single fact is the only one in the letter which is confirmed by any other witness. There is no other way there to engage the Crowninshields in this business and that is to have a thousand dollars from Palmer himself and not from him alone. Even Leighton, though intended to corroborate, contradicts it by inconsistency of time, and in the age of the letter. But he says nothing of the thousand dollars. But why should he venture to mention a thousand dollars if that was not offered? And why should he have written the letter at all, if he knew nothing about Frank's business in Danvers? The solution is simple, it supposes, indeed, some one offered Palmer, but we have seen that that is not the case. Consider when the letter was written. Not until after the arrest of the Crowninshields had he really heard this plot; did he not give information immediately on hearing of White's death, and of the rewards offered for the discovery of the murderer? He tells us that he wrote that letter to bring the Crowninshields to light; from a pure love of justice. Public justice rather than a hard mistress to him; but he is not the less faithful. Now why did not that love of justice induce him to inform the Crowninshields and



before anybody else suspected them, and while public justice had some thousands of dollars to give him to obliterate the remembrance of her castigations? He had the whole matter in his own breast. He had heard every word of the plot. If they were guilty he had information enough to lead to their detection. Yet he waits five weeks after the murder and a fortnight after the arrest of the Crowninshields and then writes this letter to Knapp, demanding money — but in fact, as he tells you, to get evidence against him. Is this credible? But what led him to suspect the Knapps? What was more easy? He probably knew that J. Knapp's mother-in-law was an heir of White — he saw F. Knapp in private conversation with George Crowninshield four days before the murder, and he saw in the papers that the Crowninshields were arrested as the murderers. It required less than Palmer's shrewdness to put these things together. As to the thousand dollars, it may be his own pure invention, — there is no other evidence of it, — or it may be that he heard the Crowninshields say after Frank left them that they expected a thousand dollars without saying from what source. His letter is therefore no corroboration at all. It does not contain a fact proved by anybody but himself except that Frank was at Danvers on the second: nor is Palmer's story on the stand corroborated by any other witness in a single fact, that had not been published in every newspaper in the State, weeks before he testified.

This is the evidence of the conspiracy. I have but two remarks to make on it. If you could believe it on such evidence, the only effect of it would be to show that Frank Knapp was an accessory; and makes nothing said or done by J. Knapp or the Crowninshields evidence against the prisoner. For the very proof relied on to establish the fact of the conspiracy proves equally well

all that of which such acts and declarations are legal evidence; that is, the design and object of the conspiracy.

The most, then, that can possibly be inferred from this evidence, bad as it is, is that the prisoner was an accessory before the fact; and that if he were in Brown Street at the moment of the murder, and in a situation in which he could give assistance, there would be a presumption that he was there for that purpose. We are willing to meet the government on that ground. We deny that he was there; and we deny that the man who was there could by possibility have given any assistance.

Two men were seen in Brown Street at half past 10, of whom one is alleged to have been the murderer, and prisoner the other. But what proof is there that the murder was committed at that hour? If that fails, the whole case fails. Was there anything in the conduct of the men to show it? One man was seen waiting half an hour in Brown Street, and a little before eleven he was joined by another who came either from the common or from Newbury Street; and might as well have come from one as from the other, as he was first seen in the middle of the street. The man that came from the eastward did not run; he walked directly up to the other, held a short conference with him; they moved on together a few feet — stopped again; talked a few moments and then parted; one stepping back out of sight and the other running down Howard Street. Of the two witnesses that saw them, Bray thought they were about to rob the graveyard; Southwick suspected; but what to suspect he did not know, and his wife suspected that he had better go out again to watch them. A murder was committed that night in the next street, and this is all the proof that these were the murderers. A club indeed was afterwards found in Howard

Street; but neither of these men had any visible weapon.

What say the doctors? Dr. Johnson says he saw the body at six and then thought it had been dead between three and four hours — Dr. Hubbard now thinks longer; but says at the time he agreed with Johnson. There is pretty strong proof that the murder was in fact committed about three o'clock.

Savary saw a man between three and four come out of Capt. White's yard and walk up Essex Street; but meeting the witness he turned about and ran down as far as Walnut Street. Walcutt about the same time, and near the lower end of Walnut street met, probably, the same man, coming towards him; on seeing him he turned about and walked the other way. Now which was most likely to be the murderer, the man who might have come either from Newbury Street or from the Common, at eleven, or the man who was actually seen to leave White's yard at half past three, and twice turned back, and once ran away to escape observation? But here we are met with a dilemma on the second trial. What I have stated was the whole of Savary's testimony on the first trial. He was then asked whether he had ever heard of that man since and he said, no. Now he is asked whether he has seen that man since, and to the utter astonishment of every one, after giggling like an idiot, he says he thinks it was the prisoner! And this is seriously taken up by the counsel for the prosecution, and Dr. Peirson is examined to prove that the stabs were made with different instruments. You have heard his reasons for it. His opinion is that some of the lower wounds, being longer than the upper, must have been made by a broader dagger or a sword cane; these lower wounds were oblique and of various lengths, but he thinks that a dagger, however sharp at the edges, driven obliquely into the body, will not make a wound longer

upon the surface than the wound of the dagger. This seems much like saying that the skin may be pierced, but not cut. It is certainly a common observation if not common sense. Dr. Johnson saw no proof of more than an instrument. But for what purpose, if Frank Knapp the murderer in Brown Street heard that the deed was done at eleven, should he have returned to the house again, and stay to see the dead body? Like another man, did he envy the perpetrator of the deed and mean to make it as his own? or was it for the money? No — for the money was not yet paid. The two suppositions that the prisoner was engaged in the deed at half past ten, and that he was in the house at half past three, are totally irreconcilable. We will take all the risk of the testimony. This is but one of many examples of the rapidity of evidence in a popular trial. Savary's first story was that he has told it so from the first of the murder, and it is confirmed by Walcutt; but this last evidence is as foolish as it is wicked, and needs no refutation or comment. The man who saw and heard him on the first trial, the manner was as indecent as the matter was absurd. The question must satisfy you beyond all reasonable doubt either that the murder was committed at half past ten, or that the prisoner was the murderer, or that he left the house at half past three. You cannot believe both; you say that you are satisfied with either? Is there not a great reasonable doubt of both? We must not convict the prisoner between the two. You must be well satisfied of one as if the other did not exist. Which do you take? That he was seen by Savary? If Savary is honest and credible, you will believe him; but his opinion from a glance

dim and misty night (for it grew more dark and cloudy towards morning); a thing certainly not to be relied upon, standing alone, as it does. Was the murder committed at half past ten? What is the proof of it? and what was the man doing in White's yard at half past three? and why did he run when he was seen? Which acted most like a murderer, the man that came into Brown Street, or the man that ran from the yard? Which was the hour most appropriate to so horrible a deed? That at which a party was breaking up at Mr. Deland's, the next house to White's, or the still hour before daylight, when no person was abroad but by accident? And what is the fair result of the doctors' opinions on the view of the body? All these things concur to fix the murder on the man who left the yard in the morning. If you believe that was Frank Knapp; if you can say on your oaths that Savary's testimony satisfies you of it beyond a reasonable doubt, be it so — but it will satisfy nobody else. I have no fear of it.

There remains, then, only the supposition that the murder was committed at half past ten; and then the question is, Was the prisoner the man in Brown Street? And on this point we have the most deplorable examples of the fallibility of human testimony, and of the weak stand that even common integrity can make against the overwhelming current of popular opinion. The witnesses are four. Webster and Southwick swore the same on both trials; Bray and Myrick have varied most essentially. As it now stands, Myrick and Webster are of little importance; Myrick saw a man in a frock coat who he now thinks was the prisoner, standing at the corner of Brown and Newbury streets from twenty minutes before to twenty minutes after nine. The man appeared to be waiting for some one; and when any person approached his post he walked away

and then turned and met him; he did this several times. Now whether that was or was not the prisoner is not in itself of any importance. It is hardly to be believed that a man who was to be engaged in a murder at half past ten would be seen lingering near the spot for forty minutes at the early hour of nine. It would, if true, be no unfavorable circumstance. For what purpose connected with the murder was he there at that hour? Did the murderers take their measures so ill that one was on the watch for the other in a public corner near the scene of the murder an hour and a half before the time? Besides, where are the persons whom Myrick saw meet the prisoner at the corner? he spoke of several. Why are they not found and produced? It is impossible they should not be found. We have been loudly and gravely called upon to produce the man in Brown Street if Frank Knapp was not he.

It is thought very strange that if it were not he, some friend of justice should not come forward and own himself to be the man, at the risk of taking the prisoner's place at the bar as a principal in the murder. So, too, it was asked, if Richard Crowninshield was not the man that joined him in Brown Street, why don't the prisoner show where Richard was? And yet we are told that the prisoner stood half an hour at a corner, and was met by various persons, but not one of those persons is produced to prove it. When it is the very question, whether it was the prisoner or not, and Myrick tells you himself that others saw him where they certainly would have recognized him. Now it is a principle of law that no evidence is good, which of itself supposes better in existence, not produced. Myrick's evidence, then, is good for nothing until those who met the prisoner at the post are produced. Besides, how did Myrick recognize him? He had never known him — he never knew him

until he was brought up for trial — nearly four months after the night of the murder, and in a different dress. He was then told, by a bystander, which was Frank Knapp. Being asked at the first trial, who he thought the man at the corner was, he said he thought it was the prisoner, not from what he had observed, alone, but partly from what he had heard about him. Now this was obviously no evidence at all. What a man thinks from what he hears, is nothing. What he hears, is no evidence; and still less, what he thinks about it. But at this trial, Mr. Myrick makes another step: he says he thinks it was the prisoner, from his own observation alone, making allowance for the difference of dress. Now how much of an allowance that is, depends on how much of the appearance of a man, seen four or five rods off by a perfect stranger, in a light, but cloudy evening, consists in his dress. It can consist of nothing but dress, figure, and manner. Mr. Myrick's evidence, therefore, amounts to this and no more: "I think the prisoner's figure and manner the same as those of a man I saw four months ago, under the circumstances above described." This is so slight, that the difference in his testimony is not worth mentioning, except to show the growing tendency of the whole evidence.

About the time that Myrick leaves the prisoner in his frock at the corner, Mr. Webster overtakes him in Howard Street, in a wrapper. He passed him without much observation; he did not see his face, but he thinks it was the prisoner. It is of no consequence whether it was or not. The probability, from the change of dress is, that it was not. And this reminds me of a remark made on the last trial, that such differences and sudden changes of dress were to be expected for the purposes of disguise when such business was on foot. With great deference to the learned counsel, it

seems to me highly inprobable. What is the evidence on this point? The prisoner is supposed to have had on his usual frock and cap at the corner, from a quarter to a quarter after nine; at nine to have walked in Howard Street, in the same cap and frock; to have sitten on the rope-walk, in his own camblet cloak at half past nine; in five minutes after, to have been seen in the same street, in the same dress. Now I agree with the learned counsel that on such an occasion, disguise is to be expected; and further, that it is entirely incredible any other disguise should go undisguised. But what disguise is here? The wrapper is not, indeed, corresponding to the known dress of the prisoner in every other situation in which he is seen, he is recognized by his dress, and by that alone. It is incredible enough that a man in a light evening, be out in a wrapper, to commit murder in town; but that he should disguise himself by putting off his own cloak, as well as his own coat, and thus be seen in two of his habitual dresses, is too much to ask you to believe. Why not assume one effect of a complete disguise? Or, if he is being seen too often in a wrapper, why not put a strange cloak on a strange coat? And why not put his own cap the whole evening? The learned counsel has said this was planned with great skill — could be more unskillful than the prisoner's part, if he was taken in.

But let us come to the material part of this testimony. Southwick swears positively that he had seen the prisoner on the rope-walk steps at half past nine, in his own cap and cloak — that he had seen him three times, and waited twenty minutes. He has known the prisoner from childhood. He would not speak, though he was very suspicious of him. That he went into the house and took of

and came out again, and the man was gone. He met Mr. Bray, who pointed out a man standing at Shepard's post, on the other side of the street, in a frock and cap like the prisoner's. Bray and he stopped and observed him till he left Shepard's post, walked down the opposite side of the street, and passed them and stood at the post under Bray's window. They then crossed over and entered Bray's house, passing within twenty feet of him. Southwick says he did not recognize the man in the frock coat, but supposed him to be the same he had seen on the steps, because there was no other person in the street; and because he had the same suspicions of him! — Now this testimony of Mr. Southwick is open to two or three important objections. In the first place, if Frank Knapp were on the steps to aid in a murder, at that moment in execution, and expecting to be joined by the murderer, would he have permitted Southwick to pass him three times and watch him twenty minutes? He knew Southwick as well as Southwick knew him. Southwick says he dropped his head each time, as he passed him, so that he could not see his face. So there is a foolish bird that puts its head in a hole and thinks itself safe if it cannot see its pursuers. Murderers are apt to be more cautious. He says he knew it, then, to be Frank Knapp and told his wife so. But though he thought the man, he and Bray saw, was the same, and both wondered what mischief he could be about, he never told Mr. Bray who he thought it was. Is that possible? Yes, both he and Bray agree in it. But the greatest impossibility of all is, that he should not have recognized the prisoner, if it was he, in his usual dress, while walking down the opposite side of this narrow street. Chadwick tells you it was so light, he easily distinguished Mr. Saltonstall, farther off, the same evening. Now how inconsistent is this story with the

supposition that that was the prisoner. He knew Frank Knapp familiarly, he saw him and recognized him in his cloak on the steps — he saw a man on the opposite side of the street five minutes after, who he, for some reason, not connected with his appearance, thought was the same: and yet, though that man wore the usual dress of the prisoner, and walked down the street by Southwick, when it was light enough to distinguish persons across the street, and though Southwick passed within twenty feet of him to go into Bray's house, he did not recognize him as the prisoner. Again, he thought the man in the frock was the same as the man in the cloak; he knew the man in the cloak was Frank Knapp, yet he and Bray wondered who the man in the frock could be, and Southwick never thought of telling Bray it was Frank Knapp. Now if Southwick's testimony were believed, it not only would not prove that the prisoner was the man at the post, but it would prove almost conclusively that it was not. It is impossible that Southwick should not have known him if it were he, and should not have told Bray if he knew him on the steps. Besides, Southwick is contradicted by Mr. Shillaber — he told Shillaber that "for ought he knew the man in Brown Street might be Richard Crowninshield, and Frank Knapp the other — he could not tell who they were." And how does Southwick explain this? he says Mr. Shillaber's question was, "might not the man that came from Newbury Street be Richard Crowninshield?" A probable question indeed for Richard's Counsel to ask! But one word more with Mr. Southwick. — When Chase and Selman were indicted for this murder, he went before the Grand Jury as a witness at Ipswich — he there swore that the man he saw in Brown Street was about the size and height of Selman, and said not one word about Frank Knapp! On this testi-

mony, and that of Hatch the convict, was Selman indicted and imprisoned as a felon, eighty-five days; until another Grand Jury assembled, and as Hatch's oath was inadmissible, and Southwick had turned his testimony against Knapp, Selman was discharged. Now when was there anything more abominable than this except in form? It is not, to be sure, within the reach of the law, but how is it in conscience? He swears now that he then knew it was Frank Knapp; and yet he indirectly swore then that it was Selman, and what is the contemptible evasion by which he tries to escape! Why, that it is true that he was about the size of Selman, and he was not asked whether it was Frank Knapp! If he tells truth now, he knew then, that by one word of truth he could clear Selman of all suspicion of being in Brown Street; and he willfully *suppressed that truth*. Now why is he a more credible witness than if he had been convicted of perjury? It is said he told his wife it was Frank Knapp. She says so, and it may be true; but it is not the very best corroboration. It is not of one half the weight of the fact that he did *not* tell it to Bray. Still that only goes to the identity of the man on the steps. It leaves the man at the post still nameless, and that is the important question. Southwick does not pretend to identify him. Besides, where was his cloak? It seems that Joseph Knapp left his cloak at Burns' stable in St. Peters' Street, and it is suggested that Frank might have got there the one that he wore. But Southwick swears the cloak was a brown camblet and Joseph's is a plaid. Besides, how could he have gone to Burns' stable without meeting Bray, who came down St. Peters' Street?

Now this, with the addition of a statement from Bray, that he could not tell who the man in Brown Street was, though he was about the size and shape of the prisoner, and wore a cap and full skirted coat, such as

the hatters and tailors sell. Knapp and a hundred others. It was absolutely all the evidence in the first trial that the prisoner was in Brown Street. Two more facts have happened since the first trial, that Mr. Bray, one of the most honest witnesses in the court, on this trial, to the same effect, answered that he had not seen the man he saw in Brown Street, the prisoner. Now I have been in a position to accuse Mr. Bray of an intentional misstatement of fact; but here is a flat contradiction. One witness says, "I have seen the prisoner in jail and in court, and I know he was the man in Brown Street," and the next week he says he has not seen him in jail and in court. I have no doubt he is telling the truth. And I am interrupted to say that this is no contradiction. The gentleman reconcile it as he can. Do not misquote the witness. He is and such was his statement. Nay more; though he says he had thought more of it since the trial, and become more convinced of the strange way of correcting the error formed on what was said months ago — he said too that he first saw the prisoner when he recognized him by his motions. Now there is nothing in these things, let them be explained as they may. But let it be true; which will you believe? That he does or does not recognize him? Mr. Bray is one of the members of Vigilance — let him say what it is worth and no more. Which is most likely to be true? his first testimony, the reflection of three months later? he knew what would be the result of the trial? or that result of the revision of a week later? he knew that the first trial was on that very point? I refuse to accuse Mr. Bray of misstatement. But I cannot acquit him of his subjection to the power of the nation which has brought

here, as honest as himself, to swear positively to things that never did and never could happen. We shall see that presently. We claim his first as his true testimony. He *cannot* say that it was the prisoner who was in Brown Street. He did not know the prisoner until he saw him arrested on suspicion of this crime. He then went to see him to compare his appearance with that of the man he had seen in Brown Street nearly two months before. Of what value is an opinion, formed under such circumstances? And which of his two statements would it be most safe for Mr. Bray to stand by? Can any man, with such means of judging, say with propriety he has no doubt? The rest of Bray's testimony I need not repeat; I have already stated the substance of it in speaking of the time of the murder, and it is not material on this point.

The other of the two remarkable facts which I have mentioned, is a most wholesome lesson as to the credibility of the testimony in this case, and of the value of circumstantial evidence. It is worth hours of argument, and peals of eloquence. It is a fact, a stubborn fact; and there is no explaining it, nor getting away from it. Miss Lydia Kimball and Miss Sanborn, two elderly respectable females, as credible persons as any that have testified, have, under the influence of the madness that seems to have possessed almost everybody in Salem, testified distinctly and positively to a thing as within their own knowledge, which is absolutely impossible. They both swore that on the morning after the murder, a person whom they did not know, brought into Capt. White's house an old cloak, and left it, saying, "*this is my brother's cloak.*" Miss Kimball can't say it was the prisoner who brought it, for neither of them knew him at that time, but Miss Sanborn thinks he had a cap on. And Miss Katherine Kimball says that Joseph Knapp afterwards

took the cloak as his own. Now here seemed to be confirmation strong. Here was the prisoner, driven by the folly that always attends guilt, carrying into the very house of the murder the disguise he had worn the night before. How perfectly this corresponded with the testimony of Burns that Joseph Knapp left his cloak at the stable, and with the suggestion of the counsel that Frank Knapp had gone there to get it as a disguise! How wonderful is the force of circumstantial evidence! Men may lie, but circumstances cannot! Now what is the fact about that cloak? It was Joseph's cloak; Stratton, Stephen White's coachman, went out to Wenham with a chaise that morning to bring in Mrs. Beckford, and she brought that cloak in with her. Stratton left Mrs. Beckford at Joseph White's, but by accident carried the cloak to Stephen White's in the chaise. And he afterwards folded it up and carried it to Joseph White's house. He was the stranger with the cap, that did *not* say, "this is my brother's cloak," — for how could he say so? he knew it was Joseph Knapp's cloak. Now what becomes of the truth of Miss Kimball's and Miss Sanborn's story, and of the force of circumstances? "Circumstances cannot lie," but women, and men too, that swear to them, may be mistaken — and, with the help of a heated imagination, and a few leading suggestions, may honestly invent the most outrageous fictions. Now this was detected by mere accident. We questioned Lathrop about it — he did not know — but he said Stratton brought Mrs. Beckford in from Wenham. We called for Stratton — he was not to be found — his examination was postponed until the prosecutors had put in their additional testimony. We called for him again, and then the whole matter was distinctly admitted. And this is the way that evidence is got up against the prisoner. And how much more of

equally plausible testimony might be explained away in like manner we shall never know. Not a single fact in the cause is better vouched than this, — few so well; and yet the only material part of it is utterly false.

Now take Bray and Southwick, the only material witnesses; make what allowances for error you think ought to be made, and can you say you are satisfied that the prisoner was in Brown Street?

There is one more piece of evidence that may apply to it; and that will bring me to an inquiry important for other reasons. I mean the testimony of Mr. Colman.

But let us first look for a few moments at the proof of the prisoner's alibi. It is applicable to two different times. The first between seven and ten, and the second after ten. The first depends on the testimony of Page, Balch, Burchmore, and Forrester. Now Page says he knows it was Monday or Tuesday evening; he said on examination he knew it was not Saturday, because he came home from college that day, and spent the evening at home. Burchmore is positive it was on Tuesday; and though uncertain before, has since remembered that he told Wm. Pierce so the day or day but one after the murder. We offer Pierce as a witness to the fact. Balch and Forrester both strongly believe that it was on Tuesday, and all agree it was cloudy, though light, and Monday was fair and bright. Now what is there against this? It is said they have expressed doubts and uncertainty heretofore. This is no contradiction; three of them give now only their belief; but it is a very strong one in all — Burchmore, however, is positive, and he gives a good reason for it — and good proof of his correctness. Here stands William Pierce ready to swear that Burchmore told him so the next day or the day after; we cannot examine him, and the prosecutors will not. We have a right

then to take it as proved. But it is said that on Tuesday, as spoken of, Frank said he learned from Osborne's, and none else, that on that evening, and one day after, on Saturday evening; a fact not thought sufficient to overweigh the whole testimony. But he had a horse and not be charged with it — or he may have told the truth when he said he had not. He can remember the purpose for which he said he was going out of town. Perhaps he chose to make a mistake of riding the better to conceal his motions; it all depends on the accuracy of Osborne's testimony. Osborne was not examined on this point. But after all it is of little importance, except to show that Phippen and Webster are mistaken, and they are not very material.

The other branch of the case is more important, because it embraces the supposed time of the murder. Capt. Knapp, on examination, swears that he went home to his room before ten, and that he went to bed a few minutes after. And there is a probability about this account that he is either as truth, or as cunning perjury; and Knapp's character is such as to shield him from such a charge. He says he commended Frank to bed at the prescribed hour; he asked him if he should be allowed to stay, and he said no, that Phippen told him that Frank, seeing him looking at his papers (for he failed to do so that night), asked if he should be allowed to stay — then threw his cap on a seat near his own hat, and went to bed. Capt. Knapp, after one, and Phippen turned at that hour, and remained the rest of the night. Samuel Knapp's evidence is that a few minutes after the prisoner opened his door, spoke to him, and went into his own room; and that he heard him leave the house. He came down to breakfast in the morning. Now



peached by testimony of certain conversations and statements of Capt. Knapp and Samuel H. Knapp. It is said Capt. Knapp told Shepard that Frank came home and went to bed before half past ten, "as Phippen told him," — if he said, as I told Phippen, that would corroborate instead of contradicting him. And it is said further that he told Treadwell that he did not know what time Frank came home, but believed about the usual hour. And that Samuel H. Knapp told Webb he did not know at what time Frank came home. Now these are not contradictions: and their apparent inconsistency depends wholly on the accuracy with which these conversations are remembered and reported. Of all kinds of evidence reports of conversations are the most uncertain. You have seen in this very case, that neither counsel, nor the reporters, nor even the judges agree as to the words used by the witnesses on the last trial of this cause, only a week since — although the greatest attention was paid and careful notes were taken. Then what is the probability that accidental conversations which took place two or three months ago, can now be accurately stated? Which is most probable; that Capt. Knapp remembers the facts he states so circumstantially, or that Shepard and Treadwell remember his words? And he is confirmed by Phippen Knapp and Eliza Benjamin as far as they could know.

But there is one piece of evidence that meets all the deficiencies of this case with a wonderful felicity. Whatever the Government cannot otherwise prove, Mr. Colman swears the prisoner has confessed and nothing more. Of half an hour's conversation with the prisoner he cannot remember a word but what turns out to be indispensable to the case of the prosecution. I no more mean to accuse Mr. Colman of willful misstatement than I do Mr. Bray, or Miss Kimball, or Miss Sanborn.

But he is ten times as likely to be mistaken as either of them. The old cloak story was, until exploded, ten times more credible than Mr. Colman's account of the confession — the witnesses for aught we know are equally respectable in character, and the testimony intrinsically more probable. What but the contagion of an unexampled popular frenzy could have so deluded these women? They have not been more exposed to it than others. But Mr. Colman has been living in its focus and breathing its intoxicating air for months. No man in the community has been so much excited by this horrible event as Mr. Colman. No man has taken a more active part in inquiring into its mysteries. Shall he then claim an exemption from the power that has either prostrated the integrity or strangely confounded the memory of witnesses as credible as himself? He had visited Joseph's cell three times that very day before he went into Frank's, and at the last time, passed directly from one cell where he had received a full verbal confession, to the other, where he now thinks he heard what he has testified. To a man, so excited as he was, and is to this day, here is ample cause for confusion and mistake. The witness is a clergyman, and whatever credibility that office may claim for him, I am willing he should enjoy. In my mind it is no more than belongs to any man of honest reputation; and on one account something less, for I cannot think the clerical office so well fits a man to endure and resist the excitement to which the witness has been subjected, as a secular employment. It is the experience of the world, that clergymen, when they mingle in worldly business, are more powerfully acted upon by it than others. Now every material word of his testimony is contradicted by Mr. N. P. Knapp, the prisoner's brother. He went into the cell with Mr. Colman, and must have heard all that was said: he had not

been in Joseph's cell during any part of his confession, and was not therefore liable to any mis-understanding. His attention was early called to it by a dispute with Mr. Colman about the club, and by consultations with counsel for his brother's defense. He has always borne an unsuspected character. Mr. Colman himself testifies to the propriety of his conduct before the trial;—he trusted him with the knowledge of the place where the club was hidden, and depended on his honor not to remove this witness of his brother's guilt; and the trust was not betrayed. Now here stand two witnesses, equal in character, directly opposed to each other on a matter known only to themselves and to the prisoner.

It is said, Mr. Knapp is contradicted by Mr. Wheatland; that is, Mr. Wheatland swears that in casual conversations held some months ago, Mr. Knapp made statements to him contrary to what he now swears. I have already remarked on the value of this kind of evidence. It depends on the thing least of all to be depended on: the accuracy with which words are remembered. The change of a word changes the whole meaning. Make the case your own. Can you pretend to remember casual conversation held with your neighbors three months ago, so that you can now swear to them? And if they should now swear to the facts differently from your present recollection of those conversations, would you charge them with perjury? Or do you think, if we had an investigating committee of twenty-seven, and the whole bar and population of Salem, looking up evidence for the prisoner, we could not find witnesses who have understood or misunderstood Mr. Colman to give accounts different from what he now swears to? With such means any man may be contradicted. But Mr. Wheatland candidly tells you on this trial, that he cannot speak

with certainty as to the truth of his confessions, how much related to what was said by Joseph, and how much to what was said by Frank. Colman admitted, the whole fact is a contradiction is gone.

I have said that Mr. Colman's confessions of the exact truth of the case required and not how that is, and how precise. The prisoner makes no general confessions; claims no right to be pressed no hope, to be State's evidence. But distinct questions respecting the murder, he gives answers criminating him. What were those answers? The murder was committed on the tenth and eleven — a fact seen wholly without other evidence, but all-important case. That Richard Crockett was the actual murderer without the shadow of a doubt except that McGlue saw him the evening before near Wheatland and looking away from the club was hidden under the step of the Branch meeting the only proof that the club had anything to do with the murder that the dirk was worked in the factory — and lastly that McGlue was absent from home at the time to fortify the Brown Street and destroy the alibi. This is one fact about this last case serves notice: Mr. Colman's reasons for asking questions, said he had heard from friends of the prisoner that he was at home that night at the time of the murder. This is a confirmation of the alibi, for Mr. Colman had heard of it the day after the arrest. But it is remarkable that so little was remembered of a half hour's conversation and that so very little. Is it not remarkable, that Frank so communicative a man should not have gone to verify Joseph's whole story in the same way? He t

has Joseph's confession covering nine sheets of paper, and yet, though Frank answered so freely, he had the curiosity to ask him only these four questions. It is truly incredible.

Now what improbability is there in N. P. Knapp's account of this interview? Not the least. He agrees with Mr. Colman, that Frank said it was hard that Joseph should confess, and he cannot positively swear that what Mr. Colman adds as to its being done for Joseph's benefit, did not follow, because he remembers the first part of the sentence, and he may have forgotten the rest. But he swears that, to the best of his belief, it was not so. As to the four questions and answers, he swears positively that no such things were said; because, if said, he must have remembered them. And is not this a perfectly proper distinction? His account too of the conversation with Mr. Colman, on the turnpike and in Central Street, of the note to Mr. Stephen White, and of all the other circumstances relating to the subject, is perfectly consistent, natural, and credible.

But what is the amount of all these confessions? If true, they prove, indeed, that he knew too much of this guilty deed. But they imply no presence at all; all, but his own absence from home, are facts that he might, and some that he must, have learned afterwards from others. And what does the fact, that he was absent from home, prove? At most it is but a circumstance corroborative of the Brown Street evidence. He may have been there, or he may have been elsewhere. . . .

One point only remains; but it is the great and important one. Believe the Prisoner—if you will believe anything on such testimony as Leighton's and Palmer's—a conspirator and a procurer of the murder—believe him in Brown Street at half past ten, and that the murder was committed at that hour, against the manifest weight of all the evidence but the confession.

Believe the confession too, and the whole of it, improbable and contradicted as it is; and, whatever the Prisoner may deserve in your moral judgment, he stands as clear of this indictment as a principal, present, aiding and abetting, as Joseph Knapp does, who was in bed at Wenham. . . .

Could the man in Brown Street give that help to the murderer, without the hope of which the murder would not have been committed? This is a question of fact for you to try on the evidence and the view. You must be satisfied of this beyond any reasonable doubt, or your verdict of Guilty will be against yourselves. Now, what assistance did the case admit? It was a secret assassination. If the prisoner had been actually present in the room or in the house, that alone would be enough. The mode of assistance would then be obvious. It would have been the part of the accomplice to beat down the strong old man, if he waked before the fatal blow; to murder any one of the inmates who should approach the chamber—give an alarm, or intercept the retreat. But when you find but one accomplice, and him at a distance in another street, you must inquire why he was there. You must be satisfied that he was posted there with some power, and therefore with the purpose, to aid. . . . Could he give an alarm? An alarm of what? You see that he could not know of the approach of danger. If the enterprise had failed, Richard might have been discovered, overpowered, and removed, before his accomplice could have been aware of any difficulty. But if it had been his object to intercept relief, or to give an alarm if he could not intercept it, where would he have been? At that point from which relief might be feared, and where early and certain intelligence of it might be had. Where was that? Certainly in Essex Street. Who would come to the relief? The inmates of Capt. White's own

house or of the adjoining houses of Deland and Gardner, or of the opposite houses, or some casual passenger. Now, against all these, the post of observation was in Essex Street, and near the house. Or if he wanted to watch the adjoining streets, why not stand at the corner of Newbury Street? Why not anywhere but at the places where he was seen during the whole time?

But one thing remains. Could he in Brown Street help the murderer to escape? If he had been waiting with a swift horse, to convey him away, that might do. But one man on foot can no more help another to run away, than one can help another to keep a secret. One could only embarrass and expose the other. Was he then to defend him in his flight? Resistance was not to be depended on or expected; besides, the accomplice was unarmed, and of what avail would he have been in Brown Street, where no force could be expected, unless the alarm had become general? [Much of this argument consisted of reference to the plans and cannot be reported.] Now we call on the Prosecutors to satisfy you of some one mode in which aid could be afforded. On the former trial two ways only were suggested. First, that Richard might have gone into the garden early in the evening, and waited for a signal from Frank in Brown Street to indicate the time when the lights were extinguished in Capt. White's house. And second, that Frank was in Brown Street to see that the coast was clear in Howard Street, that Richard might go there to hide the club. Now these things, absurd as they seem, were really said and insisted on. And they are the best hypotheses that the best of counsel can make for the government. We want no better proof of the utter weakness of the point. If Richard was in the garden under the very windows, would he want Frank to tell him when the lights were put out? He

could have watched every the house to his bed — he traced every light up the s they were extinguished in bers.—He could have he noise, and know when it the sleep of those within Frank's watching Howard would be enough to say th watched all the time, and did not once look down Street. Frank had been from five to ten minutes post where he could not into Howard Street, and t ard having finished his c without any caution or exa started and ran into that s the speed of a deer. Did like watching? And for pose was Howard Stre watched? That Richa hide his club in a partic selected — a club that no ever seen and that coul traced to him if found.

For what purpose then man in Brown Street? V bound to prove or to gues

And now, Gentlemen, a question in this cause, you on your consciences, are yo beyond a reasonable doub man in Brown Street, w was, could have given any aid in the actual commiss murder, and selected tha most proper place for tha If you doubt about tha whole evidence, do your acquit the Prisoner. . . .

I would urge you not fice him against law, t more guilty than himsel reached through him. I in your hands and in the each one of you. May each of you give no verdic sent to none, but such as y can approve now and fore

After Mr. *Dexter* had his argument, Mr. *W* dressed the Jury as follow:

I am little accustomed

men, to the part which I am now attempting to perform. Hardly more than once or twice, has it happened to me to be concerned, on the side of the Government, in any criminal prosecution whatever; and never, until the present occasion, in any case affecting life.<sup>1</sup> . . .

Gentlemen, let us now come to the case. Your first inquiry, on the evidence, will be, — Was Capt. White murdered in pursuance of a conspiracy, and was the defendant one of this conspiracy? If so, the second inquiry is, Was he so connected with the murder itself as that he is liable to be convicted as a *principal*? The defendant is indicted as a *principal*. If not guilty *as such*, you cannot convict him. The indictment contains three distinct classes of counts. In the *first*, he is charged as having done the deed, with his own hand; — in the *second*, as an aider and abettor to Richard Crowninshield, jr., who did the deed; — in the *third*, as an aider and abettor to some person unknown. If you believe him guilty on either of these counts, or in either of these ways, you must convict him.

It may be proper to say, as a preliminary remark, that there are two remarkable circumstances attending this trial. One is, that Richard Crowninshield, jr., the supposed immediate perpetrator of the murder, since his arrest, has committed suicide. He has gone to answer before a tribunal of perfect infallibility. The other is, that Joseph Knapp, the supposed origin and planner of the murder, having once made a full disclosure of the facts, under a promise of indemnity, is, nevertheless, not now a witness. Notwithstanding his disclosure, and his promise of indemnity, he now refuses to testify. He chooses to return to his original state, and now stands answerable himself, when the time shall come for his trial. These circumstances it is fit you

should remember, in your investigation of the case. . . .

And now, Gentlemen, in examining this evidence, let us begin at the beginning, and see first what we know independent of the disputed testimony. This is a case of circumstantial evidence. And these circumstances, we think, are full and satisfactory. The case mainly depends upon them, and it is common, that offenses of this kind must be proved in this way. Midnight assassins take no witnesses. The evidence of the *facts* relied on has been somewhat sneeringly denominated by the learned counsel, "*circumstantial stuff*," but, it is not such *stuff* as dreams are made of. Why does he not rend this *stuff*? Why does he not tear it away, with the crush of his hand? He dismisses it, a little too summarily. It shall be my business to examine this *stuff* and try its cohesion.

The letter from Palmer at Belfast, is that no more than flimsy *stuff*?

The fabricated letters, from Knapp to the Committee, and Mr. White, are they nothing but *stuff*?

The circumstance, that the house-keeper was away at the time the murder was committed, as it was agreed she would be, is that too a useless piece of the same *stuff*?

The facts, that the key of the chamber door was taken out and secreted; that the window was unbarred and unbolted; are these to be so slightly and so easily disposed of?

It is necessary, Gentlemen, now to settle, at the commencement, the great question of a *conspiracy*. . . .

Let me ask your attention, then, in the first place, to those appearances, on the morning after the murder, which have a tendency to show, that it was done in pursuance of a preconcerted plan of operation. What are they? A man was found murdered in his bed. — No stranger had done the deed — no one un-

[<sup>1</sup> At this point Mr. Webster delivered the now celebrated passage upon "the guilty soul which cannot keep its own secret" (*ante*, No. 278). Ed.]

some one, who had been in the house, without suspicion, who had prepared the way, is concert, this is cooperation, is conspiracy. If the King, the Crowninshields, then, the conspirators, who were Joseph Knapp had a motive, desire the death of Mr. W. that motive has been shown.

He was connected by marriage with the family of Mr. White. His wife was the daughter of Mrs. White, who was the only child of Mr. White of the deceased. The deceased was more than eighty years of age and had no children. — His children were nephews and nieces. He was expected to be possessed of a very large fortune, — which he had descended, by law, to his nephews and nieces in equal shares, or, if there was a will, then according to the will. But as Captain White had but two branches of his family, his children of his brother Henry and of Mrs. Beckford — and to the common idea each branch would have a share of half of Mr. White's property.

This popular idea is not correct. But it is common. Very probably was entered into the parties. According to Beckford, on Mr. White's death without a will, would have entitled to one half of Mr. White's ample fortune; and Josephine had married one of her children. There was a will which gave the bulk of the property to others; and we learn from that one part of the design was to destroy the will before it was committed. There had been a previous will, and that previous will was known or believed to be more favorable than the last will of the Beckford family. So by destroying the last will, they were destroying the life of the testator. At the same time, either the previous will or the more favorable will would have been destroyed or the deceased would have died which would be, as was

If the Knapps and the Crowninshields were not the conspirators, in this murder, then there is a whole set of conspirators yet not discovered. Because, independent of the testimony of Palmer and Leighton, independent of all disputed evidence, we know, from uncontroverted facts, that this murder was, and must have been, the result of concert and coöperation, between two or more. We know it was not done, without plan and deliberation; we see, that whoever entered the house, to strike the blow, was favored and aided by

possible to contend further against the proof of the entire conspiracy, as we state it.

What, then, was this conspiracy? J. J. Knapp, jr., desirous of destroying the will, and of taking the life of the deceased, hired a ruffian, who with the aid of other ruffians, were to enter the house, and murder him, in his own bed.

As far back as January, this conspiracy began. Endicott testifies to a conversation with J. J. Knapp at that time in which Knapp told him that Capt. White had made a will, and given the principal part of his property to Stephen White. When asked how he knew, he said "black and white don't lie." — When asked if the will was not locked up, he said, "there is such a thing as two keys to the same lock." And speaking of the then late illness of Capt. White he said, that Stephen White would not have been sent for, if he had been there.

Hence it appears, that as early as January, Knapp had a knowledge of the will, and that he had access to it, by means of false keys. — This knowledge of the will, and an intent to destroy it, appear also from Palmer's testimony — a fact disclosed to him by the other conspirators. He says, that he was informed of this by the Crowninshields on the 2d of April. But, then, it is said that Palmer is not to be credited — that by his own confession he is a felon, — that he has been in the State Prison in Maine, — and above all, that he was an inmate and associate with these conspirators themselves. — Let us admit these facts. — Let us admit him to be as bad as they would represent him to be; still in law, he is a competent witness. How else are the secret designs of the wicked to be proved but by their wicked companions, to whom they have disclosed them? The Government does not select its witnesses. The conspirators themselves have chosen Palmer. He was the confidant of the prisoners.

The fact however does not rest on his testimony alone, but is corroborated by other proof taken in connection with the circumstances, it has strong probability. In regard to the character of Palmer, generally, — it is said that it is less contradictory in all parts of it, either by his own testimony, or by the testimony of others, than that of a material witness, and the thing he has told, has been corroborated by other evidence. It was susceptible of corroboration. An attempt has been made to impeach his testimony, as to his being at the halfway house, on the night of the murder; you have seen the result. Mr. Babb is called to contradict him — you have seen the result. Little he knows — and not certainly; — for he, who has proved to have been in a halfway house on the evening of the 9th of April. At that time it is proved to have been a fact in Danvers. If, then, Palmer, as he is, has disclosed the truth of the conspiracy, and has told the truth — there is no reason why it should not be believed. The truth, come whence it will, though it were even from the mouth of the bottomless pit.

The facts show that the conspiracy had been long in agitation before it was not a new proposition on the 2d of April — that it had been contemplated for five or six weeks. R. Crowninshield was at the house in the latter part of March, by Starrett. F. Knapp was in Danvers, in the latter part of February, as testified by R. Crowninshield inquired of by Capt. Knapp was also in Danvers when at Wenham. The proof is, that they would open a new project to Palmer, as a new project, and are other circumstances which lead it to have been some weeks in agitation. Palmer's testimony as to the transactions on the 2d of April is corroborated by Allen

Osborn's books. He says that F. Knapp came there in the afternoon — and again in the evening. So the book shows. He says that Capt. White had gone out to his farm on that day. So others prove. How could this fact, or these facts, have been known to Palmer, unless F. Knapp had brought the knowledge? and was it not the special object of this visit, to give information of this fact, that they might meet him and execute their purpose on his return from his farm? The letter of Palmer, written at Belfast, has intrinsic evidence of genuineness. It was mailed at Belfast, May 13. It states facts that he could not have known, unless his testimony be true. This letter was not an afterthought; it is a genuine narrative. In fact, it says, "I know the business your brother Frank was transacting on the 2d of April" — how could he have possibly known this, unless he had been there? — The "\$1000, that was to be paid"; where could he have obtained this knowledge? The testimony of Endicott, of Palmer, and these facts are to be taken together; and they, most clearly, show that the death of Capt. White must have been caused by *somebody interested* in putting an end to his life.

As to the testimony of Leighton. As far as manner of testifying goes, he is a bad witness: — but it does not follow from this that he is not to be believed. There are some strange things about him. It is strange that he should make up a story against Capt. Knapp, the person with whom he lives; — that he never voluntarily told anything; — all that he has said is screwed out of him. The story could not have been invented by him; — his character for truth is unimpeached — and he intimated to another witness, soon after the murder happened, that he knew something he should not tell. There is not the least contradiction in his testimony, — though he gives a poor account of

withholding it. He says that he was extremely *bothered* by those who questioned him. In the main story that he relates, he is universally consistent with himself. — Some things are for him — and some against him. Examine the intrinsic probability of what he says. See if some allowance is not to be made for him, on account of his ignorance, with things of this kind. It is said to be extraordinary, that he should have heard just so much of the conversation and no more; — that he should have heard just what was necessary to be proved, and nothing else. Admit that this is extraordinary; — still, this does not prove it is not true. It is extraordinary, that you twelve gentlemen should be called upon out of all the men in the county, to decide this case; — no one could have foretold this, three weeks since. It is extraordinary, that the first clew to this conspiracy, should have been derived from information given by the Father of the prisoner at the bar; — and in every case that comes to trial there are many things extraordinary — the murder itself in this case is an extraordinary one — but still we do not doubt its reality.

It is argued, that this conversation between Joseph and Frank, could not have been, as Leighton has testified, because they had been together for several hours before, — this subject must have been uppermost in their minds, — whereas this appears to have been the commencement of their conversation upon it. Now, this depends altogether upon the tone and manner of the expression; — upon the particular word in the sentence, which was emphatically spoken — If he had said "when did you *see* Dick, Frank?" — this would not seem to be the beginning of the conversation. With what emphasis it was uttered, it is not possible to learn; and therefore nothing can be made of this argument. If this boy's testimony stood alone, it should be received



with caution. And the same may be said of the testimony of Palmer. But they do not stand alone. They furnish a clew to numerous other circumstances, which, when known, react in corroborating what would have been received with caution, until thus corroborated. How could Leighton have made up this conversation? "When did you see Dick?" "I saw him this morning." "When is he going to kill the old man?" "I don't know." "Tell him if he don't do it soon, I won't pay him." Here is a vast amount, in few words. Had he wit enough to invent this? There is nothing so powerful as truth; and often nothing so strange. It is not even suggested that the story was made for him. There is nothing so extraordinary in the whole matter, as it would have been for this country boy to have invented this story.

The acts of the parties themselves, furnish strong presumption of their guilt. What was done on the receipt of the letter from Maine? This letter was signed by *Charles Grant, jr.*, a person not known to either of the Knapps, — nor was it known to them, that any other person, beside the Crowninshields, knew of the conspiracy. This letter, by the accidental omission of the word *jr.*, fell into the hands of the father, when intended for the son. The father carried it to Wenham where both the sons were. They both read it. Fix your eye steadily, on this part of the *circumstantial "stuff,"* which is in the case; and see what can be made of it. This was shown to the two brothers on Saturday, 15th of May. They, neither of them, knew Palmer. And if they had known him, they could not have known him to have been the writer of this letter. It was mysterious to them, how any one, at Belfast, could have had knowledge of this affair. Their conscious guilt prevented due circumspection. — They did not see the bearing of its publication. — They advised their

father to carry it to the Committee of Vigilance, and it was done. On Sunday following, Joseph Leighton thought there might be some result in it. Perhaps, in the mean time, he had seen one of the Crowninshields. He was apprehensive, that he might be suspected, — he was anxious to turn attention from himself to his family. — What course did he take to effect this? He addressed a letter, with a false name, to the Committee, White, and another to the Committee; — and to complete the climax of his folly, he signed the letter addressed to the Committee "Grant" — the same name as the one signed to the letter they had received from Belfast, addressed to the Committee. It was in the knowledge of the Committee, that no person named Grant, Knapps had seen this letter at Belfast; — and that no one knew its signature. — It must have been irresistible to them, that one of the sons must have been the writer of the letter they had received concerning the murder on Mr. White. This, the fact of its having been mailed at Lynn, and mailed at Saturday, days after it was dated, could doubt respecting it. You ever read, or know of, a crime more odious and absurd? Merely to explain the apparent contradictions of the letter from the Committee excite the basest suspicions of a man, who, if they were true, they had no reason to believe, and who, if they were guilty, most certainly knew to be so. Could they have adopted a more direct method of exposing the writer to infamy? The letter to the Committee has intrinsic marks of the edge of this transaction. It is of the *time*, and the *manner* of the murder was committed. The line speaks the writer's condition. In attempting to turn attention from his family to himself, he charge the guilt upon another, and indelibly fixes it upon him.

Joseph Knapp requested Allen to put these letters into the Post-office, because, said he, "I wish to nip this silly affair in the bud." If this were not the order of an overruling Providence, I should say that it was the silliest piece of folly that was ever practised. Mark the destiny of Crime. It is ever obliged to resort to such subterfuges; it trembles in the broad light; it betrays itself, in seeking concealment. He alone walks safely, who walks uprightly. Who, for a moment, can read these letters and doubt of J. Knapp's guilt? The constitution of nature is made to inform against him. There is no corner dark enough to conceal him. There is no turnpike broad enough, or smooth enough, for a man so guilty to walk in without stumbling. Every step proclaims his secret to every passenger. His own acts come out, to fix his guilt. In attempting to charge another with his *own crime*, he writes his *own confession*. To do away the effect of Palmer's letter, signed *Grant* — he writes his own letter and affixes to it the name of *Grant*. He writes in a disguised hand; but how could it happen, that the same *Grant* should be in Salem, that was at Belfast? This has brought the whole thing out. Evidently he did it; because he has adopted the same style. — Evidently he did it; — because he speaks of the price of blood, and of other circumstances connected with the murder, that no one but a conspirator could have known.

Palmer says he made a visit to the Crowninshields, on the 9th of April. George then asked him whether he had heard of the *murder*. Richard inquired, whether he had heard the *music at Salem*. They said that *they were suspected*, that a Committee had been appointed to search houses — and that they had melted up the dagger, the day after the murder, because it would be a suspicious circumstance to have it found in their possession. Now

this Committee was not appointed, in fact, until Friday evening. — But this proves nothing against Palmer — it does not prove that George *did not tell him so* — it only proves that he gave a false reason, for a fact. They had heard that they were suspected — how could they have heard this, unless it were from the whisperings of their own consciences? — surely this rumor was not thus public.

About the 27th of April, another attempt is made by the Knapps to give a direction to public suspicion. They reported themselves to have been *robbed*, in passing from Salem to Wenham, near Wenham pond. They came to Salem, and stated the particulars of the adventure. — They described persons, their dress, size, and appearance, *who had been suspected* of the murder. They would have it understood, that the community was infested with a band of Ruffians, and that *they*, themselves, were the particular objects of their vengeance. Now, this turns out to be all fictitious, — all false. Can you conceive of anything more enormous — any wickedness greater, than the circulation of such reports? — than the allegation of crimes, if committed, capital? — if no such thing — thus it reacts, with double force upon themselves, and goes very far to show their guilt. How did they conduct on this occasion? did they make hue and cry? — did they give information that they had been assaulted, that night at Wenham? No such thing. They rested quietly on that night — they waited to be called on for the particulars of their adventure — they made no attempt to arrest the offenders — this was not their object. They were content to fill the thousand mouths of rumor, — to spread abroad false reports, — to divert the attention of the public from themselves — for they thought every man suspected them, because they knew they ought to be suspected.

The manner in which the com-

pensation for this murder was paid, is a circumstance worthy of consideration. By examining the facts and dates, it will satisfactorily appear, that Joseph Knapp paid a sum of money to Richard Crowninshield in five franc pieces on the 24th of April. On the 21st of April, Joseph Knapp received five hundred five franc pieces, as the proceeds of an adventure at sea. The remainder of this species of currency that came home in the vessel was deposited in a bank at Salem. On Saturday, 24th of April, Frank and Richard rode to Wenham. — They were there with Joseph an hour or more. — Appeared to be negotiating private business — Richard continued in the chaise. — Joseph came to the chaise and conversed with him. These facts are proved by Hart, and Leighton, and by Osborn's books. On Saturday evening, about this time, Richard Crowninshield is proved to have been at Wenham, with another person, whose appearance corresponds with Frank, by Lummus. Can any one doubt this being the same evening? What had Richard Crowninshield to do at Wenham, with Joseph, unless it were this business? He was there before the murder — he was there after the murder — he was there clandestinely, unwilling to be seen. If it were not upon this business, — let it be told what it was for — Joseph Knapp could explain it — Frank Knapp might explain it. But they don't explain it — and the inference is against them.

Immediately after this, Richard passes five franc pieces — on the same evening, *one* to Lummus — *five* to Palmer — and near this time George passes *three* or *four* in Salem. — Here are nine of these pieces passed by them in four days — this is extraordinary. — It is an unusual currency — in ordinary business, few men would pass nine such pieces in the course of a year. If they were not received in this way, why not explain how they came by

them? Money was not in their pockets, that they could not have whence it came, if it had been there. It is extremely unreasonable to them to explain where the money came, and they would not if they could. If, then, the blood was paid at this time in presence and with the aid of this defendant; does not this prove him to have been connected with this conspiracy?

Observe, also, the effect upon the mind of Richard, of Palmer being arrested, and committed to prison — the various efforts he made to discover the fact — the use of pencil and paper for him to write upon — the sending two lines of poetry, with the request that they would return the correspondence — the shrill and peculiar exclamation, "Palmer! Palmer! Palmer!" — things prove how great an alarm — they corroborate the story, and tend to establish the conspiracy.

Joseph Knapp had a key to the window, and secreted himself — he had free access to every part of the house — he was accustomed to visit there — he went in at his pleasure — he could do so without being suspected — he had to have been there the evening preceding.

If all these things, taken in connection, do not prove the fact that White was murdered in pursuance of a conspiracy — then the case is at an end.

Savary's testimony is very unexpected. He was called for a different purpose. When asked the person was, that he had seen out of Capt. White's yard at 3 and 4 o'clock in the morning, — he answered *Frank* — I am not clear this is not. There may be many circumstances of importance connected with this, though we believe the

have been committed between 10 and 11 o'clock. The letter to Dr. Barstow states it to have been done about 11 o'clock—it states it to have been done *with a blow on the head*, from a weapon loaded with lead. Here is too great a correspondence with the reality, not to have some meaning to it. Dr. Peirson was always of the opinion that the two classes of wounds were made with different instruments, and by different hands.—It is possible, that one class was inflicted at one time, and the other at another. It is possible, that on the last visit, the pulse might not have entirely ceased to beat; and then the finishing stroke was given.—It is said, when the body was discovered, some of the wounds weeped, while the others did not. They may have been inflicted from mere wantonness. It was known that Capt. White was accustomed to keep specie by him in his chamber—this perhaps may explain the last visit.—It is proved, that this defendant was in the habit of retiring to bed, and leaving it afterwards, without the knowledge of his family—perhaps he did so on this occasion—we see no reason to doubt the fact—and it does not shake our belief that the murder was committed early in the night.

What are the probabilities as to the time of the murder? Mr. White was an aged man;—he usually retired to bed at about half past nine—he slept soundest in the early part of the night—usually awoke in the middle and latter part—and his habits were perfectly well known. When would persons, with a knowledge of these facts, be most likely to approach him? most certainly in the first hour of his sleep. This would be the safest time. If seen then, going to or from the house, the appearance would be least suspicious. The earlier hour would then have been most probably selected.

Gentlemen, I shall dwell no longer on the evidence which tends to prove

that there was a conspiracy, and that the Prisoner was a conspirator. All the circumstances concur to make out this point. Not only Palmer swears to it, in effect, and Leighton, but Allen mainly supports Palmer, and Osborn's books lend confirmation, so far as possible from such a source. Palmer is contradicted in nothing, either by any other witness, or any proved circumstance, or occurrence. Whatever could be expected to support him, does support him. All the evidence clearly manifests, I think, that there was a conspiracy; that it originated with J. Knapp; that defendant became a party to it, and was one of its conductors, from first to last. One of the most powerful circumstances is Palmer's letter from Belfast. The amount of this was, a direct charge on the Knapps, of the authorship of this murder. How did they treat this charge, like honest men, or like guilty men? We have seen how it was treated. J. Knapp fabricated letters, charging another person, and caused them to be put into the Post-office.

I shall now proceed on the supposition, that it is proved that there was a conspiracy to murder Mr. White, and that the Prisoner was party to it.

The second, and the material inquiry is, *was the Prisoner present, at the murder, aiding and abetting therein?* . . .

It is not necessary that the abettor should actually lend a hand—that he should take a part in the act itself;—if he be present, ready to assist—that is assisting. . . .

You are to consider the defendant as one in the league,—in the combination to commit the murder. If he was there by appointment, with the perpetrator, he is an abettor. The concurrence of the perpetrator in his being there, is proved by the previous evidence of the conspiracy. If Richard Crowninshield, for any purpose whatsoever, made it a condition of the agreement, that Frank

Knapp should stand as backer, then Frank Knapp was an aider and abettor — no matter what the aid was — of what sort it was, or degree — be it never so little. Even if it were to judge of the hour, when it was best to go — or to see when the lights were extinguished — or to give an alarm if any one approached. Who better calculated to judge of these things than the murderer himself? and if he so determined them, that is sufficient.

*Now as to the facts* — Frank Knapp knew that the murder was that night to be committed — he was one of the conspirators — he knew the object — he knew the time; — he had that day been to Wenham to see Joseph, and probably to Danvers to see Richard Crowninshield, for he kept his motions secret, he had that day hired a horse and chaise of Osborn, and attempted to conceal the purpose for which it was used — he had intentionally left the place and the price blank on Osborn's books — he went to Wenham by the way of Danvers — he had been told the week before to hasten Dick — he had seen the Crowninshields several times within a few days — he had a saddle horse the Saturday night before — he had seen Mrs. Beckford, at Wenham, and knew she would not return that night. She had not been away before for six weeks, and probably would not soon be again — he had just come from there — every day, for the week previous, he had visited one or other of these conspirators, save Sunday, and then probably he saw them in town. When he saw Joseph on the 6th, Joseph had prepared the house and would naturally tell him of it — there were constant communications between them — daily and nightly visitation — too much knowledge of these parties and this transaction, to leave a particle of doubt on the mind of any one, that Frank Knapp knew that the murder was to be done this night. — The hour was come and he knew it —

if so, and he was in Brown Street without explaining why there — can the Jury for doubt, whether he was the tenance, aid, or support curiosity alone; — or to the wages of sin and death earned by the perpetrator.

What are the FACTS in this presence? Frank proved a conspirator — have known that the deed to be done. Is it not proved he was in Brown Street to the murder? There were conspirators. — It was natural one of them would go with the perpetrator. Richard Crowninshield was to be the perpetrator to give the blow. . . .

Aid could not have been from Joseph Knapp, or from Crowninshield. Joseph Knapp at Wenham, and took good care to prove that he was there. Crowninshield has proved that he was in the factory where he was in other company, was, until 11 o'clock. It rows the inquiry. — This of the prisoner to show, was not in this place, where It calls on him loudly to show to show it truly — if he could it, he would do it. — If he could and that truly, it is against him.

The prisoner has attempted to prove an alibi, in two ways. In the first place, by four young men, whom he says he was in company with the evening of the murder, from 7 o'clock, till near 10 o'clock. This depends upon the truth of the night. In the second place, by his family, from 10 o'clock onwards — this depends upon the truth of the time of the night. There are two classes of proof having no connection with each other. One may be true, and the other false. I shall examine this testimony with some attention, because of its importance in the trial, it made more important the minds of the Court, than

own mind. I think when carefully sifted and compared, it will be found to have in it more of *plausibility* than *reality*.

Mr. Page testifies, that on the evening of the 6th of April, he was in company with Burchmore, Balch, and Forrester — and that he met the defendant about seven o'clock, near the Salem Hotel — that he afterwards met him at Remond's, about 9 o'clock, and that he was in company with him a considerable part of the evening. This young gentleman is a member of College, and says that he came in town the Saturday evening previous, that he is now able to say that it was the night of the murder, when he walked with Frank Knapp, from the recollection of the fact, that he called himself to an account, on the morning after the murder, as was natural for men to do when an extraordinary occurrence happens. Gentlemen, this kind of evidence is not satisfactory — general impressions as to time are not to be relied on. If I were called upon to state the particular day on which any witness testified in this cause, I could not do it. Every man will notice the same thing in his own mind. There is no one of these young men that could give any account of himself for any *other* day in the month of April. They are made to remember the fact, and then they think they remember the time. He has no means of knowing it was Tuesday more than any other time. He did not know it at first — he could not know it afterwards. He says he called himself to an account — this has no more to do with the murder, than with the man in the moon. Such testimony is not worthy to be relied on, in any forty shilling cause. What occasion had he to call himself to an account? Did he suppose, that he should be suspected? Had he any intimation of this conspiracy?

Suppose, gentlemen, you were either of you asked, where you were,

or what you were doing, on the 15th day of June — you could not answer this question, without calling to mind some events to make it certain — just as well may you remember on what you dined on each day of the year past. Time is identical. Its subdivisions are all alike. No man knows one day from another, or one hour from another, but by some fact connected with it. Days and hours are not visible to the senses, nor to be apprehended and distinguished by the understanding. The flow of time is known only by something which marks it; and he who speaks of the date of occurrences with nothing to guide his recollection, speaks at random, and is not to be relied on. This young gentleman remembers the facts and occurrences — he knows nothing why they should not have happened on the evening of the sixth; but he knows no more. All the rest, is evidently conjecture or impression.

Mr. White informs you that he told him he could not tell what night it was. — The first thoughts are all that are valuable in such case. They miss the mark by taking second aim.

Mr. Balch believes, but is not sure, that he was with Frank Knapp on the evening of the murder. He has given different accounts of the time. He has no means of making it certain. All he knows is, that it was some evening before Fast. But whether Monday, Tuesday, or Saturday, he cannot tell.

Mr. Burchmore says, to the best of his belief, it was the evening of the murder. Afterwards he attempts to speak positively, from recollecting that he mentioned the circumstance to William Peirce, as he went to the Mineral Spring on Fast day. Last Monday morning, he told Col. Putnam he could not fix the time. This witness stands in a much worse plight than either of the others. It is difficult to reconcile all he has said, with any belief in the accuracy of his recollections.

Mr. Forrester does not speak with any certainty as to the night — and it is very certain, that he told Mr. Loring and others, that he did not know what night it was.

Now, what does the testimony of these four young men amount to? The only circumstance, by which they approximate to an identifying of the night is — that three of them say it was cloudy — they think their walk was either on Monday or Tuesday evening; and it is admitted that Monday evening was clear — whence they draw the inference that it must have been Tuesday.

But, fortunately, there is one *fact* disclosed in their testimony that settles the question. Balch says, that on the evening, whenever it was, that he saw the Prisoner, the Prisoner told him he was going out of town on horseback, for a distance of about twenty minutes ride, and that he was going to get a horse at Osborn's. This was about 7 o'clock. At about nine, Balch says he saw the prisoner again, and was then told by him, that he had had his ride, and had returned. — Now it appears by Osborn's books, that the prisoner had a saddle horse from his stable, not on Tuesday evening, the night of the murder, but on the Saturday evening previous. This fixes the time, about which these young men testify and is a complete answer and refutation of the attempted alibi, on Tuesday evening.

I come now to speak of the testimony adduced by the defendant to explain where he was after 10 o'clock on the night of the murder. This comes chiefly from members of the family — from his Father and brothers.

It is agreed that the affidavit of the prisoner, should be received as evidence of what his brother Samuel H. Knapp, would testify if present. S. H. Knapp says that about ten minutes past 10 o'clock, his brother F. Knapp on his way to bed, opened his chamber door, made some remarks, closed the door, and went to

his chamber, and that he heard him leave it afterward. Is this witness able to fix the ten minutes past ten? The circumstance mentioned, but he fixes it. He had been probably asleep — and was roused from his sleep, by the opening of the door. Was he in a situation to speak of time with precision? He knows, under such circumstances, whether it was ten minutes or ten minutes before eleven. His brother spoke to him, and he would be the natural result of a case? But we are not to conjecture this result. We have positive testimony on this point. Mr. Webb tells you that Samuel Knapp told him on the 8th of June, "that he did not know what time his brother Frank came home — and that he was not at home when he went to bed." You will consider this testimony as indorsed by Mr. Webb as indorsed by his affidavit — and with this testimony upon it, you will give it due weight. — This statement was made to him after Frank had rested.

I come to the testimony of the Father. I find myself inclined to speak of him or his testimony with severity. Unfortunately, the man! Another Lear, in the conduct of his children; another Lear, in the effect of his conduct upon his mind and understanding. He is brought here to testify to circumstances that disarm him, and call loudly for sympathy. Though it is impossible not to believe that his story cannot be true, yet I am not able to speak of it otherwise than in sorrow and sympathy. Unhappy father! he strives to remember, perhaps persuades himself that he does remember the evening of the murder. He tells himself at home at 10 o'clock. He thinks, — or seems to think, — that his son came in, at about five minutes past ten. — He fancies he remembers his conversation, and thinks he spoke of bolting

— he thinks he asked the time of night — he seems to remember his then going to his bed. — Alas! — these are but the swimming fancies of an agitated and distressed mind — Alas! they are but the dreams of hope, its uncertain lights, flickering on the thick darkness of parental distress. Alas! the miserable father knows nothing, in reality, of all these things.

Mr. Shepard says that the first conversation he had with Mr. Knapp, was soon after the murder, and *before* the arrest of his sons. Mr. Knapp says it was *after* the arrest of his sons. His own fears led him to say to Mr. Shepard that his "son Frank was at home that night — and so Phippen told him, or as Phippen told him" — Mr. Shepard says that he was struck with the remark at the time — that it made an unfavorable impression on his mind — he does not tell you what that impression was — but when you connect it with the previous inquiry he had made — Whether Frank had continued to associate with the Crowninshields? and recollect that the Crowninshields were then known to be suspected of this crime — can you doubt what this impression was? — can you doubt as to the fears he then had?

This poor old man tells you, that he was greatly perplexed at the time — that he found himself in embarrassed circumstances — that on this very night he was engaged in making an assignment of his property to his friend Mr. Shepard. — If ever charity should furnish a mantle for error, it should be here. Imagination cannot picture a more deplorable, distressed condition.

The same general remarks may be applied to his conversation with Mr. Treadwell, as have been made upon that with Mr. Shepard. He told him that he believed Frank was at home about the usual time. In his conversations with either of these persons, he did not pretend to know, of his own knowledge, the time that he came home. He now tells you,

positively, that he recollects the time, and that he so told Mr. Shepard. He is directly contradicted by both these witnesses, as respectable men as Salem affords.

This idea of alibi is of recent origin. Would Samuel Knapp have gone to sea, if it were then thought of? His testimony, if true, was too important to be lost. If there be any truth in this part of the alibi, it is so near in point of time, that it cannot be relied on. — The mere variation of half an hour would avoid it. — The mere variations of different timepieces would explain it.

Has the defendant proved where he was on that night? If you doubt about it — there is an end of it. The burthen is upon him to satisfy you beyond all reasonable doubt. Osborn's books, in connection with what the young men state, are conclusive, I think, on this point. He has not, then, accounted for himself — he has attempted it, and has failed. . . .

But, Gentlemen, let us now consider what is the evidence produced on the part of the Government to prove that John Francis Knapp, the prisoner at the bar, *was* in Brown Street on the night of the murder. This is a point of vital importance in this cause. Unless this be made out, beyond reasonable doubt, the law of *presence* does not apply to the case. The Government undertake to prove that he was present, aiding in the murder, by proving that he was in Brown Street for this purpose. Now, what are the undoubted facts? They are, that two persons were seen in that street, at several times, during that evening, under suspicious circumstances; — under such circumstances as induced those who saw them, to watch their movements. Of this, there can be no doubt. — Mirick saw a man standing at the post opposite his store, from fifteen minutes before nine, until twenty minutes after, dressed in a full frock coat, glazed cap, etc., in size and



general appearance answering to the prisoner at the bar. This person was waiting there—and whenever any one approached him, he moved to and from the corner; as though he would avoid being suspected, or recognized. Afterwards, two persons were seen by Webster, walking in Howard Street, with a slow, deliberate movement, that attracted his attention.—This was about one-half past nine. One of these he took to be the prisoner at the bar—the other he did not know.

About half past ten, a person is seen sitting on the ropewalk steps, wrapped in a cloak. He drops his head when passed, to avoid being known. Shortly after, two persons are seen to meet in this street, without ceremony or salutation, and in a hurried manner to converse for a short time—then to separate and run off with great speed. Now, on this same night, a gentleman is slain,—murdered in his bed,—his house being entered by stealth from without, and his house situated within 300 feet of this street. The windows of his chamber were in plain sight from this street—a weapon of death is afterwards found in a place where these persons were seen to pass—in a retired place around which they had been seen lingering. It is now known, that this murder was committed by a conspiracy of four persons, conspiring together for this purpose. No account is given who these suspected persons thus seen in Brown Street and its neighborhood were. Now, I ask, Gentlemen, whether you or any man can doubt, that this murder was committed, by the persons who were thus in and about Brown Street? . . .

Every man's own judgment, I think, must satisfy him that this must be so. It is a plain deduction of common sense. It is a point, on which each one of you may reason like a Hale, or a Mansfield. The two occurrences explain each other. The murder shows why these per-

sons were thus lurking, at in Brown Street, and the in Brown Street shows committed the murder.

If, then, the persons in a Brown Street, were the pl executors of the murder White, we know who th and you know that *there* them.

This fearful concatenati cumstances puts him to ar He was a conspirator. H tered into this plan of mur murder is committed, a known to have been wit minutes walk of the place. account for himself. He tempted this and failed with all these general re show he was actually i Street, and his failures in let us see what is the direc his being there. But first, l is it not very remarkable, is no attempt to show wh Crowninshield, jr., was on t We hear nothing of him. seen in none of his usual about the town. Yet, if h actual perpetrator of the which nobody doubts, he v town, somewhere. Can y fore, entertain a doubt, th one of the persons seen Street? And as to the you will recollect, that testimony of the young failed to show where he evening, the last we hear of him on the day prec murder, is; that at 4 o'clock he was at his brother's, in He had left home, after a manner doubtless des avoid observation, and to Wenham, probably by Danvers. As we hear n him, after 4 o'clock, P.M. remainder of the day and as he was one of the conspi Richard Crowninshield, jr. other, as Richard Crownin was in town in the evening seen in no usual place of

inference is very fair that Richard Crowninshield, jr., and the prisoner were together, acting in execution of their conspiracy. Of the four conspirators, J. J. Knapp, jr., was at Wenham, and George Crowninshield has been accounted for; so that if the persons, seen in Brown Street, were the murderers, one of them must have been Richard Crowninshield, jr., and the other must have been the prisoner at the bar. Now, as to the proof of his identity with one of the persons seen in Brown Street.

Mr. Mirick, a cautious witness, examined the person he saw closely, in a light night, and says that he thinks the prisoner at the bar is the same person — and that he should not hesitate at all, if he were seen in the same dress. His opinion is formed, partly from his own observation, and partly from the description of others. But this description turns out to be only in regard to the dress. It is said, that he is now more confident, than on the former trial. If he has varied in his testimony, make such allowance as you may think proper. I do not perceive any material variance. He thought him the same person, when he was first brought to Court, and as he saw him get out of the chaise. This is one of the cases, in which a witness is permitted to give an opinion. This witness is as honest as yourselves — neither willing nor swift — but he says, he believes it was the man; "this is my opinion," and this it is proper for him to give. If partly founded on what he has *heard*, then his opinion is not to be taken; but, if on what he *saw*, then you can have no better evidence. I lay no stress on similarity of dress. No man will ever be hanged by my voice on such evidence. But then it is proper to notice, that no inferences drawn from any *dissimilarity* of dress, can be given in the prisoner's favor; because, in fact, the person seen by Mirick was dressed like the prisoner.

The description of the person seen by Mirick answers to that of the prisoner at the bar. In regard to the supposed discrepancy of statements, before and now, there would be no end to such minute inquiries. It would not be strange if witnesses should vary. I do not think much of slight shades of variation. If I believe the witnesses honest, that is enough. If he has expressed himself more strongly, now than then, this does not prove him false.

Peter E. Webster saw the prisoner at the bar, as he then thought and still thinks, walking in Howard Street at half past nine o'clock. He then thought it was Frank Knapp, and has not altered his opinion since. He knew him well — he had long known him. If he then thought it was he, this goes far to prove it. He observed him the more, as it was unusual to see gentlemen walk there at that hour. It was a retired, lonely street. Now, is there reasonable doubt that Mr. Webster did see him there that night? How can you have more proof than this? He judged by his walk, by his general appearance, by his deportment. We all judge in this manner. If you believe he is right, it goes a great way in this case. But then this person it is said had a cloak on, and that he could not, therefore, be the same person that Mirick saw. If we were treating of men that had no occasion to disguise themselves or their conduct, there might be something in this argument. But as it is, there is little in it. It may be presumed, that they would change their dress. This would help their disguise. What is easier than to throw off a cloak, and again put it on? Perhaps he was less fearful of being known when alone, than when with the perpetrator.

Mr. Southwick swears all that a man can swear. He has the best means of judging that could be had at the time. He tells you that he left his father's house at half past ten o'clock, and as he passed

to his own house in Brown Street, he saw a man sitting on the steps of the ropewalk, etc. — that he passed him three times, and each time he held down his head, so that he did not see his face. That the man had on a cloak, which was not wrapped around him, and a glazed cap. That he took the man to be Frank Knapp at the time, that when he went into the house, he told his wife that he thought it was Frank Knapp; — that he knew him well, having known him from a boy. And his wife swears that he did so tell her at the time. What could mislead this witness at the time? He was not then suspecting Frank Knapp of anything. He could not then be influenced by any prejudice. If you believe that the witness saw Frank Knapp in this position, at this time, it proves the case. Whether you believe it or not, depends upon the credit of the witness. He swears it — if true, it is solid evidence. Mrs. Southwick supports her husband. Are they true? Are they worthy of belief? If he deserves the epithets applied to him, then he ought not to be believed. In this fact, they cannot be mistaken, they are right, or they are perjured. As to his not speaking to Frank Knapp, that depends upon their intimacy. But a very good reason is, Frank chose to disguise himself. This makes nothing against his credit. But it is said that he should not be believed. And why? Because, it is said, he himself now tells you that when he testified before the Grand Jury at Ipswich he did not then say that he thought the person he saw in Brown Street was Frank Knapp, but that "the person was about the size of Selman." The means of attacking him, therefore come from himself. If he is a false man, why should he tell truths against himself? they rely on his veracity to prove that he is a liar. . . . But suppose that we admit, that he did not then tell all he knew, this does not affect the

*fact* at all — because he was at the time, in the hearing that the person he saw was Frank Knapp. There is not the suggestion against the veracity of Mrs. Southwick, she swears positively, that her husband came into the house and told her that he had seen a person on the ropewalk steps and he was Frank Knapp.

It is said, that Mr. Southwick contradicted, also, by Mr. Shillaber. I do not so understand Mr. Shillaber's testimony. I think both testify is reconcilable, consistent. My learned brother, on a similar occasion, that there is more probability in such cases, the persons hearing should understand, than that the speaker, should contradict himself. I think the same remarks apply here.

You have all witnessed the uncertainty of testimony, when persons are called to testify what they themselves said. Several respectable counsellors have been called on this occasion, to give testimony of that sort. They have, of them, given different testimony. They all took minutes at the time, and without doubt intend to tell the truth. But still the testimony of Mr. Shillaber's version is inconsistent with everything that Mr. Southwick has stated elsewhere. But the reliance is to be placed upon the variations in testimony, which are manifestly intentional. It is said that Mr. Shillaber must be mistaken, that he did not rightly understand Mr. Southwick. I confess I did not understand Mr. Shillaber's testimony in the former trial, if I now rightly understand him. I therefore directed Mr. Southwick to tell the truth. Mr. Southwick, as I read in the minutes, stated that he understood Mr. Shillaber as saying that he was about a person coming out of the bury street, and whether, if he knew, it might not be Crowninshield, jr. He said that he could not tell. He

understand Mr. Shillaber, as questioning him, as to the person, whom he saw sitting on the steps of the ropewalk. Southwick, on this trial, having heard Mr. Shillaber, has been recalled to the stand, and states that Mr. Shillaber entirely misunderstood him. This is certainly most probable; because the controlling fact in the case is not controverted — that is, that Southwick did tell his wife, at the very moment he entered his house, that he had seen a person on the ropewalk steps, whom he believed to be Frank Knapp. Nothing can prove, with more certainty than this, that Southwick, at the time, *thought* the person whom he thus saw to be the prisoner at the bar.

Mr. Bray is an acknowledged accurate and intelligent witness. He was highly complimented by my brother, on the former trial, although he now charges him with varying his testimony. What could be his motive? You will be slow in imputing to him any design of this kind. I deny altogether, that there is any contradiction. There may be differences, but not contradiction. These arise from the difference in the questions put; the difference between *believing* and *knowing*. On the first trial, he said he did not *know* the person, and now says the same. Then we did not do all we had a right to do. We did not ask him who he *thought* it was. Now, when so asked, he says he *believes* it was the prisoner at the bar. If he had then been asked this question, he would have given the same answer. That he has expressed himself stronger I admit; but he has not contradicted himself. He is more confident now, and that is all. A man may not assert a thing, and still not have any doubt upon it. Cannot every man see this distinction to be consistent? I leave him in that attitude; that only is the difference. . . .

We have offered to produce witnesses to prove, that as soon as

Bray saw the prisoner, he pronounced him the same person. We are not at liberty to call them to corroborate our own witness. How then could this fact of prisoner's being in Brown Street, be better proved? If ten witnesses had testified to it, it would be no better. Two men, who knew him well, took it to be Frank Knapp, and one of them so said, when there was nothing to mislead them. Two others, that examined him closely, now swear to their opinion that he is the man.

Miss Jaqueth saw three persons pass by the ropewalk, several evenings before the murder. She saw one of them pointing towards Mr. White's house. She noticed that another had something which appeared to be like an instrument of music; that he put it behind him, and attempted to conceal it. Who were these persons? This was but a few steps from the place where this apparent instrument of music (of *music* such as Richard Crowninshield, jr., spoke of to Palmer) was afterwards found. These facts prove this a point of rendezvous for these parties. They show Brown Street to have been the place for consultation, and observation; and to this purpose it was well suited.

Mr. Burns's testimony is also important. What was the defendant's object, in his private conversation with Burns? He knew that Burns was out that night; that he lived near Brown Street, and that he had probably seen him; and he wished him to say nothing. He said to Burns, "if you saw any of your friends out that night, say nothing about it; my brother Jo. and I are your friends." This is plain proof, that he wished to say to him, if you saw me in Brown Street that night, say nothing about it.

But it is said that Burns ought not to be believed because he mistook the color of the dagger, and because he has varied in his description of it. These are slight circumstances, if

his general character be good. To my mind they are of no importance. It is for you to make what deduction you may think proper, on this account from the weight of his evidence. His conversation with Burns, if Burns is believed, shows two things; first, that he desired Burns not to mention it, if he had seen him on the night of the murder; second, that he wished to fix the charge of murder on Mr. Stephen White. Both of these prove his own guilt.

I think you will be of opinion, Gentlemen, that Brown Street was a *probable place* for the conspirators to assemble, and for an aid to be. If we knew their whole plan — and if we were skilled to judge in such a case, then we could perhaps determine on this point better. But it is a retired place, and still commands a full view of the house; — a lonely place, but still a place of observation. Not so lonely that a person would excite suspicion to be seen walking there in an ordinary manner; — not so public as to be noticed by many. It is near enough to the scene of action in point of law. It was their point of *centrality*. The club was found near the spot — in a place provided for it — in a place that had been previously hunted out — in a concerted place of concealment. — *Here was their point of rendezvous.* — Here might the lights be seen. — Here might an aid be secreted. — Here was he within call. — Here might he be aroused by the sound of the whistle. — Here might he carry the weapon. — Here might he receive the murderer, after the murder.

Then, Gentlemen, the general question occurs, is it satisfactorily proved, by all these facts and circumstances, that the defendant was in and about Brown Street, on the night of the murder? — Considering, that the murder was effected by a conspiracy; — considering, that he was one of the four conspirators; — considering, that two of the con-

spirators have accounted for themselves, on the night of the murder, and were not in Brown Street, considering that the Prisoner does not account for himself, nor show where he was; — considering, that Richard Crowninshield, the conspirator, and the perpetrator, not accounted for, nor shown elsewhere; — considering, that now past all doubt that two were seen in and about Brown Street at different times, lurking, and observation, and exciting suspicion that the neighbors watched them; — considering, if these persons, thus lurking in Brown Street, at that hour, were the murderers, it remains, on that day, wholly unknown who they were, or what their business was; — considering the testimony of Jaqueth, and that the club was found near this place; — considering, finally, that Webster Southwick saw these persons, then took one of them for his defendant, and that Southwick told his wife so, and that Benjamin Mirick examined them closely, now swear to their belief that the prisoner was one of them; — you to say, putting these conditions together, whether you think the prisoner was actually in Brown Street, at the time of the murder.

Now, it is obvious, that there are many purposes, for which he might be in Brown Street.

1. Richard Crowninshield might have been secreted in the garret, waiting for a signal.

2. Or he might be in Brown Street, to advise him as to the mode of making his entry into the house.

3. Or to favor his escape.

4. Or to see if the street was clear when he came out.

5. Or to conceal the weapon, or the clothes.

6. To be ready for any other unforeseen contingency.

Richard Crowninshield might have told Danvers — he would retire to his secret way. Brown Street

way. — If you find him there, can you doubt, why he was there !

If, Gentlemen, the Prisoner went into Brown Street, by appointment with the perpetrator, to render aid or encouragement, in any of these ways, he was *present*, in legal contemplation, aiding and abetting, in this murder. . . .

I now proceed, Gentlemen, to the consideration of the testimony of Mr. Colman. Although this evidence bears on every material part of the cause, I have purposely avoided every comment on it, till the present moment, when I have done with the other evidence in the case. . . .

Who is Mr. Colman ? He is an intelligent, accurate, and cautious witness. A gentleman of high and well-known character ; and of unquestionable veracity. As a clergyman, highly respectable ; as a man, of fair name and fame.

Why was Mr. Colman with the prisoner ? Joseph J. Knapp was his parishioner. He was the head of a family, and had been married by Mr. Colman. The interests of his family were dear to him. He felt for their afflictions, and was anxious to alleviate their sufferings. He went from the purest and best motives to visit Joseph Knapp. He came to save, not to destroy — to rescue, not to take away life. In this family he thought there might be a chance to save one. It is a misconception of Mr. Colman's motives, at once the most strange and the most uncharitable, a perversion of all just views of his conduct and intentions, the most unaccountable, to represent him as acting, on this occasion, in hostility to any one, or as desirous of injuring or endangering any one. He has stated his own motives, and his own conduct, in a manner to command universal belief, and universal respect. For intelligence, for consistency, for accuracy, for caution, for candor, never did witness acquit himself better, or stand fairer. In all that he did, as a man, and all he has said,

as a witness, he has shown himself worthy of entire regard.

Now, Gentlemen, very important confessions, made by the prisoner, are sworn to by Mr. Colman. They were made in the prisoner's cell, where Mr. Colman had gone, with the prisoner's brother, N. P. Knapp. Whatever conversation took place, was in the presence of N. P. Knapp. Now, on the part of the prisoner, two things are asserted ; first, that such inducements were suggested to the prisoner, in this interview, that any confessions by him ought not to be received. — Second, that, in point of fact, he made no such confessions, as Mr. Colman testifies to, nor, indeed, any confessions at all. These two propositions are attempted to be supported by the testimony of N. P. Knapp. These two witnesses, Mr. Colman and N. P. Knapp, differ entirely. There is no possibility of reconciling them. No charity can cover both. One or the other has sworn falsely. If N. P. Knapp be believed, Mr. Colman's testimony must be wholly disregarded. It is, then, a question of credit, a question of belief, between the two witnesses. As you decide between these, so you will decide on all this part of the case.

Mr. Colman has given you a plain narrative, a consistent account, and has uniformly stated the same things. He is not contradicted by anything in the case, except Phippen Knapp. He is influenced as far as we can see by no bias, or prejudice, any more than other men, except so far as his character is now at stake. He has feelings on this point doubtless, and ought to have. If what he has stated be not true, I cannot see any ground for his escape. If he be a true man, he must have heard what he testifies. No treachery of memory brings to memory things that never took place. There is no reconciling his evidence with good intention, if the facts are not as he states them. He is on trial, as to his veracity.

The relation in which the other witness stands deserves your careful consideration. He is a member of the family. He has the lives of two brothers, depending, as he may think, on the effect of his evidence; — depending, on every word he speaks. . . . Compare the situation of these two witnesses. Do you not see mighty motive enough on the one side, — and want of all motive on the other? I would gladly find an apology for that witness, in his agonized feelings, — in his distressed situation; — in the agitation of that hour, or of this. I would gladly impute it to error, or to want of recollection, to confusion of mind, or disturbance of feeling. — I would gladly impute to any pardonable source, that which cannot be reconciled to facts, and to truths; but, even in a case calling for so much sympathy, justice must yet prevail, and we must come to the conclusion, however reluctantly, which that demands from us. . . .

Again. We know that Mr. Colman found the club the next day — that he went directly to the place of deposit, and found it at the first attempt, — exactly where he says he had been informed it was. Now Phippen Knapp says that Frank had stated nothing respecting the club — that it was not mentioned in that conversation. He says, also, that he was present in the cell of Joseph all the time that Mr. Colman was there — that he believes he heard all that was said in Joseph's cell — and that he did not himself know where the club was — and never had known where it was, until he heard it stated in Court. Now, it is certain that Mr. Colman says, he did not learn the particular place of deposit of the club from Joseph — that he only learned from him that it was deposited under the steps of the Howard Street Meeting-house, without defining the particular steps — it is certain, also, that he had more knowledge of the position of the club, than this — else how

could he have placed his hand so readily? — and where else he have obtained this knowledge except from Frank? (Here Mr. Dexter said that Mr. Colman had other interviews with Joseph, and might have derived information from him at previous times.) Mr. Webster replied, that the man had testified that he knew nothing in relation to the club until his visit. Mr. Dexter there being any such testimony, Mr. Colman's evidence was read from the notes of the interviews, and several other persons, Mr. Webster then proceeded to the point is, to show that Knapp's story is not true, and consistent with itself. That, if it for granted, as he says, that he heard all that was said in the cell, by Mr. Colman in both cells, by Joseph, and by Frank — and that Joseph did not state particularly where the club was deposited — and that Joseph knew as much about the place of deposit of the club, as Mr. Colman. Why then, Mr. Colman must have been miraculously informed respecting the club, or Phippen Knapp has not told you the whole truth. There is no reconciling this, unless supposing Mr. Colman had been resentful, what took place in the cell, as well as what took place in Frank's cell.

Again. Phippen Knapp is contradicted by Mr. Wheatland. Mr. Wheatland tells the same story as coming from Phippen Knapp. Mr. Colman now tells. Here two against one. Phippen Knapp says that Frank made admissions, and that he said nothing to make. In this he is contradicted by Wheatland. Phippen Knapp, told Wheatland that Mr. Colman did ask Frank questions, and that Frank answered them. He told him also what the answers were. Wheatland cannot recollect the questions or answers, but recollects his reply — which is, "Is not this premature?" —

this answer is sufficient to make Frank a principal. Here Phippen Knapp opposes himself to Wheatland, as well as to Mr. Colman. Do you believe Phippen Knapp against these two respectable witnesses — or them against him?

Is not Mr. Colman's testimony credible, natural, and proper? To judge of this, you must go back to that scene.

The murder had been committed — the two Knapps were now arrested — four persons were already in gaol supposed to be concerned in it — the Crowninshields and Selman and Chase — another person at the eastward was supposed to be in the plot — it was important to learn the facts — to do this, some one of those suspected must be admitted to turn State's Witness — the contest was, *who should have this privilege?* . . . He then went to Joseph's cell, and while there it was that the disclosures were made. . . . He was incredulous as to some of the facts which he had learned — they were so different from his previous impressions. He was desirous of knowing whether he could place confidence in what Joseph had told him — he therefore put the questions to Frank, as he has testified before you, in answer to which Frank Knapp informed him,

1. "That the murder took place between 10 and 11 o'clock."

2. "That Richard Crowninshield was alone in the house."

3. "That he, Frank Knapp, went home afterwards."

4. "That the club was deposited under the steps of the Howard Street Meeting-house — and under the part nearest the burying ground, in a rat hole, etc."

5. "That the dagger or daggers had been worked up at the Factory."

It is said that these five answers just fit the case — that they are just what was wanted, and neither more or less. True they are — but the reason is, because truth always fits — truth is always congruous, and

agrees with itself. Every truth in the universe agrees with every other truth in the universe, whereas falsehoods not only disagree with truths, but usually quarrel among themselves. Surely Mr. Colman is influenced by no bias — no prejudice — he has no feelings to warp him — except now he is contradicted, he may feel an interest to be believed.

If you believe Mr. Colman, then the evidence is fairly in the case.

I shall now proceed on the ground that you do believe Mr. Colman. . . .

The defendant said, "he told Joseph when he proposed it, that it was a silly business, and would get us into trouble." — He knew, then, what this business was. . . .

He knew the daggers had been destroyed — and he knew who committed the murder. How could he have innocently known these facts? Why — if by Richard's story, this shows him guilty of a knowledge of the murder, and of the conspiracy. More than all he knew *when* the deed was done, and that *he* went home *afterwards*. This shows his participation in that deed — "went home afterwards" — home, *from what scene?* — home, *from what fact?* — home, *from what transaction?* — home, *from what place?* This confirms the supposition that the prisoner was in Brown Street for the purposes ascribed to him. . . . Then comes the club. He told where it was. . . .

Joseph Knapp was an accessory, and accessory only — he knew only what was told him. But the prisoner knew the particular spot in which the club might be found. This shows his knowledge something more than that of an accessory. . . .

Gentlemen — Your whole concern should be to do your duty, and leave consequences to take care of themselves. . . .

A sense of duty pursues us ever. It is omnipresent, like the Deity. If we take to ourselves the wings of the morning and dwell in the uttermost parts of the seas, duty performed, or



duty violated, is still with us, for our happiness, or our misery. If we say the darkness shall cover us, in the darkness as in the light, our obligations are yet with us. We cannot escape their power, nor fly from their presence. They are with us in this life, will be with us at its close, and in that scene of inconceivable solemnity, which lies yet farther onward — we shall still find ourselves surrounded by the consciousness of duty, to pain us, wherever it has been violated, and to console us so far as God may have given us grace to perform it.

The Prisoner was then inquired of by the Court whether he had anything further to add to the defense made by his Counsel, to which he replied, "I have nothing more to say."

Judge PUTNAM charged the Jury: GENTLEMEN OF THE JURY, The Prisoner at the bar stands accused by the Grand Jury of this County of the crime of murder — as principal in the second degree. . . .

If the abettor at the time of the commission of the crime, were assenting to the murder — and in a situation where he might render some aid to the perpetrator — ready to give it if necessary — according to an appointment or agreement with him, for that purpose — he would, in the judgment of the law, be present and aiding in the commission of the crime. . . .

The murder having been proved, the next question is if the Prisoner were, in the sense of the law as it has been explained and declared, *present aiding and abetting*. The Government contends, that the evidence proves that Richard Crowninshield, jr., was the perpetrator of the deed; so that the question is narrowed — and you are to consider if the Prisoner were present, aiding and assisting Richard Crowninshield, jr., to commit the murder? . . .

The first witness who was called to prove the conspiracy was Leighton, who swears to a most remark-

able conversation between the Prisoner and his brother Joseph. The witness seems to have heard just enough to prove the fact, and it seems to be susceptible of much, if not of any explanation. But you saw, from his appearance and manner of speaking, that he was somewhat excited, and that he has not been careful in regard to his knowledge of the matter. You are the judges of the credibility of the witnesses, and are permitted by the rules of the Court to testify in the case. It does not appear that this witness has been impeached on account of a general bad character for truthfulness. But if the facts and circumstances which he relates, were so important to take place and so important to induce you to doubt of the truth of what you will not depend upon. The contradictory statement which he has made upon the matter, should be taken into your consideration. If, however, you believe the statement to have been as he says, it goes very clearly to prove a conspiracy upon the part of the Prisoner, brother Joseph, and Richard Crowninshield, jr. [States Leighton's testimony.]

It is for you to consider under what circumstances these statements were uttered. Would a conversation of this nature have been so long? They had been together some hours before, walking in the fields. This seems to be the beginning of a conversation upon that subject, which must have been uppermost in their minds. It is not probable that it have been so long deferred.

It is contended on the part of the Government that nothing which was said before or after, can take away the force of the words. They refer to Capt. White's offer of the thousand dollars. Consider the excuse which the witness offers for his contradictory statement. He was frightened, and could not collect anything about it. It was a most extraordinary

But it is contended for the prisoner that one part of the story cannot be true—that he heard their conversation when they were twenty-five rods off. You must judge whether the witness was mistaken merely in regard to the distance. But he swears that he was within a few feet when they had the conversation which is so material in this case. In that he cannot be mistaken. If he speaks the truth he was near enough to hear distinctly what they said. If they did not speak the words, the witness must be corrupt or perjured. But what motive is there to induce him to give this evidence if it be not true? If he has been bribed, who bribed him? He has been in the employment of the brother of the prisoner, and still remains upon the farm.

The next witness is Palmer, who from his own account and the other evidence is probably one of the most corrupt of men. He has been convicted in Maine of an infamous crime, and would be an incompetent witness in that State. But his conviction there does not render him incompetent here. He is a legal witness, whose credibility is to be weighed by the Jury. [States his evidence.] This story seems hardly credible, and would be disregarded if it were not confirmed by other evidence in the case. The murder has been committed. It is proved that Mr. White was at his farm with and horse wagon and returned in it alone, at the time that Palmer swears it was proposed to upset him and kill him. The housekeeper was to be absent. It is proved that she was absent at the time of the murder. It does not follow, that because a man is of infamous character, he *cannot* speak the truth. If his testimony is corroborated by other facts proved, it may be believed, notwithstanding it comes from an infamous source. There is evidence, that the Prisoner said, that the thing was done for Joseph's benefit. You will judge whether

that statement does not strongly support the testimony of Palmer. The frequent visits of the prisoner to the Crowninshields are of the same tendency. Do you believe he went there for social intercourse, or that he was there, procuring the murder to be committed. The declaration which Mr. Colman swears the prisoner made, that the thing was done for Joseph's benefit, is urged as strong proof of the conspiracy, and that the prisoner was one of the conspirators. The prisoner said, "I told Joseph, when he proposed it, that it was a silly business, and would only get us into difficulty." To what thing did the prisoner refer unless to the proposal to murder Mr. White. Before he made that statement, that subject had been distinctly presented to his mind. He was informed that Joseph had determined to make a confession, and wanted the prisoner's consent. They both knew to what subject that confession was to relate. And it is to be recollected that this declaration was before any suggestion had been made to the prisoner of any benefit or favor from any course which the prisoner might pursue.

There are various other circumstances proved in the case, tending to establish the points now under consideration, to which I would refer you without particularly stating them. . . .

This leads you to the question—Was he present, and if so, with what intent?

The Government contend upon the evidence that the prisoner was in Brown Street at the time that the murder was committed; viz. at about half past 10 o'clock, and that he had been near to that part of Brown Street which opens into Howard Street, for some hours before, on that evening. They contend that he was either at the corner of Brown and Newbury streets, or in Howard Street, or in Brown Street a little to the westward of Howard Street, from about half past 8

o'clock, until the perpetrator met him in Brown Street after the murder, between half past 10 and 11 o'clock, when, after a short interview, they separated. [States the evidence given by Mirick, Webster, Southwick, and Bray.]

Upon the point now under consideration the jury should recollect the difficulty of identifying persons, especially in the evening. It was for the Government to prove the fact of *presence*. It is but fair that the prisoner should have the advantage arising from the difficulty of proving in the night time, that he was in the places where they contend he was seen by these witnesses. The state of the weather and atmosphere is however to be considered; some witnesses, Mr. Chadwick, and Mr. Saltonstall, speak of it. The moon was obscured by passing clouds, yet it was so light that Mr. Chadwick recognized the two Messrs. Saltonstalls about three rods off, and Mr. Saltonstall thinks persons of your acquaintance could be seen and known at considerable distance. Consider also the opportunity which the witnesses had of knowing the prisoner. They did not hear him speak, but Mr. Webster says he knew him well and passed him within six or eight feet, that he thought at the time it was the prisoner, judging from his walk and appearance. He thinks now that it was the prisoner, but will not swear positively to the fact.

But the dress of the person described by Mirick and Bray, is not like that worn by the person seen by Webster, or Southwick. Mirick and Bray describe him as wearing a dark frock coat and glazed cap, corresponding with the dress usually worn by the prisoner. Webster says he had a cloak or wrapper on, and Southwick says that the prisoner had a cloak on, when he was in Brown Street on the steps of the ropewalk.

The Government suggests that the prisoner could easily change his

apparel, for the purpose of changing his person, when entering such a criminal design.

Mr. Southwick speaks of the identity of the prisoner with considerable confidence. But a fact proved in the case was a strong tendency to impropriety of his testimony. A witness before the Grand Jury at the last term of this Court there was an inquiry as to the proposed guilt of Mr. Selman, Southwick stated that the prisoner whom he saw upon the steps about the size of Selman might be so. But the witness said as much about the matter to the Grand Jury as he does now, and did not state to the Grand Jury that it was Frank Knapp who was on the steps. His testimony then had a tendency to prove that it was Selman whom he saw on the steps. You will judge whether he ought not somewhat to detract from the testimony which he gave. If he then thought the prisoner, how could an honest witness leave the impression on the Grand Jury, that it was Selman. If his testimony were not confirmed by the testimony that he made at the time to his wife that it was the prisoner whom he saw on the steps, the Jury would not be disposed to rely upon it. But she stated that he did tell her when he came from the house on that evening that it was Frank Knapp."

It has been contended in the case of the prisoner that the testimony of Mr. Bray is so much stronger than upon the former trial that it should be considered contradictory to the appearance of the witness, and that the manner in which he testified is to be considered by the Jury. He states now that he has no doubt but that it was the prisoner whom he saw, and he did not say so before; but it should be remembered that the question was not put to him before. He does not undertake to swear positively to the identity of the prisoner. He says he

flected upon the subject since his former evidence, and he gives you the reasons which have induced him to form the opinion which he has expressed.

But the Counsel for the prisoner contend that all these witnesses who are called to prove that he was in Brown Street, must be mistaken, because (as they say), the prisoner, was in another place, and they refer you to the testimony of four young gentlemen, viz.: — Messrs. Balch, Burchmore, Forrester, and Page, as well as to Mr. Knapp, sen., and Samuel and Phippen Knapp, to prove the alibi. [States their evidence.]

The time embraced by the four witnesses is from about seven until near ten, and by the three last, from at five minutes after ten, until he went to bed; and if they are not mistaken in the night, and the father and his sons who have testified are not mistaken in regard to the facts of which they speak, the alibi would seem to be proved.

The burthen of proof is upon the party who would establish the alibi. You must determine whether it was on the evening of the murder that these young men were with the prisoner — or on some other evening near that time. There is one fact mentioned by Balch, upon which the Government much rely, to show that it was not on the 6th, which was the night of the murder, but on the 3d, the Saturday night before. He stated, that the prisoner told them that he was going to ride out of town on horseback, and was going to Osborn's to get his horse. And when he came back he said he had been out of town, and that it was "about a twenty minutes ride." There is a charge for a ride on horseback on the 3d — but none on the 6th. I would refer you to the testimony of the young men, and particularly to their cross-examination, and have the whole to be weighed by you.

In regard to the testimony of the father — can you doubt that he is

mistaken? I refer you to the testimony of Mr. Shepard, and of Mr. Treadwell upon this point. He stated to them that he did not know at what hour Frank came home on that night. He spoke to Mr. Shepard, not of his own knowledge — but of what "Phippen had told him." Does he know more about it, than he did when he had the conversation with those gentlemen? You must consider the testimony of Samuel Knapp in connection with the contradictory evidence given by Mr. Webb; and the testimony of Phippen Knapp in connection with the contradictory evidence in the case, to which I will now more particularly refer you . . .

If you believe Mr. Colman, there is evidence from the prisoner himself, that he was not at home at the time of the murder, but *went home afterwards*. That he knew who was the perpetrator — the weapons which he used — the particular place of concealment of one and destruction of the other, and the time when the deed was done. — Did the prisoner bear a part in it? Could he know these circumstances without having his knowledge from the perpetrator? Did they come into town upon that evening each to perform the part which had been assigned to him? From whom could the prisoner have been informed before he went home on the night of the murder, that it had been committed? The Jury will compare the evidence arising from the confessions of the prisoner (if they are admitted under the rule before stated) with the other testimony in the case, and determine whether he was in Brown Street as the Government contend that he was — and if so, with what intent he was there? It has been contended on the part of the prisoner, that if he were there, he was not in a situation in which he could render any aid or assistance to the perpetrator at the time of the murder. This is a matter of fact for the Jury.

It is proved that the part of the house occupied by the deceased as his sleeping chamber could be distinctly seen from Brown Street, and the distance of Brown Street from the house of the deceased, and the means of communication with it by the streets or otherwise, have been stated by the witnesses. The Jury must judge upon the evidence if the prisoner was there performing his part according to an agreement with the perpetrator, ready to afford him assistance if necessary — by watching — giving notice in any way of the approach of danger, or assisting in the escape, or rendering any aid or assistance which would strengthen the arm and heart of the perpetrator. . . .

You must decide upon the evidence as you have heard it within these walls — you will shut out from your minds everything you may have heretofore read or heard upon this subject — recollecting that all reasonable doubts upon any matter incumbent upon the government to prove, are to weigh in favor of the prisoner — with these remarks I leave the prisoner with his Country and his God.

The cause was committed to the Jury at 1 o'clock, P.M., on Friday, August 20, and at 6 o'clock they returned a verdict of GUILTY.

On Saturday morning the prisoner was placed at the bar. . . .

Judge PUTNAM then inquired of the prisoner if he had aught to say why sentence of Death should now be pronounced against him.

He replied, "I have only to say that I am innocent of the crime alleged against me."

Judge PUTNAM then addressed him as follows:

"JOHN FRANCIS KNAPP, You have been indicted for the crime of Murder — and upon arraignment have pleaded that you were not guilty — and put your trust upon God and your Country for trial. . . . The truth has prevailed, and the jury of your country have established your guilt — the Court is satisfied with their verdict, and you come now to receive the sentence of the Law. . . .

"It only remains for us to execute the sentence of the Law — with which and this Court doth accordingly adjudge,

"That you be carried from hence to the prison from whence you came — and from thence to the place of execution — and there be hanged by the neck until you shall be dead. And may God of his infinite mercy have mercy upon your soul."

The prisoner was remanded to prison, and the Court was adjourned.

## APPENDIX

### LIST OF TRIALS USEFUL FOR STUDY

The following select list of trials is meant to include a few which are specially profitable because (a) they are fully reported, with counsel's arguments; (b) they have a stirring plot, and, being more or less open to debate as to the verdict, their interest is a sustained one; (c) they were tried by eminent counsel and thus afford good models; (d) they are accessible in the book market of to-day; and (e) they are among the most famous of their time in legal annals. American cases fulfilling all these requirements are rare, except in Massachusetts.

#### England, Ireland, and Scotland.

R. v. ANNESLEY, 17 Howell's St. Tr. 1093 (murder); CRAIG d. ANNESLEY v. ANGLESEA, 17 Howell's St. Tr. 1139 (ejectment, involving kidnapping and disputed identity); R. v. HEATH, 18 Howell's St. Tr. 1 (perjury); R. v. ANGLESEA, 18 Howell's St. Tr. 197 (assault). These four, in the years 1742-1743, belong together; read first page 1443, Vol. 17; then in the above order. One of the strangest romances in history, and a great mystery is left unsolved; read the following critical discussions: *John Paget*, "Judicial Puzzles" (1876; reprinted from *Blackwood's Magazine*, 1860); *Andrew Lang*, preface to "The Annesley Case" (Notable English Trials Series, 1912; this preface contains a full account of the sources and discussions, but this edition of the trial itself is unfortunately unsuited for study because it omits most of Mrs. Heath's Trial, *supra*, without which the testimony cannot be weighed).

R. v. SQUIRES & WELLS, 19 Howell's St. Tr. 262 (larceny; really kidnapping); R. v. ELIZABETH CANNING, 19 Howell's St. Tr. 283 (perjury). These two, from the year 1754, belong together and form the most singular problem of evidence in the records of the 1700s; read the following critical discussions: *Courtney Kenny*, in the *Law Quarterly Review*, 1887, Vol. XIII, p. 368; *John Paget*, "Judicial Puzzles" (1876; reprinted from *Blackwood's Magazine*, 1860), p. 90; *N. W. Sibley*, "Criminal Appeal and Evidence" (1908), p. 162.

SPENCER COWPER'S TRIAL, 13 Howell's St. Tr. 1105 (1699; murder of a spinster; the accused was a well-known lawyer, later a judge, related to the poet); read the following critical discussions: *John Paget*, "Judicial Puzzles" (1876; reprinted from *Blackwood's Magazine*, 1860), p. 109; preface to Cowper's Trial (in the Notable English Trials Series, 1912).

THE STAUNTONS' TRIAL (Notable English Trials Series, 1911),<sup>1</sup> ed. J. B.

<sup>1</sup> This series, critically edited in the best style, is published by Wm. Hodge & Sons, of Edinburgh, and sponsored in the United States by the Cromarty Law Book Co., of Philadelphia. It is to be continued in other volumes, and its service will be even greater than that of the Notable Scottish Trials Series.

Atlay (1876; murder by starvation; one of the strangest stories in annals, and a trial conducted by the most eminent practitioner in modern English bar; Montagu Williams led the defense).

WILLIAM PALMER'S TRIAL (Notable English Trials Series, 1912), H. Knott (1856; murder by poisoning; the most famous one of England in the 1800s; Sir J. Stephen calls it, "as a whole, one of the best trials in the history of English law;" the expert testimony is a feature).

MRS. MAYBRICK'S TRIAL (Notable English Trials Series, 1912), Irving (1881; husband-murder by poisoning; the accused was an American; her counsel was Sir Charles Russell; the trial judge was Sir J. F. Stephen; this case aroused international interest, and competes with Palmer's for the description of the most famous poisoning case of the century).

CHANTRELLE'S TRIAL (Notable Scottish Trials Series, 1906),<sup>1</sup> Duncan Smith (1878; wife-murder by poisoning; the most notable murder of its kind in Scotland).

OSCAR SLATER'S TRIAL (Notable Scottish Trials Series, 1910), Wm. Roughead (1908; murder for money; a most astonishing verdict which enlisted the interest of Sir A. Conan Doyle, in 1912, to secure the release of the convicted man).

MRS. M'LACHLAN'S TRIAL (Notable Scottish Trials Series, 1910), Wm. Roughead (1862; murder for money; known as the Sandyford murder; it gave rise to popular factions, and agitated a generation).

FRANZ MULLER'S TRIAL (Notable English Trials Series, 1911), Irving (1864; murder in a railway compartment; the first railway murder which revealed the dangers of the European compartment system; for the accused's detection through exchanging hats with the victim; of Serjeant Ballantine's prosecutions, exhibiting his methods of examination).

MADELEINE SMITH'S TRIAL (Notable Scottish Trials Series, 1908), Duncan Smith (1857; murder of a lover by arsenic-poisoning; one of the permanent mysteries of criminal annals).

WM. LAMSON'S TRIAL (Notable English Trials Series, 1911), Adam (1882; murder by poisoning, by a doctor; an instructive trial).

MONSON'S TRIAL (Notable Scottish Trials Series, 1908), ed. More (1893; murder for insurance money; the accused a doctor who had deceased a rich pupil; on a shooting excursion, the latter is killed; as the Ardlamont Mystery, and enshrined in wax by Mme. Tussaud).

#### United States.

JOHN W. WEBSTER'S TRIAL (Little, Brown & Co., Boston, 1908), Geo. Bemis (1850; murder of Dr. Parkman, by Professor Webster; Harvard University Medical School; the most notable American murder of the 1800s).

EMIL LOWENSTEIN'S TRIAL (Wm. Gould & Son, Albany, 1874), (1873; murder for money; one of New York's best-known cases; Nathaniel C. Moak and D. C. Herrick as counsel).

<sup>1</sup> This series, also published by Wm. Hodge & Sons, Glasgow and Edinburgh, is an enterprise of great value, filling a long-felt want for the student of trials.

**JAMES M. LOWELL'S TRIAL** (Dresser, McLellan & Co., Portland, Me., 1875), ed. H. M. Plaisted (1875; wife-murder; known as the Mystery of the Headless Skeleton; tried by eminent counsel of the Maine bar).

**THOS. W. PIPER'S TRIAL** (State Printers, Boston, 1887), ed. the Attorney-general (1875; murder of a little girl by a sexton in the church belfry; the jury disagreed on the first trial; eminent counsel were on both sides).

**JOHN C. BEST'S TRIAL** (State Printers, Boston, 1903), ed. the Attorney-general (1901; murder by shooting; a good example of a trial for assassination motivated by hostility).

**MUDGETT'S (alias HOLMES) TRIAL** (Geo. T. Bisel, Philadelphia, 1897), ed. Bisel (1895; murder; the accused, whose character and history are set forth in No. 98, *ante*, was one of the monsters, occasionally arising, who murder wholesale; his killings ranged between Chicago, Indianapolis, Toronto, Detroit, and Philadelphia).

**HERSEY'S TRIAL** (A. Williams & Co., Boston), ed. J. W. Yerrinton (1860; murder of the victim of seduction; one of the leading American poisoning cases, well argued).

**TREFETHEN'S TRIAL** (State Printers, Boston, 1895), ed. Albert E. Pillsbury (1892; murder of the victim of a seduction; one of the best-known and best-tried Massachusetts cases, with distinguished counsel).

**SARAH J. ROBINSON'S TRIAL** (State Printers, Boston, 1888), ed. the Attorney-general (1886; murder of a whole family by poisoning; the best-known modern American poisoning case).

**JOHN O'NEIL'S TRIAL** (State Printers, Boston, 1901), ed. the Attorney-general (1897; rural murder and rape; a good example of circumstantial evidence).

**DURRANT'S TRIAL**, ed. Peixotto (San Francisco, 1895; murder in a church belfry; a remarkable instance of a guilty man successfully passing the ordeal of cross-examination; published under the title "The Crime of the Century").



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